

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER MO-3265

Appeal MA13-149

Township of Melancthon

November 20, 2015

**Summary:** The appellant made a request to the township for access to information relating to an application (since withdrawn) by a named company to develop a quarry on township lands. The township denied access to peer reviews and related correspondence on the basis of exemptions at sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed the township's denial of access, claiming a public interest in disclosure of the records. In this order the adjudicator upholds the township's decision to withhold one record on the basis of section 12. She does not uphold the township's decision to withhold peer reviews and other materials on the basis of section 7(1). She orders these records disclosed to the appellant, with the exception of certain portions of the peer reviews containing their authors' resumes and CVs.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss 7, 12.

### OVERVIEW:

[1] The appellant made a request to the Township of Melancthon (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to a named company's application to develop a quarry on township lands. In particular, the appellant asked for copies of peer review correspondence, work proposals, memoranda and draft and final reports prepared for the township in relation to the application since summer 2011, and to know the expenditure on peer reviews and legal advice. The appellant noted in his request that the application had since been

withdrawn by the company.

[2] In response, the township issued a decision denying access to the requested records on the basis of exemptions at sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*. In answer to the second part of the request, the township advised the appellant of its total expenditure on peer reviews and legal advice in 2011 and 2012, and that this amount was being reimbursed to the township by the company.

[3] The appellant appealed the township's decision to this office.

[4] During mediation, the township provided the appellant with an index of records containing a general description of each record responsive to his request. After reviewing the index the appellant was able to considerably narrow the number of records of interest to him and to which he seeks access. The township then issued a revised decision on those records, granting full access to five records and confirming its decision to deny access to Records 87, 113, 115 and 118-124 on the basis of sections 7(1) and 12 of the *Act*.

[5] The appellant maintained his interest in pursuing access to the withheld records, and raised the possible application of the public interest override at section 16 of the *Act*. He also asked for a breakdown of the total expenditure, which the township provided. The appellant was satisfied with the township's clarification, and this matter is no longer at issue in this appeal.

[6] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*. The adjudicator previously assigned to this appeal sought and received representations from the parties, and shared these in accordance with this office's *Practice Direction Number 7* and section 7 of its *Code of Procedure*.

[7] The appeal was then transferred to me to complete the inquiry. In this order I uphold the township's decision to deny access to one record on the basis of solicitor-client privilege. However I do not uphold its decision to withhold the remaining records. I order the township to disclose these to the appellant, with the exception of some pages that appear to contain the personal information of the records' authors.

## **RECORDS:**

[8] The records at issue are emails, memos and other correspondence concerning a named company's now-withdrawn application for the development of a quarry in the township.

[9] The records contain communications from legal counsel for the township to township staff; from peer reviewers to township counsel; and from peer reviewers to

the company. Most of the records include as attachments the peer reviewers' reports (some of which are marked "draft"), while other records contain information about the peer review process more generally.

## **ISSUES:**

- A. Does the discretionary exemption at section 12 (solicitor-client privilege) apply to Record 115? If so, should this office uphold the exercise of discretion under section 12?
- B. Does the discretionary exemption at section 7(1) (advice or recommendations) apply to Records 87, 113 and 118-124? If so, should this office uphold the exercise of discretion under section 7?
- C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 7(1) exemption?

## **DISCUSSION:**

### **Background**

[10] In 2011, the company named in the appellant's request made applications to the Ministry of Natural Resources (the ministry) and to the township further to its plan to develop a quarry on township lands.

[11] This proposal was subject to review by provincial, township and local conservation authorities, and requirements for public consultation and input. As part of its consideration of the company's application, the township appointed peer reviewers in 15 areas of expertise (such as air quality, noise and agricultural issues) to conduct peer reviews of certain components of the company's proposal. The peer reviewers were charged with assessing the reports produced by consultants retained by the company (the "company's consultants") in these various areas, which formed part of the company's development application.

[12] The township announced its intention to conduct an open and transparent review of the company's application, including by circulating the names of its peer reviewers and by making public the company's application to the township, all related background studies submitted by the company, and, once all were completed, the peer reviews themselves.

[13] The proposed development, and some public opposition to the development plan, generated a fair amount of media attention.

