



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

# **ORDER M-83**

**Appeal M-910297**

**Town of Gravenhurst**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

# ORDER

## BACKGROUND:

The Town of Gravenhurst (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to examine an Ontario Municipal Board (the OMB) file regarding a named establishment. The Town granted access to all but seven responsive records, and denied access to these remaining records in their entirety pursuant to section 7(1) (Records 1 and 2) and section 12 (Records 3-7) of the Act. The requester appealed the Town's decision, and also raised the possible application of sections 50(2) and 51(1) of the Act to the circumstances of the appeal.

Mediation was not successful, and notice that an inquiry was being conducted to review the decision of the Town was sent to the appellant and the Town. Written representations were received from both parties.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 7(1) of the Act applies to Records 1 and 2.
- B. Whether the discretionary exemption provided by section 12 of the Act applies to Records 3-7.
- C. Whether sections 50(2) and 51(1) of the Act apply in the circumstances of the appeal.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A: Whether the discretionary exemption provided by section 7(1) of the Act applies to Records 1 and 2.**

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.

Record 1 consists of hand-written notes made by the Town's Director of Planning after conferring with the Public Works Superintendent about the Superintendent's concerns relating to the subject of the OMB hearing. Record 2 consists of two zoning analyses and a chronological record of communications between the Town and other persons involved in the OMB hearing.

The Town acknowledges that disclosure of Record 1 would not reveal "specific recommendations" or a "recommended course of action", but submits that it would reveal the advice of the Superintendent which was intended to be used by the Director of Planning, if required, at the OMB hearing. As far as Record 2 is concerned, the Town states in its representations that this record does not contain either specific advice, specific recommendations or a recommended course of action. The Town submits that the material contained in Record 2 is personal to the author and that releasing it would inhibit the free flow of advice between the Town and its employees.

As Commissioner Tom Wright pointed out in Order M-40, section 7 is not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. Section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, in my view, a purposive approach should be taken to the interpretation of section 7(1) of the Act, and the exemption should be restricted to records whose release would inhibit the free flow of advice and recommendations within the deliberative process of government decision\_making and policy\_making.

In the circumstances of this appeal, the Town has acknowledged that neither of the records contain recommendations. In order to qualify as "advice" for the purposes of section 7(1), a record 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, Records 1 and 2 do not contain information which could properly be considered to be "advice" for the purposes of section 7(1), and I find that these two records do not qualify for exemption under that section of the Act, and should be released to the appellant.

**ISSUE B: Whether the discretionary exemption provided by section 12 of the Act applies to Records 3-7.**

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 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).

[Orders M-2, M-52, M-61]

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.

[Orders M-2, M-61]

Records 3, 4, 5 and 6 are notes created by the Town's Director of Planning during the course of the OMB hearing. In its representations, the Town submits that these notes were prepared "in order for him to possibly bring up certain points later during the hearing or to the attention of the solicitor, etc.", and for possible review with the Town's solicitors during the course of the OMB hearing. Record 7 consists of hand-written notes made by the Director of Planning which are described by the Town as the minutes of a meeting attended by the Town, its solicitor, and other persons involved in the OMB hearing, to discuss the zoning application which was the subject of the hearing.

I have reviewed these records and, in my view, they all fail to satisfy the requirements for exemption under the first part of the Branch 1 test. Specifically, there is insufficient evidence to establish that the records were actually communicated between the Town and its legal advisor, nor do the Town's representations establish that the records are of a confidential nature. As far as the second part of the Branch 1 test is concerned, I find that the Town has failed to establish that any of Records 3-7 were "created or obtained especially for a lawyer's brief", and therefore, this part of the exemption also does not apply.

A record can be exempt under Branch 2 of the section 12 exemption regardless of whether the criteria relating to Branch 1 are satisfied. 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.

In my view, the Town has failed to provide sufficient evidence to establish that Records 3-7 were prepared specifically for counsel, or that the Town's solicitor used the records in providing legal advice to the Town. Therefore, I find that the criteria for exemption under Branch 2 have not been established, and that Records 3-7 should be released to the appellant in their entirety.

Because none of the records at issue in this appeal qualify for exemption under the Act, it is not necessary for me to consider the application of sections 50 and 51 of the Act in the circumstances of this appeal.

**ORDER:**

1. I order the Town to disclose Records 1-7 to the appellant within fifteen (15) days from the date of this order.
2. In order to verify compliance with the provision of the order, I order the Town to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: \_\_\_\_\_

Tom Mitchinson  
Assistant Commissioner

February 10, 1993