



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-1112

Appeal M-9700160

County of Renfrew



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NATURE OF THE APPEAL:

The County of Renfrew (the County) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the following information:

- A. All records, notes, recommendations the County of Renfrew has in relation to the development of all Official Plans, Draft Official Plans, Background Studies and Draft By-Laws dating from 1986 to the present.
- B. Records with the public that comment specifically on asphalt plants, and/or mineral aggregate resources, and the Official Plan and Zoning By-Law for Horton Township.
- C. Records with the following agencies that comment specifically on asphalt plants, and/or mineral aggregate resources, and the Official Plan and Zoning By-Law for Horton Township.

Ontario Ministry of Natural Resources
Ontario Ministry of Environment and Energy
The Township of Horton
Ontario Ministry of Transportation
Municipal Affairs

- D. Records and notes in relation to attempts made to resolve the appeal to the Township of Horton, By-Law 94-07.

The request was made on behalf of a company which operates a gravel pit in the Township of Horton (the Township). The County located a number of records that it had identified as responsive to the request and granted access in full to the majority of them upon payment of a fee of \$420. The County denied access to the remaining records pursuant to section 12 of the Act (solicitor-client privilege).

The appellant appealed the County's denial of access. In addition, the appellant claimed that: (1) further records responsive to her request should exist; (2) the \$420 fee was not properly calculated; and (3) that the County had failed to properly respond to Part A of her request by restricting its search for records relating to the Township only, instead of searching for **all** records as requested. In her letter of appeal, the appellant also requested that the \$420 fee be waived.

With respect to the interpretation of Part A of the appellant's request, the County agreed that it had not properly interpreted this part of the request. In turn, it advised the appellant that this part of her request would involve a large number of records and that the fee estimate "can be as high as \$10,000". The County, however, offered to meet with the appellant in an effort to narrow the scope of the request. During the mediation stage of the appeal, the appellant agreed with the County's proposal. The appellant also agreed that any subsequent decision regarding this part of her request would be the subject of a new appeal, if necessary. Accordingly, records responsive to Part A of the request are not at issue in this appeal.

[IPC Order M-1112/June 4, 1998]

Also during mediation, the County provided the appellant with clarification regarding the calculation of the \$420 fee to the appellant's satisfaction. Accordingly, the amount of the fee is no longer at issue in this appeal.

The appellant did maintain, however, that she should be entitled to a fee waiver. In turn, she submitted a request to the County to waive the fees. Subsequently, the County issued its decision denying the appellant's request. The appellant appealed this decision, and, accordingly, this issue will be addressed in this Inquiry.

Also during mediation, the County agreed to reconsider its position concerning a number of records at issue. It gave notice, pursuant to section 21 of the Act, to a number of third parties whose interests may be affected by the disclosure of some of the records. As a result, the County disclosed the following records to the appellant: AE-92 to AE-94, BE-2 to BE-5, BE-6 to BE-7, BE-8 to BE-16, DE-1 to DE-3, DE-11 to DE-12, DE-14 to DE-15, DE-16, DE-17 to DE-18, DE-43 to DE-45, DE-86 to DE-87, DE-120 to DE-124, DE-130 to DE-133, DE-138, DE-139 to DE-143, DE-144 to DE-145, DE-148 to DE-154, DE-155 to DE-156 and DE-219 to DE-223. These records are no longer at issue in this appeal.

The County advised the appellant that it may be prepared to grant access to further records and that it has again given notice, pursuant to section 21 of the Act, to an affected party in order to seek its submissions concerning the release of such records. These records are: AE-65 to AE-71, AE-72 to AE-73, AE-74, AE-75, AE-76, AE-77 and AE-101 to AE-104. Consequently, the County issued a decision advising the appellant that these records will be released. It should be noted that these records contain information which relates to the company represented by the appellant. Accordingly, as the County is no longer denying access to these documents, they are no longer at issue in this appeal and I will order that they be disclosed to the appellant.

