



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

# **ORDER MO-1445**

**Appeal MA-000272-1**

**City of Orillia**



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## **NATURE OF THE APPEAL:**

In November 1997, the City of Orillia (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a number of records relating to a dispute between the City and the requester concerning a subdivision located in the City. The requester was the subdivision's developer and is currently embroiled in litigation with the City over the return of certain deposits made in about 1987. The City located the responsive records and denied access to them. The requester did not appeal the City's decision to deny access to the records at that time.

In August 2000, the requester again made a request for the same information. Again, the City denied access to the records, claiming the application of the following exemptions to the records:

- advice or recommendations - section 7
- solicitor-client privilege - section 12
- third party information - section 10(1)

The requester, now the appellant, appealed the City's decision to deny him access to the requested records. During the mediation of the appeal, the appellant narrowed the scope of the appeal to include 17 records and the attachments thereto. Upon receipt of the Mediator's Report and the appendix thereto, the appellant advised that he was not seeking access to Record 16. As further mediation was not possible, the appeal was moved into the Inquiry stage of the appeal process.

I decided to seek the representations of the City, initially and forwarded to it a Notice of Inquiry setting out the issues under appeal. I received no representations from the City regarding the application of the exemptions claimed to the records at issue. Rather, the City indicated that it continued to object to the disclosure of several of the requested documents, specifically, those designated as Records 7, 9, 14, 19, 24, 26, 30, 31 and 32 in the Report of the Mediator. The City also advised that Records 4, 22, 36 (which is the same as Records 29 and 35) have been disclosed to the appellant as part of the discovery of documents process in the lawsuit which he has undertaken against the City and that the information contained in Records 27, 33 and 34 has already been disclosed to the appellant through its accounting department. As the City indicates that it has no objection to the disclosure of the remaining records, I will order it to do so.

Having received no representations from the City with respect to the application of the exemptions claimed for any of the identified records, I determined that it was still necessary for me to hear from the appellant with respect to the application of the mandatory exemption in section 10(1) to Record 32 and the discretionary exemption in section 12 to Records 7, 9, 14, 19, 24, 29, 30 and 31. The appellant made submissions in response to the Notice of Inquiry, indicating that he has received access to Records 4, 29, 30, 35 and 36 and that he wishes to continue his appeal of the City's decision to deny access to Records 7, 9, 14, 19, 22, 24, 26, 27, 31, 32, 33 and 34.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

Section 12 of the *Act* provides that:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that 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.

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].

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ... [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to “a continuum of communications” between a solicitor and client:

. . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as “please advise me what I should do.” But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, cited in Order M-729].

Records 7, 9, 14, 19 and 26 are letters sent by or received from the City's solicitors which are directly related to the giving or seeking of legal advice. These records comprise confidential communications between a solicitor and client and, as such, are subject to the solicitor-client communication privilege and are exempt from disclosure under section 12.

Records 27, 33 and 34 are covering letters to legal accounts rendered by the City's solicitors. I find that they are not directly related to the giving, formulating or seeking of legal advice and contain no information of a confidential nature. I note that the appellant has already received the actual amounts of the invoices for legal services from the City's accounting department and that these records refer to those amounts in handwritten notes appended to them. In my view, any privilege which may have attached to the information contained in these records was waived at the time the dollar values were disclosed to the appellant by the accounting department. Accordingly, Records 27, 33 and 34 are not exempt under section 12. As no other exemptions have been claimed for these records, I will order that they be disclosed to the appellant.

Record 24 is a five-page memorandum dated August 26, 1987 prepared by the City's counsel following a meeting held on August 11, 1987 of a Committee of Council to discuss the status of a subdivision. The memorandum describes the chronology of the dispute and the efforts made to remedy it. On pages 4 and 5 of the memorandum, certain legal advice obtained by the City from its solicitors is described in detail. I find that Record 24 was prepared by legal counsel in order to brief the Committee on the situation involving the subdivision dispute. I find that Record 24 represents a confidential communication between a solicitor and his client and is directly related to the giving of legal advice. Record 24 is, therefore, exempt from disclosure under section 12.

