



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

# **ORDER M-520**

**Appeal M-9500025**

**Township of Bentinck**



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>

## **NATURE OF THE APPEAL:**

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Township of Bentinck (the Township) received a request for access to several categories of information related to the development of a named property. The request was made by the solicitors for the owners of a property located a short distance from the named property.

The Township gave notice of the request to the development consultant (the consultant), on behalf of the owner of the named property. After considering the representations of the consultant in response to this notification, the Township granted access to a number of records including correspondence, initial and final site plans, a building permit and the application for the building permit. The Township denied access to 18 records. The Township subsequently located two additional records which it disclosed to the requester. The requester then appealed the denial of access.

The Township later released five of the documents which it had originally withheld, and raised the application of another discretionary exemption to deny access to the remaining records, described in Appendix "A" to this order. Accordingly, the exemptions now at issue in this appeal are as follows:

- security - section 8(1)(i)
- third party information - section 10(1)
- solicitor-client privilege - section 12

The appellant indicated that he was not satisfied that the Township had identified all the records which responded to his request.

A Notice of Inquiry was sent to the Township, the appellant, the owner of the named property and one of the proposed tenants for the property development. Representations were received from the Township and counsel representing the property owner, the consultant and the proposed tenants (the affected parties).

The submissions of the affected parties pertain only to the disclosure of Record 18, the building plans. The affected parties have consented to the disclosure of 13 of the 52 pages of plans. These are listed in Appendix "B" to this order and should be disclosed to the appellant. Appendix "C" lists the pages of the plans which are still at issue. In this order, I will refer to these remaining documents as the "Plans".

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

It is the position of the Township that all of the records, with the exception of Record 18, qualify for exemption pursuant to section 12 of the Act which 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.

This exemption consists of two branches, which provide an institution 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 institution 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 (Order 49).

Records 2, 3, 8, 11, 14, 15 and 16 consist of correspondence from the Township's solicitor to his client, the Township. Records 3, 8, 11, 14 and 15 all enclose draft documents prepared by the solicitor for review by his client. In my view, the drafts incorporate the legal advice provided by the solicitor to the Township in order to represent its interests in the development proposal. As a group, I find that Records 3, 8, 11, 14 and 15 constitute confidential communications between the solicitor and his client directly related to the giving of legal advice and thus qualify for exemption pursuant to Branch 1 of section 12 of the Act.

Records 2 and 16 are directly related to the giving of legal advice concerning a specific matter related to the site plan agreement for the development. As these documents also satisfy the other three criteria set out above for the application of the common law solicitor-client privilege exemption, they, too are exempt pursuant to section 12.

Records 12 and 13 are facsimile transmissions from the Township to its counsel in which the Township is seeking the solicitor's comments and advice with respect to the matters contained in the attachments. I find that these two records constitute confidential communications between the solicitor and his client, the Township, directly related to the seeking of legal advice. They also qualify for exemption pursuant to section 12 of the Act.

In summary, I find that Records 2, 3, 8, 11, 12, 13, 14, 15 and 16 qualify for exemption pursuant to the common law solicitor-client privilege in section 12.

### **THIRD PARTY INFORMATION**

The Township and the affected parties claim that the 39 Plans which make up Record 18 are third party information which should not be disclosed on the basis of the mandatory exemption contained in section 10(1) of the Act.

Having reviewed the representations of these parties and, in particular, the affidavit of the proposed tenant, I note that the submissions with respect to the Plans numbered A8, M1, M5, E6, E9, E10, E11 and E12 are directed solely to security concerns. Accordingly, I will only consider the application of section 8(1)(i) to these documents. In addition, I believe that plans E2 and E5 are more appropriately considered under that exemption as well.

For a record to qualify for exemption under section 10(1)(a), (b) or (c) the institution and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

[Order 36. See also Order M-29 and Order M-37]

### **Part One of the Test**

The Plans to be considered under section 10(1) are comprised of 29 drawings of the architectural, merchandising, structural, mechanical and electrical configurations of the facilities of the proposed tenants for the development. They were prepared by the architects and engineers acting for the property owner.

The affected parties submit that these documents contain "technical information" within the meaning of section 10(1) of the Act. I agree that the construction details of the building constitute information "belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts" and thus may be considered to be "technical" information for the purposes of section 10(1) of the Act (Order P-454). Thus, the first part of the test is met.