Also during mediation, the County conducted a further search and located two additional records responsive to the appellant's request (Records AE-135 to AE-139 and DE-258 to DE-265). The County indicated that it is relying on sections 11(e) and 12 of the Act to withhold Record AE-135 to AE-139 and section 12 of the Act to withhold Record DE-258 to DE-265. As the appellant was not satisfied with the County's decision with respect to these records, they are also at issue in this appeal. The appellant continues to maintain that further records responsive to her request should exist.

The County further advised the Commissioner's office that in addition to section 12 of the Act, it also relies on sections 6(1)(b), 7 and/or 11(e) of the Act to withhold some of the records which were identified as responsive to the appellant's request. These additional discretionary exemptions were claimed after the expiration of the 35-day period stipulated in the Confirmation of Appeal which was provided by this office to the County.

Furthermore, upon review of the records at issue, the Appeals Officer determined that sections 10 and 14 of the Act may also be relevant in the circumstances of this appeal. Accordingly, the parties to the appeal

were also requested to make submissions on the possible application of these exemptions to the information contained in the records.

A Notice of Inquiry was provided to the appellant, the County, ten businesses and individuals, as well as the provincial Ministry of Natural Resources (the affected parties), as it appeared that their rights may be affected by the disclosure of some of the information contained in the records. Representations were received from the County, the appellant and from five of the affected parties, one of whom consented to the disclosure of any information contained in the records which relates to her.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

Following the receipt of the appellant's request on May 6, 1997, the County issued a decision letter advising the appellant that, upon payment of a fee, access would be granted to a number of records responsive to her request. It also advised at that time that access to a number of other records was denied as these documents were exempt from disclosure under section 12. The appellant appealed this decision and, in its Confirmation of Appeal, this office advised the County that it would be permitted to raise additional discretionary exemptions only until 35 days after the receipt by this office of the appeal, which was July 21, 1997. In an index provided to this office on November 20, 1997, the County first made reference to the application of sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations) and 11(e) (economic or other interests) to a number of the subject records.

The Notice of Inquiry provided to the parties by this office requested submissions on the issue of the late raising of discretionary exemptions by the County. Specifically, the County was asked to include in its representations the reasons why it was claiming discretionary exemptions after the date mandated in the Confirmation of Appeal and the reasons why the discretionary exemptions apply.

The County did not make any submissions on this aspect of the Notice of Inquiry.

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in the original decision letter.

In Order P-658, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption is claimed late in the appeals process, a decision maker has the authority to decline to consider the discretionary exemption. I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

In the circumstances of this appeal and in the absence of any submissions from the County with respect to this issue, I am not persuaded that a departure from the 35-day time frame is justified. Accordingly, I decline to consider the application of sections 6(1)(b), 7(1) and 11(e) to the records which were originally identified by the County, though not Records AE-135 to AE-139.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The appellant is the plaintiff in an action currently before the Ontario Court (General Division) against the Township, several of the affected parties and the provincial Ministry of the Environment and Energy. In addition, the appellant has initiated a proceeding before the Ontario Municipal Board (the OMB) seeking to overturn a portion of the Township's Comprehensive Zoning By-law (By-law 94-07).

As a result of these proceedings, the Township has sought and received legal advice from its counsel and that of its liability insurers relating to the drafting of the Township's comprehensive Zoning By-law and to the proceedings before the Courts and the OMB. The Township also received the expert assistance of the Planner from the County in relation to these matters. I find that the Township and its liability insurers have a common interest in the defence of the proceedings brought by the appellant in the Courts and before the OMB. The records at issue consist of correspondence, legal opinions, draft by-laws and other documents prepared in the course of these activities.

The County has compiled the responsive records into five categories, corresponding to the five parts of the appellant's request. As noted above, the County has claimed the application of section 12 to each of the records to which access has been denied. For the purposes of this appeal, I will refer to the numbering system adopted by the County and used in the Notice of Inquiry.

