



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

ORDER M-882

Appeal M_9600269

The Corporation of the Town of Milton



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NATURE OF THE APPEAL:

The appellant submitted a request to the Corporation of the Town of Milton (the Town) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of a specified report received by Council regarding an Ontario Municipal Board (OMB) decision. The Town located the record responsive to the request and denied access to it pursuant to the following sections of the Act:

- section 7 - advice or recommendations
- section 12 - solicitor-client privilege.

The appellant appealed the denial of access.

This office provided a Notice of Inquiry to the appellant and the Town. Both parties submitted representations in response to this notice.

The record is a five-page document dated May 24, 1994 to the Mayor and Members of Council from the Director of Planning and Zoning (the Planning Director). The document gives an analysis of an OMB Decision relating to an appeal against a draft plan of a named subdivision.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Town has claimed that the information in the record is exempt from disclosure pursuant to section 7(1) of the Act. This section reads as follows:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Previous orders of the Commissioner have determined that advice and recommendations for the purpose of section 7(1) must contain more than just information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 7(1) of the Act (Orders 118 and P-1124).

The Town submits that, in his report, the Planning Director advised Council of certain issues relating to the Planning Department’s dealings with the subdivision application. The Town states further that the Planning Director indicated how these dealings would occur in the future. This, the Town argues, amounts to advice to the Council.

In my view, the purpose of the exemption is to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

I have carefully reviewed the information in the report. I find that it primarily contains a synopsis of the OMB's decision. It also contains conclusions drawn by the Planning Director as a result of the decision and reflects the current methods employed by the Planning Department in dealing with more recent applications. I find that none of the information in the report qualifies as advice or recommendations for the purpose of section 7(1). Accordingly, this information is not exempt from disclosure under section 7(1) of the Act.

SOLICITOR-CLIENT PRIVILEGE

The Town submits that the requested record is exempt from disclosure under section 12. This section consists of two branches, which provide the Town 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 the Town 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 Town 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 Town relies on the second part of Branch 1 of the section 12 test. In this regard, the Town indicates that the matter concerning the subdivision in question is still before the OMB as a rehearing of the matter has been requested. The Town argues that solicitor-client privilege attaches to this document as a result of the ongoing hearing on the matter.

As I indicated above, the report was prepared by the Director of Planning and Zoning. It was submitted to the Mayor and Members of Council. According to the Minutes of the meeting of Council held on March 21, 1994, this report was to be received by Council "for information". Although the Town states that the OMB matter may still be ongoing, the Town has provided no evidence that this record was created or obtained especially for a lawyer's brief for existing or contemplated litigation. Neither is there any information on the face of the record which would indicate that this document was intended for the Town's lawyer's attention.

Accordingly, I find that the record is not exempt from disclosure under the second part of Branch 1 and section 12, accordingly, has no application.

ORDER:

1. I order the Town to disclose the record to the appellant by sending him a copy on or before **January 9, 1997**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the Town to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ December 20, 1996