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

ORDER M-392

Appeal M-9400051

City of North York

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The City of North York (the City) received a request for access to two agreements relating to the naming and the operation of the North York Performing Arts Centre (NYPAC). The requester also wished to receive any notes taken by a lawyer with the City Solicitor's office at a meeting attended by the requester. The City identified three responsive records but denied access to these documents based on the following exemptions contained in the Act:

- closed meeting - section 6(1)(b)
- security - section 8(1)(i)
- third party information - sections 10(1)(a), (b) and (c)
- valuable government information - section 11(a)
- economic and other interests - sections 11(c) and (d)
- solicitor-client privilege - section 12

The requester appealed the denial of access to the Commissioner's office. A Notice of Inquiry was provided to the City, the appellant and to an affected person whose interests may be affected by the disclosure of the records. Representations were received from all three parties.

DISCUSSION:

CLOSED MEETING

The City has claimed the application of the exemption provided by section 6(1)(b) of the Act to the Management and Naming Agreements.

The Management Agreement

It should be noted that the Management Agreement for the operation of the NYPAC which is at issue in this appeal was also the subject of Order M-241 in which I upheld the City's decision to deny access to this particular record.

The representations received from the City relating to the application of section 6(1)(b) of the Act to the Management Agreement are substantially similar to those submitted in the appeal which was resolved by Order M-241. The appellant has, however, raised several additional issues not considered in that order. I will address each of these individually.

In his representations, the appellant states that:

> The secrecy provided by section 6 is a privilege enjoyed by municipal politicians and their appointees. It is analogous to the common law solicitor-client privilege and, as that privilege is lost through disclosure to outsiders, so the privilege of politicians is lost through the selective release of privileged information. Clearly, what purports to be elements of the agreement have been released to the public.

I disagree that the closed meeting exemption creates a "privilege" which is analogous to the common law solicitor-client privilege.

The exemption created by section 6(1) of the Act is modified by the provisions of section 6(2) of the Act which contain certain exceptions which, if applicable, override the exemption. If the Legislature had intended to create a "privilege" to apply to records created by municipal institutions, it would have done so. Rather, through the creation of the section 6(2) exceptions to the exemption, the Legislature has chosen to delineate specific situations in which the exemption will not apply.

With his representations, the appellant has attached a letter written by a City of North York councillor, who was present during the in camera meeting of the Council's Committee of the Whole held on May 29, 1991 when the proposed Management Agreement was discussed. The councillor indicates that there were no recorded deliberations concerning the confidentiality of the item under discussion and that the meeting was "extremely brief with the exception of my voicing my disapproval of the agreement."

In Order M-241, I found that the disclosure of the Management Agreement would reveal the **substance** of deliberations of an in camera meeting of the City Council's Committee of the Whole, which had been held in accordance with section 55 of the Municipal Act. In the context of the present appeal, I find once again that the substance of the deliberations, however brief, of the in camera meeting would be revealed should the Management Agreement be disclosed.

The appellant also submits that the exception set out in section 6(2)(b) of the Act applies to override the exemption in section 6(1)(b). This section creates an exception to the section 6(1)(b) exemption in situations where the subject matter of the deliberations of an in camera meeting are **considered** in a meeting open to the public.

In his representations, the appellant states that the North York City Council, in a public meeting held immediately following the in camera meeting of its Committee of the Whole on May 29, 1992, adopted the recommendations of the Committee to approve the Management Agreement.

In its representations, the City argues that the Council simply adopted, without discussion, the recommendation of the Committee of the Whole. In Order M-241, I determined that the adoption without discussion by Council at a public meeting of a report which was discussed at an earlier in camera meeting could not be characterized as the consideration of the **subject matter** of the in camera deliberations. In the circumstances of this appeal, I similarly conclude that the subject matter of the deliberations of the in camera meeting were not **considered** in the open Council meeting within the meaning of section 6(2)(b). Accordingly, I find that the exception provided by this section has no application to the Management Agreement.

The Naming Agreement

The City has also claimed the closed meeting exemption for the Naming Agreement, a 37-page document dated December 16, 1992 between the North York Performing Arts Centre Corporation (the Corporation) and the affected person. In order to rely on section 6(1)(b), the City must establish that:

1. A meeting of a council, board, commission or other body or a committee of one of them took place; **and**

2. A statute authorizes the holding of such a meeting in the absence of the public; **and**

3. The disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

I will now consider whether each part of the section 6(1)(b) test has been established.

In its representations, the City indicates that the Naming Agreement originally came before an in camera meeting of the Board of Directors of the Corporation on January 16, 1992. This agreement was then discussed at an in camera meeting of the City of North York's Executive Committee on January 28, 1992 before being adopted, without discussion, at a public meeting of the Council held on February 5, 1992.