As noted above, the County has claimed the application of section 12 to each of the records. This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and
2. a record which was prepared by or for counsel employed or retained by the County for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the County must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

- (b) the communication must be of a confidential nature, **and**
- (c) the communication must be between a client (or his agent) and a legal advisor, **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

- 2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49, M-2 and M-19]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

- 1. the record must have been prepared by or for counsel employed or retained by the County; and
- 2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Because of the unique nature of the issues and the large number of records in this appeal, the Notice of Inquiry included a number of specific questions which addressed such issues as the nature of the relationships between the County and the Township, their respective solicitors and liability insurers. The questions were posed in order to obtain a clearer picture of the circumstances surrounding the creation of the records and the often complicated relationships existing between the various parties to this appeal. The County has provided responses to each of these questions as they pertain to each of the records.

The Township engaged the services of the Planner employed by the County (the Planner) to provide it with advice respecting the zoning issue. The Planner, in the course of his duties as the Township's expert, communicated on behalf of the Township with the solicitors for both the Township and the Township's insurers. The Planner is not an employee of the Township. However, this does not necessarily mean that documents flowing to and from the Planner are not privileged.

In Canadian Pacific v. Canada (Competition Act, Director of Investigations), [1995] O.J. No. 67 (June 2, 1995) (Ontario Court General Division), Mr. Justice Farley held that:

If a third party is truly an agent of the client seeking professional advice from the lawyer, not merely in the sense of being an agent of the client, but also being the agent who actually seeks the advice then there has been no waiver of disclosure to that third party.

I find that the Planner's involvement was an essential conduit on behalf of the Township for legal advice and instructions to counsel, and that he was "playing an indispensable role which cannot be performed reasonably by the client in the client's affairs, and for this role to be carried out, the party must be part of the process in seeking and obtaining legal advice." (Canadian Pacific, supra). Since the Planner was an essential part of the client Township's team, I find that any privileged document communicated to or by the Planner on behalf of the Township maintains its privileged status.

I am informed that the litigation which is the subject matter of much of the records continues. Accordingly, the privilege which I find to exist in those records which are exempt under Branch 2 of the section 12 exemption has not yet been lost due to the termination of the litigation.

In light of these findings, I will now consider the application of the section 12 exemption to the records. The representations of the County in response to the Notice of Inquiry are categorized on the basis of the origin of each record. I agree that this is the least complicated way to address the application of the section 12 exemption to these records.

Records Created by the Township of Horton

Records BE-1, BE-17 to BE-25, BE-26 to BE-31, CE-1 to CE-9, DE-102 to DE-103, DE-137 and DE-235 to DE-239 are confidential written communications from the Township to its solicitor seeking legal advice on matters pertaining to the draft by-law then being prepared. I find that these records qualify for exemption under Branch 1 of section 12.

The County submits that Records DE-71 to DE-74, DE-85 and DE-125 are exempt under either Branch 1 or Branch 2 of section 12. Record DE-71 to DE-74 is a facsimile cover page and three pages of maps which were sent by the Township Clerk to the Planner. I find that these records do not constitute a confidential communication between a solicitor and client. Neither were they created or obtained especially for the lawyer's brief or for use in litigation. Accordingly, I find that these documents are not exempt under either branch of section 12.

The County submits that Record DE-85, a draft resolution of the Township Council dated December 18, 1995, is exempt under Branch 2 of section 12. I have not been provided with any submissions as to how this record might qualify for exemption under Branch 2 of section 12. Record DE-125 is a Resolution passed by the Township Council on January 22, 1996. Again, I have not been provided with any evidence as to how this record might be found to fall within the ambit of Branch 2 of section 12. It is not clear on the face of either record that the information which they contain is subject to solicitor-client privilege. Accordingly, I find that these records do not qualify for exemption under this section.