[14] In November 2012, before completion of the peer review process, the company

withdrew its applications to the township and the ministry. The company has since sold the lands on which the quarry was to be developed.

[15] None of the peer reviews commissioned by the township appears to have been made public by the township. However, the appellant reports that the ministry and a local conservation authority have both released peer reviews relating to this same project that are of the sort he has requested from the township.

[16] The township withheld the peer reviews and related materials at issue in this appeal on the basis of sections 12 and 7(1) of the *Act*.

**A. Does the discretionary exemption at section 12 (solicitor-client privilege) apply to Record 115? If so, should this office uphold the exercise of discretion under section 12?**

[17] The township submits that Record 115 is exempt from disclosure pursuant to section 12 of the *Act*. Section 12 states:

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.

[18] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[19] The common law and statutory branches encompass two types of solicitor-client privilege: solicitor-client communication privilege; and litigation privilege. The statutory and common law privileges, although not identical, exist for similar reasons.

[20] The township does not specify which type of solicitor-client privilege is claimed for Record 115. The appellant makes no representations on this issue. As Record 115 is a record of correspondence between legal counsel and the township, I will first consider whether it qualifies for solicitor-client communication privilege.

[21] The solicitor-client communication privilege at common law 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.<sup>1</sup> The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.<sup>2</sup> The privilege covers not only the document containing the

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<sup>1</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>2</sup> Orders PO-2441, MO-2166 and MO-1925.

legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.<sup>3</sup>

[22] 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.<sup>4</sup>

[23] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege knows of the existence of the privilege, and voluntarily demonstrates an intention to waive the privilege.<sup>5</sup> An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.<sup>6</sup>

[24] Record 115 consists of a covering email and attached memorandum from outside legal counsel for the township updating the township on the status of the peer review process. The memorandum is marked privileged and confidential and is addressed only to the chief administrative officer/clerk for the township, to whom the covering email is also addressed. The email is copied to two other individuals, one of whom is the township's solicitor and the other an administrative assistant for the outside counsel who drafted the memorandum and email.

[25] I find that Record 115 qualifies for exemption under the common law privilege for solicitor-client communications. The record clearly contains communications of a confidential nature between outside legal counsel and his client, the township. There is no evidence of waiver of privilege.

[26] I also uphold the township's exercise of discretion to deny access to this record on the basis of solicitor-client privilege. Although the township did not explicitly address this matter in its representations, on my review of all the materials before me, I am satisfied that the township did not err in exercising its discretion to withhold this record, which is the only record at issue for which section 12 is claimed. I accept that considerations relevant to its exercise of discretion in these circumstances include the importance of maintaining solicitor-client privilege, the sensitivity to its recipients of information subject to legal privilege and the fact the record does not contain any personal or other information of the appellant. I see no basis for disturbing the township's assessment that such considerations outweigh any public interest in this particular record, or any other factors that may favour disclosure.

[27] I therefore uphold the township's decision to withhold Record 115 under section

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<sup>3</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

<sup>4</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

<sup>5</sup> *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

<sup>6</sup> *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

12.

**B. Does the discretionary exemption at section 7(1) (advice or recommendations) apply to Records 87, 113 and 118-124? If so, should this office uphold the exercise of discretion under section 7?**

[28] The township seeks to withhold Records 87, 113 and 118-124 in their entirety on the basis of section 7(1) of the *Act*.

[29] The township's representations on this issue are brief. It is opposed to disclosing any of these records on the basis that the majority of the records have not been seen, nor will ever be seen, by township council. The township explains that there was no reason for the records to be viewed, as most are in draft form and subject to change. In support of its position that there is no public interest in disclosure of these records, the township refers to the company's withdrawal of its development application and its subsequent sale of the subject lands.

[30] The appellant in his representations addresses only the public interest in disclosure of the records. I need only consider these submissions if I find that any of the records at issue are subject to exemption under section 7(1). This section states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[31] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.<sup>7</sup>

[32] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[33] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.<sup>8</sup>

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<sup>7</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para 43.

<sup>8</sup> See above at paras 26 and 47.