## **Part Two of the Test**

To satisfy this part of the test, the Township and/or the affected parties must show that the information at issue was supplied to the Township in confidence, either implicitly or explicitly.

The Plans were supplied by the affected parties to the Township for its review prior to the issuance of the building permits and other permits in accordance with the Building Code. Thus, the first element of the second part of the test has been satisfied.

The appellant submits that the Plans were not supplied to the Township in confidence but has provided no evidence to substantiate this claim. In contrast, both the Township and the affected parties have provided detailed evidence that the affected parties held a reasonable expectation that the Plans would be kept confidential.

As part of its representations, the Township has included an affidavit from the Clerk of the Township in which he states that it is not the practice of the Township to make building plans available to the public. He indicates that, in the one instance in which such plans were requested and provided to a member of the public, the express permission of the applicant had been obtained.

The submissions of the affected parties include an affidavit from the principal with the consultants who details his understanding of the circumstances under which the plans were submitted to the Township. Also included in these submissions is an affidavit from one of the proposed tenants who describes how the Plans have been consistently treated in such a manner so as to reflect his organization's concern for their protection from disclosure.

Based on the evidence provided by the Township and the affected parties, I am satisfied that the Plans were submitted to The Township implicitly in confidence. Thus the second part of the section 10(1) test has been met.

## **Part Three of the Test**

The affected parties submit that disclosure of the Plans could prejudice significantly the competitive position of the proposed tenants (section 10(1)(a)) which may result in their suffering undue financial loss while their competitors incur financial gains (section 10(1)(c)).

The proposed tenant indicates that there are two aspects of its success which may be discerned from the plans: (1) the merchandising strategy; and (2) the building operational efficiency. The affidavit provided by the proposed tenant links the information contained in each of the Plans to one of these elements and submits that, should such materials be disclosed, its commercial success could reasonably be expected to be compromised in the manner described by the harms in sections 10(1)(a) and (c) of the Act.

Having carefully reviewed the Plans and the submissions of the affected parties, I am satisfied that disclosure of the technical information contained in Plans A1, A1.2, A4, A4.1, A5, A6, A7, A9, A10, MP1, S5, M3, M4, M7, SP1,

EM1, E1, E3, E4, E8, MCD-A1, MCD-M1, MCD-E1, MCD-E2, MCD-K1, MCD-K2 and MCD-K3 could reasonably be expected to prejudice significantly the competitive position of the affected parties. Thus I find that these Plans are exempt pursuant to section 10(1)(a) of the Act.

With respect to Plan M2, the affidavit of the proposed tenant states that disclosure of the information contained in Plan M2 could adversely affect its merchandising and operations as it describes "... the number and location of washrooms which can be copied by competitors to gain an advantage in customer service and comfort". In my view, this is not sufficient evidence to satisfy me that disclosure of the information contained in Plan M2 could reasonably be expected to result in any harms to the competitive position of the proposed tenant. Such information is, in my opinion, readily apparent to anyone who has visited one of the locations of the proposed tenant. Therefore, Plan M2 should be disclosed to the appellant.

## **SECURITY**

I will now consider whether the exemption provided by section 8(1)(i) of the Act applies to exempt Plans A8, M1, M5, E2, E5, E6, E9, E10, E11 and E12 from disclosure.

Section 8(1)(i) of the Act states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

The Plans indicated above contain information describing the doors, areas of the store not accessible to the public, roof access, power supply locations, computer system, telex and communication satellite, power drops, security systems, electrical switches and fire systems and alarms.

I have carefully reviewed these Plans and the submissions of the affected parties. I find that sufficient evidence has been provided to demonstrate a direct linkage between disclosure of the information described above and the harm addressed in section 8(1)(i) of the Act. Therefore, this exemption applies to exempt Plans A8, M1, M5, E2, E5, E6, E9, E10, E11 and E12 from disclosure.

## **REASONABLENESS OF THE SEARCH**

Where the requester provides sufficient details about the records which he or she is seeking and the Township indicates that such records do not exist, it is my responsibility to ensure that the Township has made a reasonable search to identify any records which are responsive to the request. The Act does not require the township to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge

its obligations under the Act, the Township must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

The appellant has advanced two reasons to support his claim that more records must exist. First he notes his concern that, after its initial decision, the Township subsequently located two additional responsive records. Second, he indicates that his client is surprised that none of the "... usual planning, traffic, market, or other professional reports that one would expect to have been submitted by the applicant [the owner of the named property] in these circumstances" were identified.

