



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1203

Appeal MA-980248-1

Town of Gravenhurst



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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Town of Gravenhurst (the Town). The request was for access to all records having to do with the Lumberjack Inn. The Town granted partial access to the records, denying access to parts of the records under the following sections of the Act

- draft by-laws - section 6(1)(a)
- closed meetings - section 6(1)(b)
- solicitor-client privilege - section 12
- invasion of privacy - section 14

The appellant appealed the Town's decision to deny access.

I sent a Notice of Inquiry to the appellant, the Town, and three individuals named in the records. Representations were received from the appellant, the Town and one individual (the affected person).

In its representations, the Town indicated that the reference to section 6(1)(a) in its decision letter was in error. Accordingly, section 6(1)(a) is not at issue in this appeal.

DISCUSSION:

CLOSED MEETINGS

The Town claims that section 6(1)(b) applies to a "Confidential Memorandum" dated July 16, 1998. The memorandum is addressed to the Mayor and the Committee of the Whole, and was written by the Chief Planner.

In order to qualify for exemption under section 6(1)(b), the Town must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Order M-64]

The first and second parts of the test for exemption under section 6(1)(b) require the Town to establish that a meeting was held **and** that it was held in camera [Order M-102]. The Town has provided me with a copy of the minutes of the July 21, 1998 meeting, which show that the Committee of the Whole resolved to enter closed session to discuss "proposed or pending acquisition of land" and "litigation or potential litigation, including matters before administrative tribunals". Accordingly, I am satisfied that a meeting was

[IPC Order MO-1203/April 14, 1999]

held and that it was held in camera. I am also satisfied that disclosure of the records would reveal the substance of the deliberations of that meeting. Therefore, I find that parts one and three of the test have been met.

The Town states that it is relying on section 55(5)(d) of the Municipal Act as the authority to meet in closed session. However, the substance of its representations refer to section 55(5)(e). Section 55(5)(e) states:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board.

The record relates to a proposed zoning amendment application, and the appropriate response to letters written on the subject by the appellant and others. The Town submits that there is a long history of the appellant and the others mentioned in the record opposing the development of and/or on this property. The Town indicates that these gentlemen have appealed every application with regard to the property and the municipality has had to appear before the Ontario Municipal Board on numerous occasions. In fact, the appellant has indicated that he did appeal Zoning By-law 98-156 to the Ontario Municipal Board. This By-law related to a site specific zone change affecting the property and was passed on October 20, 1998.

Accordingly, I am satisfied that the Board was authorized to hold this meeting in the absence of the public. In my view, the record pertains to an issue which has the potential to result in litigation affecting the municipality before an administrative tribunal, and I find that section 6(1)(b) applies.

SOLICITOR-CLIENT PRIVILEGE

The Town claims that section 12 applies to a letter dated July 14, 1998 and a memo dated July 21, 1998. The letter is addressed to a law firm and was written by the Chief Planner. The memo is addressed to the Chief Planner and was written by a lawyer.

Branches 1 and 2

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 an institution 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 institution 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.

[Order 49, see also Orders 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 an institution; 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]

Scope of Branches 1 and 2 determined with reference to the common law

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents

prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

[Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

The Town has claimed that both branches of section 12 apply to these records.

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

Having reviewed the records, I am satisfied that they are direct written communications between a solicitor and a client, which directly relate to the seeking and giving of legal advice. Direct communications between a solicitor and client are not affected by the termination of litigation, and I am satisfied, therefore, that these records qualify for exemption under section 12 of the Act.

INVASION OF PRIVACY

The Town claims that section 14 applies to names, addresses and home telephone numbers found on a number of responsive records. The Town has also applied section 14 to exempt two letters, dated May 4 and 6, 1998 in their entirety.

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Having reviewed the records, I am satisfied that the information which has been withheld is personal information, which relates to individuals other than the appellant. This information fits within paragraphs (d) and (h) of the definition of personal information, which state:

"personal information" means recorded information about an identifiable individual, including,

- (d) the address, telephone number, fingerprints or blood type of the individual,

- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 14(1)(f) of the Act reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

If one of the section 14(3) presumptions applies, personal information can be disclosed only if it falls under section 14(4) or if the section 16 “public interest override” applies to it [Order M-1154; John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.)].

The Town submits that the names, addresses and telephone numbers were withheld because disclosure would result in an unjustified invasion of personal privacy of the individual to whom the information relates, and there is not a compelling public interest in the disclosure of the records.

The Town also submits that the two letters were withheld in their entirety because they relate to a complaint received from an individual other than the requester. The Town indicates that it is a small community. It submits that there has been enough background history associated with this property that it felt that if the letter was released, the author of the letter would be recognized.

The affected person indicates that he considers any document authored by him to be of a confidential and personal nature between himself and the party to whom the document is addressed.

The appellant has not addressed the application of section 14(1)(f) in his representations.

In the circumstances of this appeal, the representations I have been provided with weigh in favour of finding that disclosure of the personal information at issue in this appeal would constitute an unjustified invasion of personal privacy. Additionally, I find that the appellant has been provided with a significant degree of disclosure in this case, as in almost every case the only information which has been severed is the name, address and telephone number of another person.. Having found that the records contain information which qualifies as personal information of individuals other than the appellant, and in the absence of any representations weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 14(1)(f) does not apply, and the personal information of individuals other than the appellant is properly exempt from disclosure under section 14(1) of the Act.

ORDER:

I uphold the Town's decision.

Original signed by: _____
Holly Big Canoe
Adjudicator

_____ April 14, 1999