Records Created by the Planner

The County submits that a large number of records which originated with the Planner are exempt from disclosure under Branch 2 of the section 12 exemption. Based on my review of these records, it is evident that the Township authorized the Planner to assist counsel for the Township's insurers in defending the legal action and the OMB proceeding begun by the appellant. This assistance took the form of the preparation of reports, the review of the appellant's evidence and various other activities designed to brief counsel on the issues in the action. The County submits that many of the records which it identified as responsive to the request that were created by the Planner were prepared for this purpose.

Record AE-13 to AE-50 consists of a covering letter, a planning report and various other documents compiled by the Planner for the solicitor for the Township's insurers. In light of my findings above with respect to the role which the Planner played in the conduct of the litigation involving the appellant and the Township, these records were prepared for counsel retained by the Township's insurers for use in litigation. The information which they contain relate to issues surrounding the definition of a legal, non-conforming use, which is an important issue in the litigation. I find that these documents are properly exempt under Branch 2 of section 12.

Similarly, Record AE-58 to AE-62 is another copy of the planning report referred to in Record AE-13 to AE-50 which was forwarded to the Township's Clerk and copied to counsel for the Township's insurers. Again, I find that this document was prepared for counsel for use in litigation and is properly exempt under Branch 2 of section 12.

Record AE-78 to AE-79 is a response from the Planner to an opinion prepared by another planner retained by the appellant. This record was addressed to counsel for the Township's insurers. Clearly, this record qualifies for exemption under Branch 2 of section 12 as it was prepared for counsel retained by the Township for use in litigation.

Records AE-83 to AE-91 and AE-98 are memoranda prepared by the Planner for counsel for the Township setting out his professional opinion on several issues pertaining to the legal action and OMB proceeding initiated by the appellant. These records are similarly exempt from disclosure under Branch 2 of section 12 as they were prepared for counsel for use in this litigation.

Record AE-111 to AE-134 are a series of notes made by the Planner on the subject of a draft Official Plan for the Township. These notes appear to be preparatory in nature and contain his suggestions for amendments and language which would address the concerns raised by the appellant's legal action and OMB proceeding. The notes were not, however, shared with the Township or with any of the counsel involved in these proceedings and remain in the possession of the Planner only. Because these documents were not prepared by or for counsel for use in litigation, they do not qualify for exemption under Branch 2 of section 12.

Record AE-135 to AE-139 is a memorandum prepared by the Planner for counsel to the owner of the property upon which is located the asphalt plant (one of the affected parties). I find that the interests of the Township and the affected party are not concurrent and it cannot be said that they have a common interest in the litigation before the Courts and the OMB. In my view, by sharing this information with counsel for the landowner, any privilege which may have existed in this record has been waived. Accordingly, I find that this record does not qualify for exemption under Branch 2 of section 12.

Record DE-26 to DE-42 is a letter with a number of attachments sent by the Planner to the Township's solicitor. The issues discussed in these documents relate directly to the subject matter of the litigation between the Township and the appellant. I find that this document is properly exempt from disclosure under Branch 2 of section 12 as it represents a record which was prepared for counsel for use in litigation.

Record DE-51 to DE-62 is a covering letter enclosing suggested outlines of possible Official Plan and Zoning By-law amendments sent from the Planner to the Township's Clerk. This record appears to be a more formal description of the information contained in the notes which appear in Record AE-111 to AE-134. However, unlike the situation in Record AE-111 to AE-134, this information was communicated to the Township's Clerk.

Solicitor-Client Privilege in Canadian Law, R.D. Manes and M. Silver, Butterworths, Toronto 1993, states, at page 55:

Canadian cases have also upheld the principle that communications between a solicitor and employees of the client can be privileged. This would include documents between employees which transmit or comment on privileged communications with lawyers, as long as the communications were connected with legal advice or contemplated litigation.

I find that Record DE-52 to DE-61, which is a communication between the Planner as agent for the Township and the Township Clerk, was for the purpose of conveying or implementing the legal advice obtained by the Planner in his capacity as agent on behalf of the Township.