As part of its submissions, the Township has included an affidavit from the Clerk-Deputy Treasurer of the Township who processed the appellant's request. This individual states that, in order to locate the responsive records, he undertook the following steps:

- (1) he searched two files of correspondence and documentation relating to the property owner's application for the removal of the holding provision on the property, the application for site plan approval and for a building permit;
- (2) he requested and reviewed information from the Township's Chief Building Official and By-law Enforcement Officer;
- (3) he searched the minutes of Council and Committee meetings;
- (4) he searched the Township's zoning by-laws including those related to the site plan agreement between the property owner and the Township, the amendment of the by-law removing the holding provision and that related to an agreement for the extension of water and sanitary services with the Town of Hanover; and
- (5) he reviewed the site plans and building plans.

He also explains how he happened to locate the two additional documents.

Based on the information contained in the affidavit and the representations submitted to me, I am satisfied that the Township conducted a reasonable search for the records responsive to this request.

### **ORDER:**

1. I uphold the decision of the Township to deny access to Records 2, 3, 8, 11, 12, 13, 14, 15 and 16 and the Plans listed in Appendix "C", **with the exception of Plan M2.**
2. I order the Township to disclose Plan M2 and the Plans listed in Appendix "B" to the appellant within thirty-five (35) days after the date of this order and not earlier than the thirtieth (30th) day after the date of this order.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Township to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.
4. I uphold the reasonableness of the search conducted by the Township to locate responsive records.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ May 8, 1995

## **POSTSCRIPT**

Although I have upheld the Township's application of the section 12 solicitor-client privilege exemption to all the records for which it was claimed, there are certain points made by the Township in its representations which I feel deserve some comment.

The Township states that:

It is our submission that the principle of solicitor-client privilege is sacred and that the sanctity of the principle is jeopardized and eroded at each instance a request for production and disclosure such as is presently before the Commissioner is granted.

It is our submission that the actual content of the correspondence between a client and his solicitor should bear little relevance to the determination of whether or not such documents ought to be disclosed. If the correspondence contains little of substantive value in the way of "legal advice" or "request for legal advice" and, in fact, the contents are innocuous, then what must be considered by the Commissioner is the injury that would inure to the solicitor-client relation in permitting disclosure of the documents, and the fact that that injury would be far greater than the benefit gained in disclosure of immaterial documents.

...

It is our submission that, the moment a precedent is set - as would be in this case if disclosure is ordered - lawyers, knowing that their correspondence to municipalities may be subject to production in the course of any routine zoning appeal, will feel seriously constrained in what and how they write, with the serious potential consequence that the quality, candour, and reliability of



legal advice may be compromised ...

I cannot agree with this position. First I would note that the solicitor-client privilege exemption is discretionary such that the head or his or her delegate may disclose the document. This is to be contrasted with other exemptions, such as section 10 (third party information) which are mandatory in that the records must not be disclosed. Thus the legislature recognized that documents created as part of the solicitor-client relationship, in and of itself, should not always attract the protection of the exemption.

Moreover, I believe it is important to consider the purposes of the Act when considering the application of all the exemptions to particular documents. Two of the purposes of the Act as set out in sections 1(a)(i) and (ii) are that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. In my view, the approach suggested by the Township would result in the broad application of the section 12 exemption to any correspondence between a solicitor and his or her client regardless of the content. In my opinion, this analysis is inconsistent with the purposes of the Act as set out above.

Finally, the Township suggests that if I order disclosure in this case I would be setting a precedent that would adversely impact on the relationship between municipalities and their counsel involved in zoning matters. The Act has been in effect for some four years; the provincial Freedom of Information and Protection of Privacy Act with its counterpart exemption, section 19, for seven. Should I have ordered disclosure in this case, it would not have been the first time that a record for which an institution has claimed the application of the solicitor-client privilege exemption has been ordered released by this office.