[34] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[35] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information<sup>9</sup> and information prepared for public dissemination.<sup>10</sup>

[36] The records the township seeks to exempt under section 7(1) contain reports or updates from peer reviewers retained by the township to assess various components of the company's development application. Most of the records also contain emails that indicate to whom the peer reviews were sent. In particular:

- In Record 87, a peer review was sent from a peer reviewer directly to the company's consultant, with copies to other parties including the township and outside legal counsel retained by the township to manage the peer review process.
- In Record 113, a peer review was sent from a peer reviewer to counsel for the township, township staff and other parties.
- In Records 118, 119, 120 and 124, peer reviews were sent from counsel for the township to township staff.

[37] Records 121 and 122 are memos from a peer reviewer to counsel for the township, with copy to the company's consultants.

[38] Record 123 is duplicated in Record 118 and I will not address it separately in this order.

### ***Findings on section 7(1)***

[39] The purpose of the section 7 exemption, as set out in the 1979 Williams Commission Report<sup>11</sup> and endorsed by the Supreme Court of Canada,<sup>12</sup> is to protect the deliberative decision-making processes of government. This office has interpreted this section to apply to government decision-making and policy-making processes, and not to the processes of non-government entities.<sup>13</sup> This office has also required that there be a degree of proximity between the advice or recommendations and the decision-making that the advice or recommendations are meant to inform.<sup>14</sup> I agree with this

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<sup>9</sup> Order PO-3315.

<sup>10</sup> Order PO-2677.

<sup>11</sup> Makuch, Stanley M. and John Jackson, *Freedom of information in local government in Ontario*, (Toronto: Commission on Freedom of Information and Individual Privacy, 1979).

<sup>12</sup> In *John Doe v. Ontario (Finance)*, cited above, at para 43.

<sup>13</sup> MO-1981, PO-2206 and others.

<sup>14</sup> M-941.

interpretation of section 7, and apply it to this appeal. For the reasons that follow, I find the records at issue under this heading are too far removed from the deliberative process of township decision-making to qualify for exemption under section 7(1). I lack the evidence to find that the information in these records sets forth considerations to be taken into account by the township in its decision-making, or that the information was prepared to serve as the basis for its decision on a preferred course of action or between various courses of action.<sup>15</sup>

[40] The peer reviews in the records contain the peer reviewers' assessments of certain reports produced by the company's consultants to accompany its proposal to develop a quarry on township lands. The consultants' reports are about the impacts of the proposed development in areas such as air quality, agriculture and noise. The peer reviews vary in content, but generally set out the peer reviewers' opinions on the consultants' reports, and often include extracts from the consultants' reports followed by the peer reviewers' comments, concerns, questions and statements of agreement or disagreement with the findings of the company's consultants.

[41] Some of the peer reviews are marked "draft" by the peer reviewers. While drafts of material containing advice or recommendations may be exempt under section 7(1), the characterization of a record as a draft does not in itself transform the information in a record into exempt advice or recommendations. Similarly, the fact that some of the peer reviews contain the headings "advice" or "recommendations," or that their authors describe some of the findings in the body of their reviews in this way, is not determinative. In every case, it is the actual content of the information sought to be exempted, rather than its characterization by the author, that must be considered.<sup>16</sup>

[42] In this case, the peer reviews were commissioned by the township to assess various components of the proposed development. Some of the peer reviews are explicitly addressed to legal counsel for the township; even for those that are not, the records indicate that each of the peer reviews at issue in this appeal was sent to the township – either directly by the peer reviewers, or forwarded to the township by outside legal counsel who managed the peer review process for the township.

[43] From my review of the records, however, it appears to me that the peer reviews figured, at most, as an interim step in a more complex decision-making process that was to have culminated in the township's approval or rejection of the company's application. The records contain references to earlier versions of the peer reviews having been shared with the company's consultants, and to the findings and comments in those earlier reviews having been incorporated into revised reports of the company's

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<sup>15</sup> *John Doe v. Ontario (Finance)*, cited above, at para 47.

<sup>16</sup> Orders P-434, P-442, Order PO-2028 (upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v Ontario (Assistant Information and Privacy Commissioner)*, 2004 CanLII 15009 (ON SCDC), aff'd 2005 CanLII 34229 (ON CA), leave to appeal refused [2005] S.C.C.A. No. 564), and many others.



consultants. In fact, in Record 87, a peer review was sent directly to the company's consultants (with copy to township staff) by way of an email from a peer reviewer to the company's consultants. The prefacing email in this record invites future discussions between the peer reviewer and the company's consultants on the attached peer review.