I find that regardless of the fact that this record was not prepared by or for counsel for use in litigation, it qualifies for exemption under Branch 1 of section 12 as the exchange of information is in the context of processing and implementing the privileged legal advice received from counsel.

Record DE-88 to DE-89 is a facsimile cover page and a map prepared by the Planner for the Township's Clerk. As this record was not communicated to counsel, it cannot qualify for exemption under Branch 2 of section 12.

Record DE-90 to DE-101 is a facsimile cover page attached to a number of draft documents which would enable the Township to enact an amendment to its By-law 94-07. I find that this record was communicated from the Planner acting on behalf of the Township to the Township's solicitor. Accordingly, I find that it

qualifies for exemption under Branch 1 of section 12 as a confidential communication between solicitor and client for the purpose of obtaining legal advice.

Record DE-108 to DE-115 is a facsimile cover page to which is attached a decision of the OMB. This record was sent by the Planner to the Township's solicitor. In my view, this record is exempt from disclosure under Branch 2 of section 12 as it is a record obtained by counsel for use in litigation.

Record DE-126 to DE-129 are two drafts of a letter from the Planner to the Township's Clerk, copied to the Township's solicitor setting out several possible amendments to the Township's Site Control Plan which may address the concerns raised by the appellant in his litigation against the Township. In my view, these documents represent records which were prepared for counsel for use in resolving the litigation involving the appellant and are properly exempt from disclosure under Branch 2 of section 12.

Record DE-136 is a one-page document entitled "By-law Questions". On its face, I am unable to determine who prepared this record or for what purpose. The County acknowledges that it was not communicated to counsel. It does not qualify for exemption under section 12, therefore.

Records DE-157 to DE-178 are draft by-laws to amend the Township's existing By-law 94-07. I have been provided with no evidence as to whether these documents were shared with counsel and there is no indication on their face that this was done. I find that these records are not, therefore, exempt under section 12.

Records DE-183 to DE-187, DE-204 to DE-209, DE-211 to DE-218, DE-240 to DE-247 and DE-255 to DE-257 are letters written by the Planner to the Township's Clerk containing information with respect to the language to be included in the proposed amending by-law. For the reasons noted in my discussion of Record DE-51 to DE-62, I find that these records, while not prepared by or for counsel, represent communications between the Township's agent and its employee in which the legal advice received by the agent is conveyed for the purpose of implementing the advice received. For this reason, I find that they are properly exempt under Branch 1 of section 12.

Record DE-224 to DE-229 is a draft by-law sent by the Planner to the Township Clerk. Records DE-230, DE-248 to DE-254, EE-1 to EE-11 and EE-12 to EE-31 consist of notes made by the Planner following various telephone conversations with counsel and officials of other area municipalities. I find that the records comprising EE-1 to EE-11 contain information relating to confidential communications which took place between the solicitors for the Township and its insurers and the Planner, acting as agent for the Township. These records are, therefore, exempt from disclosure under Branch 1 of section 12. The remaining records, DE-230, DE-248 to DE-254 and EE-12 to EE-31, do not contain such communications and are not, accordingly, exempt under section 12.

Records Created by the Township's Council

Records AE-1 to AE-4, AE-5 to AE-8 and AE-9 to AE-12 (which is a copy of AE-5 to AE-8) are letters from the Township's counsel to it. Each contains legal advice about a legal issue (the amendment of the Township's Official Plan) which is of a confidential nature. I find that these records qualify for exemption under Branch 1 of section 12.

Records AE-80 and AE-81 to AE-82 are letters from the Township's counsel to the Planner with respect to the conduct of the OMB proceeding involving the appellant. I find that these records represent confidential communications from counsel to the agent for his client and as such, they fall within the ambit of Branch 1 of section 12.

