



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

ORDER M-61

Appeal M-910301

Town of Westminster



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ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act (the Act) and the Municipal Freedom of Information and Protection of Privacy Act.

BACKGROUND:

The Corporation of the Town of Westminster (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of a report dated March 25, 1991 prepared by Huron-Middlesex Engineering Ltd. The Town granted partial access to the record. Two severances were made to a portion of the report entitled "Partial Certification of Final Acceptance by the Town Engineer" and three severances were made to the portion of the report entitled "Outstanding Deficiencies". The Town cited sections 7(1) and 12 of the Act to exempt the information in the severed portions of the record. The requester appealed the Town's decision.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the Town, and Huron-Middlesex Engineering Ltd. Written representations were received from the Town.

ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 7(1) of the Act applies.
- B. Whether there is a compelling public interest in disclosure of the record or part thereof which clearly outweighs the purpose of the section 7 exemption.
- C. Whether the discretionary exemption provided by section 12 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 7(1) of the Act applies.

The Town cites section 7(1) of the Act to withhold the information in all of the severances made to the record. Section 7(1) of the Act states:

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

Severance 1 contains the engineering firm's finding regarding actions taken following recommendations previously submitted in a report to the Town with respect to storm sewers.

Severance 2 contains the engineering firm's finding regarding "As-Constructed Drawings" Phase I and II and refers to its letter to the Town dated February 8, 1991.

Severance 3 refers to the status of submissions being made to the Town regarding outstanding deficiencies, and refers to a record dated October 5, 1990, and a record addressed to the Town's solicitor dated December 12, 1990.

Severance 4 contains a finding regarding actions taken following recommendations made with respect to outstanding deficiencies and refers to three records dated November 20, 1990, January 7, 1991 and February 8, 1991.

Severance 5 consists of two paragraphs pertaining to outstanding deficiencies. Paragraph one contains the engineering firm's finding with respect to the deficiency identified. The first sentence in paragraph two provides the firm's professional opinion and refers to its report dated December 12, 1990. The second sentence is a factual statement regarding the particular deficiency. The last sentence in paragraph two contains the engineering firm's recommendation to the Town.

The Town submits that disclosure of the information in the severances "would reveal the advice or recommendations of a consultant retained by the municipality".

"Advice", for the purposes of section 7(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order M-40).

In my view, Severances 1, 2, 3 and 4 and all of Severance 5 except for the last sentence, do not contain information that could properly be considered advice or recommendations for the purposes of section 7(1). Accordingly, I find that Severances 1 to 4 and all of Severance 5, except for the last sentence, do not satisfy the requirements for exemption under this section.

The last sentence in Severance 5 contains the engineering firm's recommendation to the Town, and I find that it qualifies for exemption under section 7(1) of the Act.

In his letter of appeal, the appellant submitted that the severed portions of the record will be covered by the exceptions set out in section 7(2) of the Act. Section 7(2) of the Act provides that despite section 7(1), a head may not refuse to disclose a record that contains certain types of information. I am satisfied that none of the exceptions listed in section 7(2) apply in the

circumstances of this appeal to the part of the record which I have found to qualify for exemption under section 7(1).

Section 7 exemption is a discretionary exemption. The Town has provided representations regarding the exercise of discretion to refuse to disclose the information contained at issue, and I find nothing to indicate that the exercise of discretion was improper.

ISSUE B: Whether there is a compelling public interest in disclosure of the record or part thereof which clearly outweighs the purpose of the section 7 exemption.

In his letter of appeal, the appellant stated "There is a lengthy history around [this] issue" and "I believe that in this case, there is a compelling public interest which should override the protection that is sought under section 7". The appellant did not submit any further representations on this issue. Section 16 of the Act states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

The Act is silent as to who bears the burden of proof in respect to section 16. Where the application of section 16 has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making submissions in support of their contention that section 16 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

Accordingly, I have reviewed the record with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption found in section 7. In the circumstances of this appeal, I am not convinced that a compelling public interest in the disclosure of the last sentence in Severance 5 exists, such as to outweigh the purpose of the exemption.

ISSUE C: Whether the discretionary exemption provided by section 12 of the Act applies.

The Town cites section 12 to withhold the information in all of the severances made to the record. 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.

In Order M-2, Commissioner Wright stated that section 12 provides 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 Town must provide evidence that the record satisfies either of the following tests:

1.
 - (a) there must be 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 adviser; **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 M-2]

I have reviewed the record and I find that it fails to satisfy the requirements for exemption under the first test in Branch 1, as the record is not a communication between a client and a legal advisor; it was prepared for the Town's Director of Planning by an engineering consultant retained by the Town. In addition, there is no evidence to indicate that the record is of a confidential nature.

As far as the second test in Branch 1 is concerned, the Town has failed to establish that the record was "created or obtained especially for a lawyer's brief".

A record can be exempt under Branch 2 of the section 12 exemption regardless of whether the criteria relating to Branch 1 are satisfied. The Town submits that its solicitor had requested the engineer's status report dated March 25, 1991 and that it was "... used by [the solicitor] to provide a legal opinion of April 11, 1991 to the administrative staff of the Town and to Council regarding a possible legal claim against named parties". In my view, the criteria relating to Branch 2 have not been satisfied as the Town has failed to provide any evidence to substantiate its claim that the engineer's status report dated March 25, 1991 was prepared for counsel. The record indicates that it was prepared by the engineering firm for the Town's Director of Planning for the purpose of responding to his "request concerning certification of the subdivision works". It is also not

clear that the solicitor used the record at issue in this appeal in providing his legal opinion to the Town on April 11, 1991. Accordingly, the section 12 exemption does not apply to the severances made to the record.

ORDER:

1. I uphold the Town's decision to exempt the last sentence in Severance 5 on page five of the record under section 7(1) of the Act.
2. I order the head to disclose Severance 1 on page two, Severance 2 on page three, Severances 3 and 4 on page four, and all of Severance 5 on page five (except the last sentence) to the appellant within fifteen (15) days from the date of this order.
3. In order to verify compliance with the provisions of the order, I order the head to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, only upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ November 10, 1992