Sections 8(2)(c) and (d) of the City of North York Act authorize the Board of Directors of the Corporation to hold meetings which are closed to the public. Similarly, section 55 of the Municipal Act permits meetings of committees of municipal councils, including meetings of the Council's Committee of the Whole, to be held in the absence of the public.

Based on this series of events, I am satisfied that in camera meetings of the Board of Directors of the Corporation and the City Council's Committee of the Whole took place, and that the necessary statutory authority exists which permits the holding of such meetings in the absence of the public. Therefore, parts 1 and 2 of the section 6(1)(b) test have been satisfied.

In its representations, the City indicates that the Board of Directors of the Corporation considered changes and clarifications to the Naming Agreement at its in camera meetings and that the deliberations of the Board focused on the terms of this document.

I have reviewed the representations of the parties, the minutes of the relevant meetings and the Naming Agreement itself. I find that the disclosure of the Naming Agreement would reveal the substance of deliberations of in camera meetings of the Board of Directors of the Corporation and the Committee of the Whole which were held in accordance with the provisions for in camera meetings in the City of North York Act and the Municipal Act respectively. As part 3 of the section 6(1)(b) test has been met, I find that the Naming Agreement is exempt from disclosure.

I further find that the subject matter of the deliberations of the in camera meetings of the Corporation and

the North York Council's Committee of the Whole were not **considered** at the public meeting of Council held on February 5, 1992. Rather, the recommendation of the Committee of the Whole was adopted without further discussion by the Council. Accordingly, the exception provided by section 6(2)(b) of the Act to section 6(1)(b) has no application in the circumstances of this appeal.

As I have found that both the Management and Naming Agreements are exempt from disclosure under section 6(1)(b) of the Act, it is not necessary for me to address the application of sections 8(1)(i), 10 and 11(a), (c) and (d) of the Act to these records. As only the solicitor-client privilege exemption (section 12) has been claimed for the remaining record, I will now consider its application to the lawyer's notes.

SOLICITOR - CLIENT PRIVILEGE

The City has claimed the application of the second part of Branch 1 and Branch 2 of the solicitor-client exemption to deny access to copies of a series of notes made by counsel to the Corporation.

The second part of Branch 1 of the solicitor-client privilege exempts from disclosure a record which was created or obtained especially for a lawyer's brief for existing or contemplated litigation. Branch 2 exempts from disclosure 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.

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

Part 2 of Branch 1

The notes were made by counsel to the Corporation, who is employed by the City Solicitor's Office, during a meeting with members of a civic organization, held on July 7, 1993. The subject matter of the meeting was the financial operation of the NYPAC. At the time of the meeting, the City had received an access request from another individual under the Act for access to the Management Agreement which is at issue in this appeal. In March 1993, the City had resolved an earlier request from the appellant for other financial information about the operation of the NYPAC. This request did not result in an appeal to the Commissioner's office.

In an affidavit filed along with the City's representations, the solicitor who made the notes deposes that it was his expectation that another request would be made by the appellant for access to records relating to the financial operation of the NYPAC. He further indicates that he anticipated that, as access to the Management and Naming Agreements would be denied by the City, an appeal to the Commissioner's office by the appellant was reasonably likely to occur.

The City argues, therefore, that the notes of the meeting were made "in contemplation of impending anticipated litigation in the form of an appeal pursuant to the Act" and, therefore, that the notes qualify for exemption under the second part of Branch 1 of the section 12 exemption, as a "record created or obtained especially for the lawyer's brief for existing or **contemplated** litigation".

I find that, at the time the record was created, there did not exist a reasonable likelihood of contemplated litigation as is required by section 12 of the Act. On July 7, 1993, a request for the information in question had not yet been made to the City by the appellant, though the appellant's civic organization had certainly expressed a great deal of interest in the financial operations of the NYPAC prior to that date. I find, therefore, that the record at issue was not created especially for the lawyer's brief for contemplated litigation and that the City has not satisfied the requirements of part 2 of Branch 1 of the section 12 exemption.

Branch 2

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.

I am satisfied that the record was prepared by counsel employed by the City. For the reasons stated in my discussion of part 2 of Branch 1 of the solicitor-client privilege, I cannot agree that there existed at the time the records were created a reasonable likelihood that litigation in the form of an appeal to the Commissioner's office would occur. I find that the dominant purpose for the creation of the lawyer's notes was not for use in contemplated litigation but, rather, to provide a written record of the meeting's discussions. Accordingly, I find that the City has not met the requirements of Branch 2 of the section 12 exemption. As this is the only exemption which the City has applied to this record, the notes should be disclosed to the appellant.

ORDER:

1. I uphold the decision of the City to deny access to the Management Agreement and the Naming Agreement.

2. I order the City to disclose to the appellant the notes taken by counsel at the July 7, 1993 meeting within fifteen (15) days of the date of this order.

3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant pursuant to Provision 2.

Original signed by: September 20, 1994
Donald Hale
Inquiry Officer