Record AE-95 to AE-97 is a reporting letter to the Township Council from its solicitor. This confidential communication clearly falls within Branch 1 of the section 12 exemption as it is directly related to the giving of legal advice. Record AE-99 is a similar letter to the Township Clerk from counsel and is also exempt under Branch 1. Record AE-100 is a letter from the Township's counsel to the Planner soliciting his response to the appellant's mediation proposal in the OMB proceeding. I find that this document is exempt under Branch 2 as it was prepared by counsel for use in the ongoing litigation involving the appellant.

Record AE-105 to AE-110 is an opinion prepared by the Township's solicitor for members of the Township Council. I find that this record qualifies for exemption under Branch 1 of section 12 as it is a confidential communication containing legal advice from a solicitor to his client.

Record DE-4 to DE-10 is a letter from the Township's counsel to the planner requesting his comments on a draft pleading. This record was prepared by counsel for use in litigation and is exempt under Branch 2 of section 12.

Records DE-13, DE-20 to DE-21 and DE-196 to DE-200 are letters from the Township's counsel to the solicitor for one of the affected parties with respect to the Township's position in the OMB proceeding. As I found above in my discussion of Record AE-135 to AE-139, the information contained in these records was communicated to a party whose interests were not concurrent with that of the Township. Accordingly, any privilege which may have attached to that information has been waived. These documents should, therefore, be disclosed to the appellant.

Record DE-19 is a letter from the Township's counsel to the Planner regarding a proposed pre-hearing conference in the appellant's OMB proceeding. I find that this record was created by counsel for use in giving legal advice to his client, the Township. As such, it is exempt under Branch 2 of section 12.

Record DE-22 to DE-24 is a letter from the solicitor to the Township Council in which he sets out his legal opinion on several subjects then under consideration by the Council. I find that this record is exempt under Branch 1 of section 12 as it is a confidential communication which contains legal advice between a solicitor and his client.

Record DE-25 is a letter from counsel to the Planner reporting on a particular stage of the OMB proceeding. I find that this record was prepared by counsel for use in litigation and is, accordingly, exempt under Branch 2 of section 12.

Records DE-46 to DE-50, DE-63 to DE-66 and DE-67 to DE-70 are reporting letters from the solicitor to the Township Council in which the solicitor brings the Council up to date on the progress of the discussions between the parties to the OMB proceeding and the legal action. I find that these records represent confidential communications between a solicitor and client containing legal advice and they are, therefore, exempt under Branch 1 of section 12.

Records DE-75 and DE-76 to DE-82 are letters to the Planner and the Township Council respectively. I find that each were prepared by counsel for use in litigation and they are, accordingly, exempt under Branch 2 of section 12.

Record DE-83 to DE-84 is a letter addressed to the Township Council containing legal advice from the solicitor. I find this record to be exempt under Branch 1 as it is a confidential communication from a solicitor to his client with respect to a legal issue.

Record DE-104 is a facsimile cover page from the solicitor to the County's Planner to which is attached a letter from the appellant's counsel (Record DE-105 to DE-107). I find that the cover page is a confidential communication between a solicitor and client and qualifies for exemption under Branch 1 of section 12. The letter received from the appellant's counsel is not, however, exempt under either branch of section 12 and should be disclosed to the appellant.

Records DE-116, DE-119 and DE-146 to DE-147 are letters from counsel to the Planner. I find these records to be exempt under Branch 1 as they are confidential communications between a solicitor and his client about a legal matter.

Record DE-117 to DE-118 is a letter from the Township's counsel to the appellant's lawyer. Clearly, any privilege which may have existed in the information contained in this record has been waived. It should, accordingly, be disclosed to the appellant.

Records Created by Counsel for the Township's Insurer

As noted in my discussion above, I have found that the Township and its insurer have a common interest in the defence of both the OMB application and the legal action. For this reason, I found that communications shared between these parties, as well as the Planner, as agent for the Township, remain subject to the solicitor-client privilege. In my view, because of this common interest in the litigation, the privilege in these records was not waived when the information in them was communicated amongst the participants to the litigation.

