



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

ORDER M-560

Appeal M-9400575

Regional Municipality of Haldimand-Norfolk



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:

The Regional Municipality of Haldimand-Norfolk (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records held by the Municipality's solicitors concerning the requester's operation of a salvage yard. The Municipality located 835 pages of records which were responsive to the request and granted access to 769 of them, denying access to the remaining 66 pages under the following exemptions contained in the Act:

- advice or recommendations - section 7(1)
- law enforcement - sections 8(1)(a), (b), (d) and (g) and 8(2)(a)
- endanger life or safety - section 8(1)(e)
- solicitor-client privilege - section 12

The requester appealed the Municipality's decision. A Notice of Inquiry was sent to the Municipality, the appellant and to seven individuals whose interests may be affected by the disclosure of the records (the affected persons). Representations were received from the Municipality, the appellant and three of the affected persons.

The records at issue consist of 27 letters, three memoranda, three legal accounts, a FAX cover sheet, a fact sheet, an occurrence report, a note, a trial list, three pages of photographs, two affidavits, a draft Notice of Motion and a draft Notice of Application.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Municipality claims that the solicitor-client privilege found in section 12 of the Act applies to exempt all of the records from disclosure.

Under section 12 of the Act, a municipality may 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 the municipality for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Municipality indicates that it is relying on both branches of section 12 to exempt the contents of all of the records. For a record to be subject to the common law solicitor-client privilege (Branch 1), the Municipality must provide evidence that the record either:

1. constitutes a written or oral communication of a confidential nature between a client (or the clients's agent) which relates directly to seeking, formulating or giving legal advice, or

2. that the document was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

I have reviewed the records and the representations of the parties and find that Pages 6, 12, 13, 14, 15, 16, 21, 22, 23, 24, 36, 37 and 57 qualify for exemption under the first part of Branch 1 of the section 12 exemption as these documents constitute written communications of a confidential nature between a client and a legal advisor which are directly related to the seeking, formulating or giving of legal advice.

In addition, I find that Pages 1, 3, 4, 5, 7, 8, 9, 10, 38, 44, 54, 58, 59 and 63 are exempt under the second part of Branch 1 as they are documents created or obtained especially for a lawyer's brief for existing or contemplated litigation.

For a record to qualify for exemption under Branch 2, the Municipality must establish that the document was prepared by or for counsel employed or retained by it and that the record was prepared (1) for use in giving legal advice, (2) in contemplation of litigation or (3) for use in litigation.

Pages 2, 25, 26, 55 and 56 are letters sent or received by counsel for the Municipality in the course of its prosecution of the appellant for various by-law infractions. I find that these records are exempt from disclosure under the second branch of section 12 as they were prepared by or for counsel for use in litigation. Pages 46, 47 and 48 are photographs taken of the appellant's property for use in court as evidence by counsel. I find that these records also fall within Branch 2 of the section 12 exemption. Pages 49-53, 60, 61, 62, 64, 65 and 66 are draft pleadings prepared by counsel for the Municipality. I find that these records are also exempt from disclosure under Branch 2 of section 12 as they represent documents prepared by counsel for use in litigation which were not, however, incorporated into the court file relating to this matter.

Pages 17, 18, 19, 20, 33, 34 and 35 are legal accounts rendered to the Municipality by its counsel for services provided in relation to various actions, prosecutions and advice pertaining to the appellant.

In Order P-624, Assistant Commissioner Irwin Glasberg undertook a detailed analysis of the application of the common law solicitor-client privilege to various legal accounts. He concluded that a legal account is no different than an invoice for services remitted to an institution by a consultant or other category of professional. The distinguishing feature of a legal account is that it is issued by a law firm to its client and it relates to the provision of legal services. In that order, Assistant Commissioner Glasberg determined that findings on the application of solicitor-client privilege to legal accounts must be based on an independent review of each record and based on the wording and intent of the Act. Therefore, for a legal account to qualify for exemption under section 12 of the Act, its contents must relate in a direct and tangible way to the seeking, formulating or provision of legal advice.

In Order P-676, Inquiry Officer Anita Fineberg elaborated on the principles set forth in Order P-624 and

found that the test will be satisfied where the disclosure of the information contained in the account would reveal the subject(s) for which legal advice was sought, the strategy used to address the issues raised, the particulars of any legal advice provided or the outcome of these investigations. This approach reflects the fact that some information contained in a legal account may relate to the seeking, formulation or provision of legal advice but also allows the principle of severance to be applied to the record in a predictable fashion.

I agree with the approaches outlined by both Assistant Commissioner Glasberg and Inquiry Officer Fineberg and adopt them for the purposes of this appeal. On this basis, I have reviewed the records together with the representations of the parties.

