



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1890

Appeal MA-040121-1

City of Vaughan



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NATURE OF THE APPEAL:

The City of Vaughan (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of all records relating to the use and zoning of the land on which a named school is located. In addition, the requester, who is the solicitor for the school, sought access to all records relating to any complaints concerning the school that are maintained by the City. The requester specified that he is seeking access to the following records:

- (a) notes, correspondence, memos and reports relating to zoning and land use issues;
- (b) notes, memos, correspondence and reports concerning the alleged use by School staff or students of [a specified public park];
- (c) notes, memos, agendas, minutes, transcripts, or audio or video recordings of public meetings, public hearings, council meetings, committee meetings (including committees of the whole);
- (d) Notices to Remove, work orders, and other documents relating to alleged breaches of by-laws and statutes, including all notes, memos, complaints, inspection reports and other documents giving rise to such Notices to Remove, work orders, or citations;
- (e) Names and where available addresses and telephone numbers of any individuals, corporations, or other entities that have made submissions or complaints concerning the operation of the School, the zoning of the School site, or the use or occupation of the [specified park] by students of the school; and
- (f) Copies of work orders, Notices to Remove, complaints of nearby residents, and meeting agendas and minutes relating to the occupancy of the School site during the last five years of occupation of the site by its previous owner.

The City located a number of records and, upon payment of the requested fee, disclosed some of them to the requester. The City indicated that some of the requested records do not exist and denied access to other records, claiming the application of the following exemptions contained in the *Act*:

- section 15(a) – information published or publicly available;
- section 8(1)(d) and 8(2)(a) – law enforcement;
- section 14(1) – invasion of privacy; and
- section 12 – solicitor-client privilege

It also advised the requester that the City does not have custody and control of City Councilors' records.

The requester, now the appellant, appealed the City's decision.

During mediation, the City disclosed a number of the records for which it had applied the section 15(a) exemption. As a result, the appellant agreed not to pursue access to the remaining records for which section 15(a) had been claimed.

The appellant maintained that additional records, including correspondence to and from City Councilors, ought to exist. Accordingly, the issue of whether the City's search was reasonable remains outstanding. I sought and received the representations of the City, which were shared in their entirety with the appellant, along with a copy of the Notice of Inquiry. The appellant did not provide any representations in response to the Notice.

RECORDS:

The records remaining at issue consist of documents located in each of the following City Departments and numbered as follows:

- Legal Services Department, pages 1-17, the City claims these records are exempt under section 12;
- By-Law Enforcement Division, Correspondence pages 1-80, the City maintains that these records are exempt under sections 8(1)(d), 8(2)(a) and 14(1); and
- By-Law Enforcement Division, Investigation and Work Orders pages 1-49, the City claimed the application of sections 8(1)(d), 8(2)(a) and 14(1) for these records

The records consist of a series of email chains and correspondence from City residents, along with the internal responses of City employees and Councilors. The information received from the residents and Councilors is duplicated many times in the pages identified as responsive as the email replies from their recipients were simply tagged onto the original message.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

General principles

Section 12 of the *Act* reads:

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.

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

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 or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

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].

The privilege applies to “a continuum of communications” between a 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 [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also 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].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The City’s representations

The City claims the application of the discretionary exemption in section 12 for the 17 pages of records located in its Legal Services Department on the basis that they qualify under Branch 1 of the privilege as solicitor-client communications. It submits that these records consist of correspondence between officials with the appellant school and the City’s Director of Legal Services (the Director), as well as written communications between the Director and City Council. The City argues that the correspondence relates to the giving of legal advice and that it has not waived solicitor-client privilege that exists in the communications.

Findings

Solicitor-client communication privilege recognizes that information passing between a solicitor and his or her client is deserving of protection from disclosure to those outside that relationship. In the present appeal, however, the majority of the records for which the City has applied the exemption in section 12 are letters to and from the appellant school. In my view, no privilege

can be claimed in documents passing from the Director to representatives of the school. As a result, I find that section 12 has no application to the information contained in pages 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16 and 17 of the Legal Services Department records.

Pages 4 and 11 of the Legal Services Department records are memoranda from the Director to members of the City Council and the Mayor describing certain action she has taken. I find that these documents represent a confidential communication passing between a solicitor and her client for the purpose of giving legal advice. As such, pages 4 and 11 qualify for exemption under the discretionary exemption in section 12.