Record AE-51 to AE-57 is a letter from counsel for the Township's insurers to the Planner to which is attached a draft affidavit for execution by the Township Clerk. I find that this record is exempt under Branch 2 of section 12 as it was created by counsel for use in litigation. Similarly, in Record AE-63 to AE-64, counsel for the insurer's requests that the Planner review a document and forward his comments. I find that this record is subject to Branch 2 of section 12 as it was prepared by counsel for use in the litigation.

Record DE-189 to DE-190 is a letter from the insurer's counsel to the Planner requesting his opinion on a question relating to the court action brought by the appellant. I find that this document is exempt under Branch 2 of the section 12 exemption. The attachment to this document, Record DE-191 to DE-195 is an earlier opinion provided by the Planner to the Township Clerk. I find that the dominant purpose for the creation of this record was to advise the Clerk on certain questions relating to the litigation. In my view, this record was not created for counsel for use in giving legal advice, in contemplation of litigation or for use in litigation. It is not, therefore, exempt under Branch 2 of section 12.

To summarize, I find that Records AE-1 to AE-4, AE-5 to AE-8 (and AE-9 to AE-12), AE-13 to AE-50, AE-51 to AE-57, AE-58 to AE-62, AE-63 to AE-64, AE-78 to AE-79, AE-80, AE-81 to AE-82, AE-83 to AE-91, AE-95 to AE-97, AE-98, AE-99, AE-100, AE-105 to AE-110, BE-1, BE-17 to BE-25, BE-26 to BE-31, CE-1 to CE-9, DE-4 to DE-10, DE-19, DE-22 to DE-24, DE-25, DE-26 to DE-42, DE-46 to DE-50, DE-63 to DE-66, DE-67 to DE-70, DE-75 to DE-82, DE-83 to DE-84, DE-90 to DE-101, DE-102 to DE-103, DE-104, DE-108 to DE-115, DE-116, DE-119, DE-126 to DE-129, DE-137, DE-146 to DE-147, DE-188 to DE-189, DE-235 to DE-239 and EE-1 to EE-11 are exempt from disclosure under either Branch 1 or Branch 2 of section 12.

THIRD PARTY INFORMATION

The County made no submissions on the application of this exemption to the records beyond simply stating that the exemption applies. Two of the affected parties made submissions in response to the Notice of Inquiry but neither specifically addressed the possible application of the section 10 exemption to any of the records. Because this is a mandatory exemption, however, I am required to review the records in order to determine whether any of them may qualify for exemption under this section.

The County submits that Records AE-111 to AE-134, AE-135 to AE-139, DE-51 to DE-62, DE-71 to DE-74, DE-88 to DE-89, DE-157 to DE-158, DE-183 to DE-187, DE-204 to DE-209, DE-211 to DE-218, DE-224 to DE-229, DE-230 and DE-240 to DE-247 are exempt under section 10.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the County and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

Part One of the Test

I have reviewed the information contained in each of the records described above and find that they do not contain information which may properly be categorized as a trade secret or scientific, technical, commercial, financial or labour relations information for the purposes of section 10.

For the most part, these records relate to the drafting of the necessary amendments to the Township's planning by-law to address the question of asphalt manufacturing plants within the Township. They do not contain third party information of the type contemplated by the exemption in section 10.

Accordingly, I find that this exemption has no application to the remaining records for which it was claimed.

ECONOMIC AND OTHER INTERESTS

The County has claimed the application of the exemption in section 11(e) to Record AE-135 to AE-139. This section states:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

As noted above, this record consists of a memorandum prepared by the Planner for counsel to one of the affected parties. The County has not made any submissions on the application of the section 11(e) exemption to this document. I have reviewed Record AE-135 to AE-139 and find that it does not contain positions, plans, procedures, criteria or instructions which are intended to be applied to negotiations currently underway or to be undertaken in the future. Rather, this record is a series of notes intended to form the basis for discussions between counsel to the affected party and the Township.