I find that disclosure of those portions of the legal accounts which describe the matters attended to or the services rendered would reveal the subject matter on which legal advice was sought and/or given. In my view, this information qualifies as a written communication of a confidential nature between a client and a legal advisor and relates directly to the seeking, formulating or giving of legal advice. On that basis, it is properly exempt under section 12 of the Act. I have highlighted these portions of the records which qualify for exemption under section 12 in yellow on the copy of the records sent to the Municipality's Freedom of Information and Privacy Co-ordinator with a copy of this order. The remaining non-highlighted portions of the legal accounts do not qualify for exemption under this section and should be disclosed to the appellant.

Record 45 is the pre-trial list prepared by the Ontario Court (General Division) at Simcoe for September 6, 1991. This record is publicly available and is not subject to exemption under either branch of section 12 of the Act. As no other exemptions have been claimed for this record, it should be disclosed to the appellant.

To summarize, all of the records at issue in this appeal, with the exception of pages 11, 27, 28, 29, 30, 31, 32, 39, 40, 41, 42, 43, 45 and those portions of pages 17, 18, 19, 20, 33, 34 and 35 which are not highlighted on the copy provided to the Municipality's Freedom of Information and Privacy Co-ordinator are exempt from disclosure under section 12. As other exemptions have been claimed for pages 11, 27-32 and 39-43, they will be addressed below.

LAW ENFORCEMENT

The Municipality has claimed the application of sections 8(1)(a), (b), (d) and (g) and 8(2)(a) to Pages 11, 27, 28, 29 and 30. These pages are copies of correspondence received or sent by the Municipality and local residents or their counsel with regard to the proceedings being taken against the appellant.

Section 8(1)(d) provides:

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

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the

confidential source;

The correspondence at issue relates to by-law enforcement matters involving the activities of the appellant. I find that the events which gave rise to the letters being sent fall within the definition of a "law enforcement matter" within the meaning of the Act. In my view, it is implicit in the correspondence that the information which they contain was to be treated in a confidential fashion by the Municipality. I find that the disclosure of the correspondence would reveal the identities of individuals who furnished, in confidence, information about a law enforcement matter. Accordingly, I conclude that Pages 11, 27, 28, 29 and 30 are exempt from disclosure under section 8(1)(d).

The Municipality also claims that Pages 39-43 are exempt from disclosure under section 8(2)(a) of the Act. The section states that:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

Pages 39-43 represent a five page document prepared by a Regional By-law Enforcement Officer for the Manager of the Municipality's Agreement and By-law Administration branch entitled Occurrence Report dated, September 19, 1989.

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act. In addition, the Municipality establish that:

1. the record is a report; **and**
2. the report has been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report has been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

The contents of this document relate to the investigation of a possible violation of a municipal by-law. I have found that by-law enforcement qualifies as a law enforcement matter within the meaning of section 2(1) of the Act. I will now address each of the three-part test outlined above.

The word "**report**" is not defined in the Act. Based on previous orders, however, for a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact. [Order 200]

Following my review of this document, I find that it is a "report" within the meaning of section 8(2)(a) as it summarizes the investigation and facts surrounding the appellant's use of his property. I find, therefore, that the first part of the section 8(2)(a) test has been satisfied.

Further, I find that the report was prepared by a Regional By-law Officer in the course of a law enforcement inspection and investigation and that the By-law Enforcement Administration of the Municipality is an agency which has the function of enforcing and regulating compliance with a law.

I find, accordingly, that the five-page document is properly exempt from disclosure under section 8(2)(a) of the Act.

ENDANGER LIFE OR SAFETY

The Municipality submits that Pages 31 and 32 are exempt from disclosure under section 8(1)(e) of the Act which reads:

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

 endanger the life or physical safety of a law enforcement officer or any
 other person;

Because of the nature of these records, I am unable to describe them in any great detail as to do so may expose the individuals mentioned in them to the type of harm suggested by the section. The Municipality has indicated that, in its view, it is reasonably likely that the harm contemplated by this exemption would occur should these pages be disclosed. I find, based on my review of Pages 31 and 32 and the representations of the Municipality, that there exists a reasonable expectation that the harm set out in section 8(1)(e) will occur if the information is disclosed. These pages are, accordingly, properly exempt under this section.

To summarize, I find that all of the records at issue in this appeal are exempt from disclosure with the exception of Page 45 and those portions of Pages 17, 18, 19, 20, 33, 34 and 35 which are **not** highlighted on the copy of the records provided to the Municipality's Freedom of Information and Privacy Coordinator.

ORDER:

1. I order the Municipality to disclose to the appellant Page 45 and those portions of Pages 17, 18,

19, 20, 33, 34 and 35 which are **not** highlighted on the copy of the records which I have provided to the Municipality's Freedom of Information and Privacy Co-ordinator within twenty-one (21) days of the date of this order.

2. I uphold the Municipality's decision to deny access to the remaining records.
3. In order to verify compliance with this order, I reserve the right to require the Municipality to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

July 7, 1995