



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-162

Appeal M-9300069

Town of Gravenhurst



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ORDER

BACKGROUND:

The Town of Gravenhurst (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for records concerning a named development, including those records related to the Ontario Municipal Board hearing on the development. The Town identified seven responsive records and denied access in total pursuant to sections 6(1)(b) and 12 of the Act. The requester appealed the Town's decision.

Mediation was partially successful. The Town consented to the release of five of the records, and granted partial access to the sixth. Accordingly, section 6(1)(b) is no longer at issue in this appeal. The Town continued to deny access to one record in its entirety and the outstanding portion of the other, claiming the exemption in section 12 of the Act.

Notice that an inquiry was being conducted to review the decision of the Town was sent to the Town and the appellant. Written representations were received from both parties.

The records remaining at issue are:

1. Letter from the Town's solicitor to the Town
2. Notes of an Ontario Municipal Board hearing taken by the Planning Director of the Town

The sole issue in this appeal is whether the discretionary exemption provided by section 12 of the Act applies to Records 1 and 2.

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.

This section consists of two branches, which provide the Town with the discretion 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 and 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 and M-61]

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.

[Order M-83]

Record 1

Record 1 is a letter from the Town's solicitor to a Town official relating in part to the ongoing Ontario Municipal Board hearing on the development, and in part to the application of section 12 of the Act to documents associated with the hearing.

The Town submits that both branches of the section 12 test are applicable to the record. In support of this position, the Town merely states that "This letter was prepared by the Town Solicitor giving advice on an upcoming Ontario Municipal Board."

The appellant submits that there has been a consistent pattern of information sharing between the Town's solicitor and the developer of the project, but he provides no evidence indicating that the record was disclosed to the developer or his lawyer. A Town official has stated that this letter was not disclosed to the developer or his lawyer.

I have carefully reviewed Record 1, and it is my view that it qualifies for exemption under Branch 2 of the section 12 test. The record was prepared by counsel retained by the Town. While portions of the record are factual in nature, these are inter-mingled with, and the letter as a whole relates to, material prepared for use either in giving legal advice or for use in litigation. With respect to the latter part of the test, it is my view that no distinction should be made between court actions and matters heard before administrative tribunals, such as the Ontario Municipal Board.

Section 12 is a discretionary exemption which allows the Town to disclose a record which qualifies for exemption. Having reviewed the representations of the Town, I find nothing improper in the manner in which it exercised discretion in favour of denying access to Record 1.

Record 2:

Record 2 consists of hand-written notes created by the Town's Planning Director during the course of the Ontario Municipal Board hearing. They consist entirely of summaries of statements made by various participants during the hearing. The appellant was in attendance at the hearing.

I have reviewed the record, and in my opinion it fails to satisfy the requirements for exemption under either the Branch 1 or 2 tests.

With respect to the Branch 1 tests, the Town submits that the notes were prepared for discussion with the Town's solicitor. While the record may be used for such discussions it is, on its face, nothing more than a factual record of what transpired during the course of the hearing. There is insufficient evidence to establish that the record was of a confidential nature, that it was actually communicated between the Town and its legal advisor, or that it is directly related to seeking, formulating or giving of legal advice.

With respect to the second part of the Branch 1 test, I am of the opinion that the Town has failed to establish that the record was "created or obtained especially for the lawyer's brief". Therefore, neither part of the Branch 1 test applies to the record.

As far as the Branch 2 test is concerned, I am of the view that the Town has failed to provide sufficient evidence to establish that Record 2 was prepared specifically for counsel, or that the Town's solicitor used the record in providing legal advice to the Town.

I therefore find that the tests for exemption under section 12 of the Act have not been established, and that Record 2 should be disclosed to the appellant.

ORDER:

1. I uphold the Town's decision to deny access to Record 1.
2. I order the Town to disclose Record 2 to the appellant within fifteen (15) days of the date of this order.
3. In order to verify compliance with this order, I order the Town to provide me with a copy of the record disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ July 14, 1993