[44] Another record contains as an appendix to a peer review a document that is described as the response of the company's consultant to an earlier version of the peer review.<sup>17</sup> In other records, the peer reviews are not addressed directly to the company, but contain comments, questions and requests for clarification on specific deficiencies and other areas of concern in the consultants' reports which appear to be directed to the company's consultants rather than to the township.

[45] The material before me suggests that the peer reviews were part of an iterative process involving the company's consultants and the peer reviewers, with successive drafts of the consultants' reports and the peer reviews of those reports being shared between the consultants and the reviewers, and used to inform future versions of both. The records reflect some of the peer reviewers' assessments of some of the components of the company's application. Although the township was one of the recipients of each of the peer reviews at issue in this appeal, I am not satisfied that the records are sufficiently connected to the deliberative decision-making process that was to be undertaken by the township in relation to the company's application to qualify as advice or recommendations within the meaning of section 7(1).

[46] Furthermore, I have not been provided with evidence from the township that would enable me to identify the specific advice or recommendations in the records, or to understand how any such information is sufficiently connected to the township's decision-making process to qualify for exemption. Given that at least some of these records have already been shared with the company's consultants, and the township's publicized intention to eventually disclose all the completed peer reviews to the public, I am not satisfied that disclosure of the peer reviews at issue here would have the consequence of interfering with the deliberative process of government decision-making or hinder the free and frank exchange of views within the public service that section 7 is meant to protect. In any event, I have not been provided with a basis to support the opposite finding. In all, I find there is insufficient evidence to conclude that the peer reviews qualify for exemption as advice or recommendations under section 7(1).

[47] For these reasons I reject the township's denial of access to Records 121 and 122 on the basis of section 7(1). These records are memos from one peer reviewer to township counsel, with copies to some of the company's consultants, to update the township on meetings held between the peer reviewer and the consultants. The memos set out the next steps to be undertaken by the company's consultants as a result of these meetings, and expected timelines for the next versions of the consultants' reports

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<sup>17</sup> Record 123, duplicated as an appendix to Record 118. I will only address Record 118 in this order.

and peer reviews. On the face of these records, I am unable to conclude that any information in them qualifies as advice or recommendations within the meaning of section 7(1).

[48] I also reject the township's denial of access on the basis of section 7(1) to the prefacing emails and attached peer reviews in Records 87, 113, 118, 119, 120 and 124. I will order the township to disclose these records in their entirety, with the exception of certain pages in Records 119 and 124 that set out the resumes and CVs of some of the peer reviewers. On its face, this information constitutes the personal information of the peer reviewers within the meaning of section 2 of the *Act*, and may therefore qualify for the mandatory exemption for personal privacy at section 14(1). As it is unclear to me whether the appellant has any interest in this information, and as these individuals have not been notified of this appeal, I will not order that this information be disclosed.

[49] It is unnecessary for me to address the township's section 7(1) claim for Record 123, which is a duplicate of pages contained in Record 118.

[50] Finally, as I have rejected the township's section 7 claims, it is unnecessary for me to address the township's exercise of discretion under this section. It is also unnecessary to address the appellant's public interest arguments. This is because I have already rejected the township's section 7(1) claims, and the public interest override at section 16 is not available for the record that I found exempt from disclosure pursuant to section 12.<sup>18</sup>

## **ORDER:**

1. I uphold the township's decision to withhold Record 115.
2. I order the township to disclose Records 87, 113, 118, 120, 121 and 122 in their entirety, and Records 119 and 124 in part, to the appellant.

The township is to sever the pages comprising the CV of one individual in Record 119, and the resumes and CVs of three individuals in Record 124, before these records are disclosed to the appellant.

The township is to disclose the records, or parts of records as described above, to the appellant by **December 28, 2015** but not before **December 21, 2015**.

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<sup>18</sup> The constitutional validity of the absence, in Ontario public sector access-to-information legislation, of a public interest override for solicitor-client privileged records was upheld by the Supreme Court of Canada in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

3. In order to verify compliance with this order, I reserve the right to require the township to provide this office with copies of the information disclosed to the appellant.

Original Signed by: \_\_\_\_\_

Jenny Ryu  
Adjudicator

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November 20, 2015