## APPENDIX "A"

### INDEX OF RECORDS AT ISSUE Appeal Number M-9500025

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
2	Letter dated May 2, 1994 from solicitor to the Township	12	Decision Upheld
3	Letter dated April 15, 1994 from solicitor to the Township enclosing the site Plan Agreement and the Development agreement	12	Decision Upheld
8	Letter dated November 8, 1994 from solicitor to Township enclosing revised intermunicipal agreement	12	Decision Upheld
11	Fax cover page dated November 4, 1994 from solicitor to Township with attached revised notice	12	Decision Upheld
12	Fax cover page dated November 4, 1994 from Township to solicitor enclosing notice	12	Decision Upheld
13	Fax cover page dated November 3, 1994 from Township to Town of Hanover with attached excerpt from the Planning Act Guidelines	12	Decision Upheld
14	Letter dated November 1, 1994 from solicitor to Township enclosing agreement between the Township and the Town of Hanover	12	Decision Upheld
15	Letter dated October 5, 1995 from solicitor to Township enclosing revised site plan agreement	12	Decision Upheld
16	Letter dated October 4, 1994 from solicitor to Township re: site plan agreement	12	Decision Upheld
18	Building plans (detailed plans for construction of building) dated October 19, 1994 - 39 pages listed in Appendix "C"	8(1)(i) and 10(1)	Disclose in Part

## **APPENDIX "B"**

### **PLANS FOR WHICH THE AFFECTED PARTIES HAVE CONSENTED TO DISCLOSURE AND WHICH SHOULD BE DISCLOSED TO THE APPELLANT**

1. Cover Page - [Name] Commercial Development Building A
2. Drawing A1.1 - Site Details
3. Drawing A2 - Elevations
4. Drawing A2.1 - Wall Sections
5. Drawing A3 - Vestibule Plan and Details
6. Drawing A9.1 - Miscellaneous Details (Garden Centre Plan Details)
7. Drawing S1 - General Notes
8. Drawing S2 - Schedules and Diagram
9. Drawing S3 - Foundation Plan
10. Drawing S4 - Foundation Details
11. Drawing S6 - Roof Details
12. Drawing S7 - Entrance Sections
13. Drawing M6 - Mechanical Details

## APPENDIX "C"

### PLANS FOR WHICH THE AFFECTED PARTIES DO NOT CONSENT TO DISCLOSURE

1. Drawing A1 - Floor Plans
2. Drawing A1.2 - Reflected Ceiling Plan
3. Drawing A4 - Roof Plan
4. Drawing A4.1 - Roof Details
5. Drawing A5 - Office and Stockroom
6. Drawing A6 - Washroom Plans and Details
7. Drawing A7 - Room Finish Schedule
8. Drawing A8 - Door Schedule
9. Drawing A9 - Garden Centre
10. Drawing A10 - Pharmacy
11. Drawing MP1 - Merchandising Plan
12. Drawing S5 - Roof Plan
13. Drawing M1 - Plumbing and Drainage Floor Plan
14. Drawing M2 - Plumbing and Drainage Risers and Part Plans
15. Drawing M3 - HVAC Floor Plan
16. Drawing M4 - HVAC Enlarged Part Plans
17. Drawing M5 - HVAC Roof Plan
18. Drawing M7 - Mechanical Schedules
19. Drawing SP1 - Sprinkler Protection Floor Plans and Details
20. Drawing EM1 - EMS Floor Plan and Details

- 21. Drawing E1 - Lighting Plan
- 22. Drawing E2 - Power Plan
- 23. Drawing E3 - Enlarged Lighting Plans
- 24. Drawing E4 - Enlarged Power Plans
- 25. Drawing E5 - Power Drop Dimensions and IRC Wiring Plan
- 26. Drawing E6 - Legend and Details
- 27. Drawing E7 - Lighting Control Diagram
- 28. Drawing E8 - Details and Lighting Fixture Schedule
- 29. Drawing E9 - Panelboard Schedule
- 30. Drawing E10 - Panelboard Schedule
- 31. Drawing E11 - One-line Diagram and Details
- 32. Drawing E12 - Fire Alarm Plan and RTU Power Layout
- 33. Drawing MCD-A1 - Plans and Details
- 34. Drawing MCD-M1 - Mechanical Layout
- 35. Drawing MCD-E1 - Electrical Power and Lighting
- 36. Drawing MCD-E2 - Electrical Panels and Details
- 37. Drawing MCD-K1 - Kitchen Plan and Elevations
- 38. Drawing MCD-K2 - Kitchen Rough-Ins
- 39. Drawing MCD-K3 - Kitchen Layout and Schedules