LAW ENFORCEMENT

The City claims the application of the discretionary exemptions in sections 8(1)(d) and 8(2)(a) to the information contained in the records maintained by its Enforcement Services Department, pages 1 to 80 (correspondence) and 1 to 49 (investigation and work orders). These sections state:

(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

(2) A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term "law enforcement" is used in section 8(1)(d) and 8(2)(a), and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b)

The term “law enforcement” has been found to apply in the following circumstance:

- a municipality’s investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]

The representations of the City

In support of its arguments in favour of the application of section 8(1)(d), the City submits that:

The Enforcement Services Department’s by-law enforcement complaint process is a complaint driven system. A complainant must provide their name, address and telephone number when making a by-law enforcement complaint that relates to a Provincial Statute or to a City By-law infraction. At the time the complaint is made, the complainant is advised that their name, address and telephone number will remain confidential in accordance with the Act. Disclosure of the name, address and telephone number of the complainant would disclose information furnished or provided by a confidential source. It is in the City’s interest to ensure that the name, address and telephone number of the complainant is kept confidential. The City must ensure that the public, on whom it relies to identify infractions, will continue to have confidence in the by-law enforcement complaint process and be willing to come forward to identify infractions without fear of reprisal from the individual being named in the complaint. In a neighbour dispute, if the name of the complainant is disclosed, they will have a reasonable fear that the neighbour may threaten their safety or health, as well as the safety or health of their children. This reasoning is supported in Order MO-1416.

There is a reasonable expectation of confidentiality within the City’s by-law enforcement complaint process. Disclosure of the name of the complainant would disclose the identity of a confidential source of information that was supplied to the City of Vaughan in confidence to investigate an alleged Provincial Statute or City By-law infraction. Disclosure of the name of the complainant would jeopardize the effectiveness and integrity of the City of Vaughan’s by-law enforcement complaint process. This reasoning is supported by Orders M-4 and M-16.

Findings

In Order MO-1795, I addressed the application of section 8(1)(d) to records relating to a by-law enforcement investigation of a possible infraction against the City of Hamilton’s noise by-law. In that case, the records included the name, address and telephone number of individuals who had filed complaints with the City about barking dogs owned by the requester. I reviewed the application of section 8(1)(d) and found that:

Previous orders of the Commissioner have determined that a municipality's by-law enforcement process qualifies as a "law enforcement" matter for the purposes of section 2(1) of the *Act* (Orders M-16 and M-582). I agree with the reasoning in those orders and adopt their findings for the purposes of this appeal. The record addresses an alleged infraction of the City's noise by-law [as opposed to a zoning by-law as stated in the City's submissions] and I find, therefore, that it relates to "law enforcement" as defined in section 2(1).

I have reviewed the record and the representations of the parties and find that the disclosure of the name, address and telephone number of the complainant would reveal the identity of a confidential source of information in respect of a law enforcement matter, the investigation of a possible violation of a municipal by-law. I find, therefore, that the undisclosed information about the complainant qualifies for exemption under section 8(1)(d).

I adopt the approach undertaken in Order MO-1795 for the purposes of the present appeal. In this case, the records relate to various complaints about alleged infractions of City by-laws relating to littering, noise, parking and land use. The records contain the names, addresses and telephone numbers of the complainants and also include information whose disclosure would reveal the identities of these individuals, such as the proximity of their homes to the school or the named park. I find that the disclosure of all of the records would reveal information that could reasonably be expected to identify a confidential source of information in respect of a by-law enforcement matter. As a result, I find that the information contained in the correspondence file (pages 1 to 80) and the investigation/work orders file (pages 1 to 49) qualify for exemption under section 8(1)(d). As noted above, the information received by way of email or in correspondence received from residents, such as their names, addresses and telephone numbers, is duplicated many times throughout the records.

Because of the manner in which I have addressed the application of section 8(1)(d) to these records, it is not necessary for me to consider whether they are also exempt under sections 8(2)(a) or 14(1) of the *Act*.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The City provided me with detailed representations describing the nature and extent of the searches undertaken for responsive records. Its representations set out the City Departments searched, the individual in each Department who conducted the search, the actual record-holdings that were searched and the records retrieved as a result of the searches. The representations indicate that the constituency records of both the Mayor and the local city Councillor were also searched, along with each City Department.

I did not receive any representations from the appellant in response to the Notice of Inquiry provided to him.

Based on the representations of the City, I am satisfied that it conducted a reasonable search for records that are responsive to the appellant's request. The City provided me with detailed information describing the searches undertaken by knowledgeable staff in each City Department, as well as the Mayor and applicable City Councillor's office. I will, accordingly, dismiss this part of the appeal.

ORDER:

1. I order the City to disclose pages 1, 2, 3, 5 to 10 and 12 to 17 of the Legal Services Department records by providing him with copies by **January 17, 2005**.
2. I uphold the City's decision to deny access to pages 4 and 11 of the Legal Services Department records and all of the Enforcement Services Department's by-law enforcement records (pages 1 to 80 and 1 to 49) under sections 12 and 8(1)(d) respectively.
3. In order to verify compliance with Order Provision 1, I reserve the right to require the City to provide me with a copy of the records that are disclosed to the appellant.
4. I find that the City conducted a reasonable search and dismiss that part of the appeal.

Original signed by: _____
Donald Hale
Adjudicator

December 22, 2004
