



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

ORDER P-1383

Appeal P_9600422

Ministry of Municipal Affairs and Housing



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NATURE OF THE APPEAL:

The Ministry of Municipal Affairs and Housing (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information pertaining to the construction of a non-profit housing project in the Town of Alton. The Ministry issued a fee estimate to the requester and upon payment of the fee, the Ministry granted partial access to the records. Access to the remaining records was withheld under the exemptions provided by sections 13 (advice or recommendations), 17 (third party information) and 19 (solicitor-client privilege) of the Act.

The Ministry indicated that there were additional records which it was withholding pending third party notification. Subsequently, the Ministry issued a second decision in which it also granted partial access to these additional records and withheld the balance under section 17 of the Act.

The requester appealed both the decisions to deny access. The requester represents a construction company which is currently involved in a civil suit against the non-profit housing corporation. The non-profit housing corporation (the affected party) is also represented by counsel.

During mediation, the appellant identified the following records that remain at issue in this appeal:

1. Page 3 of the application, which sets out the certified and other estimates of the costs of land acquisition and servicing, building, landscaping and site improvement;
2. Pages 736 and 737 - a briefing note;
3. Record 11 (five pages) - a certified audited Statement of Final Capital Costs;
4. Record 15 - a two-page letter from the affected party to the Ministry;
5. Part of Record 16 (Appendix "D") - the provincial certification of the project application.

The Ministry denied access to pages 736 and 737 (the briefing note) under section 19 of the Act (solicitor client privilege). Access to the remaining records which I have described above was withheld under section 17 of the Act (third party information). Since the appellant narrowed the scope of his request and appeal to the above records, the exemption in section 13 is not at issue.

This office provided a Notice of Inquiry to the appellant, the Ministry and the affected party. Representations were received from all parties.

PRELIMINARY ISSUE:

The affected party has raised the application of section 18(1) (valuable government information) to the records. Previous orders of the Commissioner have found that section 18(1) may only be relied upon by the institution in respect of records containing information that belongs to the

institution. The Ministry has not raised the possible application of section 18(1) to the records and I will not consider its application in this order.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry has made no submissions with respect to the application of section 17 other than to state that it relies on the submissions made by the affected party.

The affected party submits that section 17(1)(a) applies to the records. For a record to qualify under this section, the party resisting disclosure, in this case the affected party, must satisfy each of the following three requirements:

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 Ministry in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harms specified in section 17(1)(a) will occur.

Type of Information

I have reviewed the information in the records and I find that it relates to the cost and funding of the non-profit housing construction project. On that basis, I find that the information qualifies as financial and commercial information for the purposes of section 17(1) of the Act. The first requirement of this section has been met.

Supplied in Confidence

To satisfy the second requirement of the section 17(1) exemption, the affected party must demonstrate that the information in question was supplied to the Ministry, and that it was supplied in confidence, implicitly or explicitly.

Page 303 forms part of the affected party's application for an increase in funding; Record 11 consists of an audited statement of final capital costs of the project; Record 15 is a letter from the affected party to the Ministry, while Record 16 is the application for provincial certification for the project. The affected party has made no submissions to show that the information in the records was supplied to the Ministry. However, it is evident from my review of the records that the information in the records was supplied to the Ministry by the affected party.

The affected party also makes no submissions on confidentiality other than to state that disclosure of the records would disclose "confidential information". There is nothing on the face of the records to indicate that the information contained therein is confidential nor do they reveal the supplier's expectation that the information would be received in confidence and treated as such.

I have carefully considered the information in the records together with the representations of the affected party and I find there is not sufficient evidence before me to conclude that the records were supplied by the affected party to the Ministry in confidence. As I have indicated previously, all three requirements must be met in order for the records to qualify for exemption under section 17(1) of the Act. Accordingly, I find that the records do not qualify for exemption. The Ministry has not claimed any discretionary exemptions and as no other mandatory exemption applies and the records must be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the Act consists of two branches, which provide a head 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 Crown counsel 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 Ministry must provide evidence that the record satisfies either of two 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]

A record can be exempt under Branch 2 of section 19, regardless of whether the common law criteria relating to Branch 1 are satisfied. 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 Crown counsel; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The Ministry submits that the briefing note (pages 736 and 737) qualifies for exemption under both Branches 1 and 2 of section 19. With respect to Branch 1, the Ministry states that the briefing note was prepared in direct response to the civil action commenced by the appellant against a maintenance/construction inspector employed by the Ministry, the affected party and others. The Ministry submits that the record was prepared to “inform [the Crown law office, Civil] of the circumstances leading to [the employee] being named as a defendant.” The Ministry submits that the record relates to an allegation against an employee, was prepared with the assistance of legal counsel or for legal counsel and is therefore confidential. The Ministry states that the record was prepared as a result of advice received from its legal Branch and that it was intended to be used to instruct Crown counsel.

I have carefully considered the information in the record together with the representations of the Ministry. I am not persuaded that the record represents written communication between a client (or his agent) and a legal advisor nor am I satisfied that it is directly related to the seeking, formulating or giving of legal advice. I also find that there is no evidence that the record was created or obtained especially for the lawyer’s brief for existing or contemplated litigation. Accordingly, I find that the record does not meet the requirements of Branch 1 of the section 19 exemption. I will now consider whether Branch 2 applies to the record.

The Ministry submits that the record with its background information constitutes a preliminary assessment of the allegations and the Ministry’s possible defence. The Ministry states that portions of the record “appear to be a summary of opinions given by the Ministry’s Legal Branch.”

Having reviewed the record and the representations of the parties, I am not satisfied that the record was prepared by or for Crown counsel for use in giving legal advice, or in contemplation or litigation, or for use in litigation. In my view, the information under the headings **ISSUE** and **BACKGROUND** consists of factual information while the information under **MINISTRY POSITION** relates to the position of its Housing Operations Division rather than a legal opinion espoused by its legal branch or Crown counsel.

Accordingly, I find that the record does not qualify for exemption under Branch 2 of the section 19 exemption. The Ministry has not claimed any other exemption for this record and no mandatory exemption applies. Therefore, this record should be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the records to the appellant by **May 29, 1997** but not before **May 26, 1997**.

2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ April 24, 1997