In my view, by sharing the information contained in this record with counsel for the affected party, who does not share a common interest with that of the Township, any protection which may have been afforded this information under section 11(e) was lost. Accordingly, I find that section 11(e) has no application to Record AE-135 to AE-139.

REASONABLENESS OF SEARCH

The appellant maintains that additional records which are responsive to her request should exist. She has provided a list of documents which she has obtained from other sources which she believes should also be in the custody of or under the control of the County. I note that a number of the documents which are referred to in this list have in fact been addressed in this appeal.

The County submits that the searches for records responsive to the appellant's request were undertaken by its Senior Planner and took place in the County Planning Department. I am satisfied that this individual was the most appropriate person to conduct the search as he has the necessary familiarity with the subject matter of the records.

Where a requester provides sufficient details about the records which she is seeking and the County indicates that such records do not exist, it is my responsibility to ensure that the County has made a reasonable search to identify any records which are responsive to the request. The Act does not require the County to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the County must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

Based on the information provided to me by the County, my review of the records and the submissions of the appellant, I am satisfied that the searches undertaken by the County for records responsive to the appellant's request were reasonable in the circumstances.

FEE WAIVER

In Order M-1087, a request was made to the Township of Horton by the same appellant as that in the present appeal. In that case, one of the issues requiring adjudication was whether the Township's decision not to grant the appellant a fee waiver was reasonable in the circumstances. The appellant raised a number of arguments in favour of the granting of a fee waiver on the basis that the health or safety of the Township's residents will benefit by the dissemination of the information contained in the records. In that order, I found that the appellant had not provided me with sufficient evidence to establish that it would be fair and equitable for the fee to be waived in the circumstances of that case.

In the present appeal, the appellant's arguments are essentially the same. In my view, the subject matter of these records, which describe in great detail the political process surrounding the drafting of an amending by-law, is similar to that found in the records at issue in the appeal which gave rise to Order M-1087. For the reasons stated in that order, I again find that the appellant has failed to establish that it would be fair and equitable for the fee to be waived in the present appeal on the basis that the dissemination of the records would benefit public health or safety.

ORDER:

1. I uphold the County's decision not to grant the appellant a fee waiver. Further, I find that the County's search for responsive records was reasonable in the circumstances. These aspects of the appeal are, accordingly, dismissed.
2. I uphold the County's decision to deny access to Records AE-1 to AE-4, AE-5 to AE-8 (and AE-9 to AE-12), AE-13 to AE-50, AE-51 to AE-57, AE-58 to AE-62, AE-63 to AE-64, AE-78 to AE-79, AE-80, AE-81 to AE-82, AE-83 to AE-91, AE-95 to AE-97, AE-98, AE-99, AE-100, AE-105 to AE-110, BE-1, BE-17 to BE-25, BE-26 to BE-31, CE-1 to CE-9, DE-4 to DE-10, DE-19, DE-22 to DE-24, DE-25, DE-26 to DE-42, DE-46 to DE-50, DE-52 to DE-61, DE-63 to DE-66, DE-67 to DE-70, DE-75 to DE-82, DE-83 to DE-84, DE-90 to DE-101, DE-102 to DE-103, DE-104, DE-108 to DE-115, DE-116, DE-119, DE-126 to DE-129, DE-137, DE-146 to DE-147, DE-183 to DE-187, DE-188 to DE-189, DE-204 to DE-209, DE-211 to DE-218, DE-235 to DE-239, DE-240 to DE-247, DE-255 to DE-257 and EE-1 to EE-11.
3. I order the County to disclose the remaining records to the appellant by providing her with a copy of each by **July 9, 1998** but not before **July 6, 1998**.

4. In order to verify compliance with the terms of this order, I reserve the right to require the County to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: _____

Donald Hale

Adjudicator

(formerly Inquiry Officer)

_____ June 4, 1998