



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

# **ORDER M-983**

**Appeal M-9700034**

**Township of Rideau**



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On June 12, 1997, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

## **NATURE OF THE APPEAL:**

The Township of Rideau (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for copies of any statements, correspondence or other records, prepared by, or received by the Township since September 1, 1996, related to a rezoning issue initiated by a particular individual. The request includes the statement about costs and other matters mentioned by a Township Councillor in newspaper reports.

The requester also sought copies of any correspondence or records since May 1, 1993 related to any request that may have been made by the individual or his representative to the Mayor, other Council members and/or Township staff seeking assistance or advice in dealing with residents concerned about his proposal.

The Township granted access, in part, to the records responsive to the first part of the request, and charged a fee of \$51.80. Access was denied to three of the records based on the following exemption:

- section 12 - solicitor-client privilege

The requester was advised that records responsive to the second part of his request do not exist.

The requester objected to paying the fee and asked that it be waived. The Township issued a decision refusing to waive the fee. The requester paid the fee charged by the Township and received copies of the records with the exception of the three records for which solicitor-client privilege was claimed.

The requester (now the appellant) appealed the Township's decision not to waive the fee and to deny access to the three records. The requester is not appealing the decision that there are no records responsive to the second part of his request or the amount of the fee.

This office sent a Notice of Inquiry to the Township and the appellant. Representations were received from both parties.

The records at issue in this appeal consist of three pieces of correspondence from the Township's solicitor to the Township.

## **DISCUSSION:**

### **SOLICITOR-CLIENT PRIVILEGE**

Section 12 of the Act states that a head may refuse to disclose a record that is subject to solicitor-client privilege (Branch 1) 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 (Branch 2).

The Township relies on both branches of the exemption.

In order for the record to be subject to the common law solicitor-client privilege (Branch 1), the Township 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]

A record can be exempt under Branch 2 of section 12 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 counsel employed or retained by the Township; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The Township states that all three records are confidential communications between the Township solicitor and Township staff and Council and that all three records contain legal advice relating to litigation that is on-going. The Township also addresses each record individually putting it in context and explaining the specific circumstances surrounding its creation. The appellant did not make representations on the issue of solicitor-client privilege.

Having reviewed the records, I am satisfied that they are subject to the common law solicitor-client privilege (Branch 1). They are written communications of a confidential nature prepared

by the Township's legal advisor to the Township. The contents of the records directly relate to the giving of legal advice. Therefore, I find that the records are exempt under section 12.

### **FEE WAIVER**

The provisions of the Act relating to fee waiver are found in section 45(4), which states as follows:

A head shall waive the payment of all or any part of an amount required to be paid under this Act if, in the head's opinion, it is fair and equitable to do so after considering,

- (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
- (b) whether the payment will cause a financial hardship for the person requesting the record;
- (c) whether dissemination of the record will benefit public health or safety; and
- (d) any other matter prescribed in the regulations.

In this appeal, the appellant has already paid the fee charged by the Township and received copies of the records with the exception of the three records I have discussed above. He requests that the Township be ordered to waive the fee and refund the money paid to obtain the records. The regulations permit the refund of any fee that has been paid and is subsequently waived.

It has been established in a number of previous orders that the person requesting a fee waiver must justify the request and demonstrate that the criteria for a fee waiver are present in the circumstances (Orders M-429, M-598, M-753 and M-914). I am also mindful of the Legislature's intention to include a user pay principle in the Act, as evidenced by the provisions of section 45.

In Order P-474, former Assistant Commissioner Irwin Glasberg found that the appropriate standard of review for decisions under section 57(4) of the provincial Freedom of Information and Protection of Privacy Act (which is the equivalent of section 45(4) of the Act) is one of correctness. In that same order, former Assistant Commissioner Glasberg also found that the phrase "in the head's opinion" means only that the head of an institution has a duty to determine whether it is fair and equitable in a particular case to waive a fee, and this wording does not affect the statutory authority of the Commissioner and his delegates to review the correctness of that decision.

The appellant states that the fee should be waived because the records relate to the issue of public health and safety mentioned in section 45(4)(c). In Order P-474, former Assistant

Commissioner Glasberg found that the following factors are relevant in determining whether dissemination of a record will benefit public health or safety:

1. Whether the subject matter of the records is a matter of public rather than private interest.
2. Whether the subject matter of the records relates directly to a public health or safety issue.
3. Whether the dissemination of the records would yield a public benefit by a) disclosing a public health or safety concern or b) contributing meaningfully to the development of understanding of an important public health or safety issue.
4. The probability that the requester will disseminate the contents of the records.

I agree with former Assistant Commissioner Glasberg's interpretation and I adopt it for the purposes of this appeal.

The representations of both the appellant and the Township indicate that a group of local citizens are concerned about the rezoning proposal. The appellant states that there is a general public safety concern about proposed rezoning which would permit use of the property as a service station. The concerns relate to fuel delivery as well as traffic flow because the property is located across from an elementary school. Therefore, I am satisfied that the rezoning issue is of public interest.

However, the Township claims that the records do not contain background research or technical information which relates in any way to the issues of public health or safety. The appellant, although he is aware of the contents of the records, has not made any representations on whether the subject matter of these records relates directly to a public health or safety issue. He has provided a copy of the Ontario Municipal Board proceedings regarding the rezoning in which the Board Member indicates she intends to hear evidence at the next session on safety and traffic flow. In my view, the indication of an intent to hear such evidence is not sufficient to demonstrate that the subject matter of these records relates to safety issues.

In addition, the appellant has not made any representations on the third and fourth factors identified by former Assistant Commissioner Glasberg, namely, whether the dissemination of the records would yield a public benefit by disclosing a safety concern or contributing meaningfully to the development of understanding of an important public safety issue and whether he will disseminate the contents of the records.

Accordingly, the appellant has not met the onus on him to justify the request and to demonstrate that the criteria for a fee waiver set out in section 45(4)(c) are present in the circumstances of this appeal. Therefore, I need not consider whether it would be fair or equitable for the fee to be waived in this particular case.

I do not uphold the appellant's request for a fee waiver.

**ORDER:**

1. I uphold the decision of the Township with respect to solicitor-client privilege.
2. The appeal with respect to fee waiver is denied.

Original signed by: \_\_\_\_\_  
Marianne Miller  
Inquiry Officer

\_\_\_\_\_ August 1, 1997