Record 22 is a one-page memorandum dated June 2, 1987 from an engineer in the City's Engineering Department and the City's Clerk-Administrator. The body of the memorandum has been disclosed to the appellant with the exception of a handwritten note at the bottom of the page which is signed by the Deputy Clerk. I find that the undisclosed portion of Record 22 does not represent a confidential communication between solicitor and client and does not relate to the giving, formulating or seeking of legal advice. As such, it does not qualify for exemption under section 12.

Similarly, Record 31, a memorandum dated September 19, 1989 from the City's Engineer to the Deputy Clerk, contains no legal advice and is not a solicitor-client communication. It clearly fails to qualify for exemption under section 12.

## **ADVICE OR RECOMMENDATIONS**

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

. . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice" or "recommendations," the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)].

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the "deliberative process":

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office [Orders P-1147 and P-1299].

Information in records which would reveal the advice or recommendations is also exempt from disclosure under section 7(1) of the *Act*. [Orders 94, P-233, M-847, P-1709]

In its original decision letter, the City indicated that it was also relying on the exemption in section 7(1) with respect to the undisclosed portion of Record 22. I find that this portion of Record 22 does not contain any "advice or recommendations" and cannot, therefore, qualify for exemption under section 7(1) either. As no other exemptions have been claimed for the undisclosed portion of Record 22, I will order that it be disclosed.

Record 31, described above in my discussion of solicitor-client privilege, contains certain advice from the Engineer to the Deputy Clerk with respect to a proposed course of action for the City to take regarding the subdivision dispute. I find that Record 31 qualifies for exemption under section 7(1) as it contains advice or recommendations about a specific approach to the problem described therein.

### **THIRD PARTY INFORMATION**

The City submits that Record 32 is exempt from disclosure under section 10(1), the third party information exemption. This section states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the City 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.

[Orders 36, P-373, M-29 and M-37]

Record 32 consists of a letter received from a contractor by the City dated January 29, 1991 and the City's reply letter to him of February 1, 1991. The contractor is seeking the return of certain deposit monies paid to the City at the time building permits were taken out for the construction of a number of homes. The appellant indicates that the contractor is no longer carrying on business. The City has made no submissions on the circumstances surrounding the receipt of this correspondence, nor has it given any indication as to whether this information is treated in a confidential fashion when it is received.

Based on my review of Record 32, I find that the letter from the City to the contractor does not contain any of the types of information listed in section 10(1). However, the letter from the contractor to the City sets out in detail the nature of the work which it has completed and the amount of the deposits being claimed. I find that this information may properly be characterized as "commercial" information within the meaning of section 10(1). The first part of the three-part test has, accordingly, been satisfied with respect to the letter dated January 29, 1991 only. As all three parts of the test must be met in order for a record to be found to be exempt under section 10(1), I find that the City's February 1, 1991 letter does not qualify for exemption under this section. As no other exemptions have been claimed to apply to this document, I will order that it be disclosed to the appellant.

I have not been provided with any evidence to indicate that the January 29, 1991 letter was provided to the City by the contractor with an expectation of confidentiality. In the circumstances, however, I am prepared to agree that the information conveyed by this letter was intended to be treated in confidential manner by the City. It involved a claim for the return of a substantial amount of money and appears to have been on-going for some time.

Again, based on the evidence before me, I am unable to determine whether the disclosure of the information contained in this record could reasonably be expected to result in one of the harms specified in section 10(1). The appellant indicates that the contractor was hired by his development firm to construct the homes which were built in the subdivision. As the contractor is no longer carrying on business, I cannot agree that it would suffer any undue loss or prejudice to its competitive position through the disclosure of the information contained in the January 29, 1991 letter. As a result, I find that this letter is not subject to the mandatory exemption in section 10(1) and that it will be ordered disclosed.

**ORDER:**

1. I order the City to provide the appellant with copies of Records 22, 27, 32, 33 and 34 by **July 26, 2001** but not before **July 21, 2001**.
2. I uphold the City's decision to deny access to Records 7, 9, 14, 19, 24, 26 and 31.
3. In order to verify compliance with the terms of this order, I reserve the right to require the City to provide me with copies of the records described in Provision 1.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_  
June 21, 2001