



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-285**

**Appeal M-9300186**

**City of Kitchener**



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# INTERIM ORDER

On July 30, 1988, a severe rain storm struck the Kitchener area. Many residents received a large amount of storm water in the basement area of their homes. As a result, some residents filed notices of claim with the City of Kitchener (the City) alleging water damage.

Recently, the City received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from one of the residents. The requester was seeking access to records regarding drainage and flooding in his neighbourhood. In particular, the requester sought access to an Adjusters Canada report along with all reports, letters, memos and documents from or to any city employee, insurer and/or politician regarding flooding and drainage in the Forest Heights area; specifically in the local and general study area of Royal Orchard Drive at Red Maple Place as defined by the study area of CH2M Hill Engineering Limited.

The City provided the requester with access to the originals of the majority of the records, with certain information severed therefrom. Severances were made pursuant to sections 10 and 14 of the Act. The requester was content with this part of the City's decision.

The City denied access under section 12 of the Act to four Adjusters Canada reports (Records 2, 3, 4 and 5) relating to flooding claims in the area and to a February 18, 1993 memorandum from the City Solicitor to an Alderman (Record 1). The requester appealed the City's denial of access to these five records.

Mediation of the appeal was unsuccessful and notice that an inquiry was being conducted was sent to the appellant and the City. The City indicated that its representations were contained in a letter to the Appeals Officer, which pre-dated the notice of inquiry. Representations from the City regarding the exercise of discretion were contained in a separate letter. The appellant did not provide representations.

The sole issue arising in this appeal is whether the discretionary exemption provided by section 12 of the Act applies.

Section 12 of the Act 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.

Section 12 consists of two branches, which provide the City 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 City must provide evidence that the record satisfies either of the following tests:

1.
  - (a) there is 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 advisor; **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 49, M-2 and M-19]

The City maintains that the memorandum from the City Solicitor to the Alderman (Record 1) should be exempt from disclosure under the first part of Branch 1 of section 12 of the Act. The City submits that Record 1 is a written communication of a confidential nature between a client (the Alderman) and its legal advisor (the City Solicitor) and was prepared in response to a request from the Alderman for legal advice on the flooding problem. I agree. In my view, Record 1 meets all four parts of the first test and is properly exempt from disclosure under the first part of Branch 1.

With respect to the Adjusters Canada reports (Records 2, 3, 4 and 5), the City states that they fit within the second part of Branch 1.

The City submits that the reports were prepared for counsel in contemplation of litigation and that the litigation privilege pertains to papers and materials created or obtained especially for the lawyers brief for litigation whether existing or contemplated. The City submits that several residents, including the requester, had put the City on notice that they held it responsible for the alleged water damage caused by the flooding incident. The City states that upon receiving the notices of claim, the City's liability insurers were contacted. In turn, the insurer retained Adjusters Canada for the purpose of investigating the alleged damage and to advise the insurer on whether or not the City was liable for the alleged damage and if so, whether the City, through its deductible or its insurers, would cover the loss.

I have reviewed all four reports and find that they fit within the litigation privilege. They were created as a direct result of the claims filed with the City and provide the City with the results of their investigation into the alleged damage caused to the homes. They also provide legal advice as to potential liability and damages with respect to the claims made to the City. In my view, therefore, Records 2, 3, 4 and 5 qualify for exemption under the second part of Branch 1 of section 12 of the Act.

As I have found that the records are exempt from disclosure in full pursuant to the first branch of section 12 of the Act, it is not necessary for me to consider whether the records are exempt from disclosure under the second branch of section 12 of the Act, as was argued by the City.

Section 12 of the Act is a discretionary exemption. It provides the head with the discretion to disclose the record even if the record meets the test for exemption.

In response to a specific request for representations on the exercise of discretion, the City's Freedom of Information Co-ordinator states:

The City Solicitor has advised that he relies on solicitor/client privilege in all instances where a claim against the City is involved or where there is an allegation of responsibility for damages.

The Co-ordinator confirms that it was the City Solicitor who reviewed the records and made the decision with respect to access and that the head of the City merely adopted the City Solicitor's decision.

Where access to disclosure is denied pursuant to a discretionary exemption, the head is required to decide whether the record falls within the exemption claimed. Having established that it does, the head must then decide whether the exemption should be applied.

Guidance as to the general principles that apply to the exercise of discretion is found in "de Smith's Judicial Review of Administrative Action" (4th ed., Toronto: Carswell, 1980) at page 285:

In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case.

Further guidance is provided in Orders P-262 and P-344, in which former Assistant Commissioner Tom Mitchinson stated at page 7 of each order:

In this appeal, the head's representations regarding the exercise of discretion do not refer to the particular circumstances of the appellant's situation. At most, they set out general

concerns about the type of record at issue. The head has not explained why, in this case, the appellant's rights and interests are outweighed by these general concerns.

[Order P-262]

In my view, taking a "blanket" approach to the application of section 14(3) in all cases involving a particular type of record would represent an improper exercise of discretion. Although it may be proper for a decision maker to adopt a policy under which decisions are made, it is not proper to apply this policy inflexibly to all cases. In order to preserve the discretionary aspect of a decision under sections 14(3) and 49(a), the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the Act.

[Order P-344]

I adopt the reasoning applied in both these orders and find that, in this case, the head acted under the dictation of the City Solicitor. Further, I find that the City applied a blanket approach in deciding whether section 12 of the Act applies. There is no indication in any of the correspondence from the City that it considered the merits of this particular appellant's case or that it considered whether, in this appeal, a departure from their general policy, as stated in their representations, would be warranted. Accordingly, in my view, the head has not properly exercised his discretion, and I order him to reconsider the question of discretion, in accordance with the requirements outlined above.

### **ORDER:**

I order the head to reconsider the exercise of his discretion pursuant to section 12 of the Act within 15 days of the date of this Interim Order. I further order the City to provide me with written representations as to the factors considered in the exercise of discretion within 20 days of the date of this Interim Order.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ March 11, 1994