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

ORDER 69

Appeal 880130

Ministry of Municipal Affairs

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) of the Act a right to appeal any decision of a head to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On February 8, 1988, the Ministry of Municipal Affairs (the "institution") received a request for access to "copies of proposals, reports, maps, and correspondence relating to boundary negotiations between the Village of Grand Bend and the Township of Bosanquet".

2. On April 28, 1988, the institution notified the requester in writing that partial access to some of the information requested would be granted. Access to certain other documents was denied on the basis of subsections 15(a), 15(b), 17(1)(a), 18(1)(e) and 21(3)(g) of the Act.

3. On May 13, 1988, the requester appealed this decision of the institution. I gave notice of the appeal to the institution.

4. A copy of the record at issue was obtained and reviewed by the Appeals Officer assigned to the case.

5. Between May 13, 1988 and October 12, 1988, attempts were made to settle the appeal. On October 12, 1988, the institution sent a letter to the appellant re_defining the institution's position with respect to this appeal. However, as no progress was made toward disclosure of any portions of the record being withheld, no further efforts to mediate a settlement were made.

6. By letter dated January 31, 1989, I notified the appellant, the institution and the two municipalities involved (the Village of Grand Bend and the Township of Bosanquet) that I was conducting an inquiry into this matter. Enclosed with this letter was a copy of a report by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report. The Report is sent to all persons affected by the subject matter of the appeal.

7. All parties were invited to make written representations.

8. Representations were received from the institution, and further clarification of those representations was received. The appellant provided only those representations contained in his original letter of appeal. One of the two municipalities submitted a letter. I have considered all representations in making my Order.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about

themselves held by institutions and should provide individuals with a right of access to their own personal information.

Section 10 sets out a person's right of access to records as follows:

> 10.__(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.
>
> (2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

Further, section 53 of the Act provides that the burden of proof that a record falls within one of the specified exemptions in this Act lies upon the head.

Background to this Appeal:

The information at issue in this appeal came into the possession of the institution during the course of activities pursuant to the Municipal Boundary Negotiations Act, 1981 S.O. 1981 c.70 as amended. In its representations, the institution provided a detailed description of the process for settling municipal boundary disputes. The process is one of negotiation, and the institution argues vigorously that confidentiality is valuable in negotiation, particularly in the early stages. The institution acknowledged that after a certain point in the negotiations, the information can be made available for public scrutiny without jeopardizing the dispute settlement process as a whole. However, according to the institution, premature disclosure of information would put the negotiations into the public forum too soon, polarizing issues and reducing the

opportunity for settlement. In a letter to me, one municipality reinforced the institution's position, suggesting that any disclosure should be "after a specified time frame".

I can certainly understand and sympathize with the institution's position in this regard. Considerable public benefit flows from a process through which issues can be settled through mediation, in a constructive, non_adversarial way. However, my role as Commissioner is to interpret and apply the provisions of the Act as they relate to rights of access to information, and to possible exemptions from disclosure. I turn now to the issues raised with respect to the exemptions from disclosure under the Act.

The issues arising in this appeal are as follows:

A. Whether the exemption provided by section 15 applies to any part of the record.

B. Whether the exemption provided by subsection 17(1) applies to any part of the record.

C. Whether the exemption provided by section 21 applies to any part of the record.

D. Whether the exemption provided by subsection 18(1) applies to any part of the record.

ISSUE A: Whether the exemption provided by section 15 applies to any part of the record.

The institution seeks exemption under section 15 of the Act for some 36 records and documents and in some cases, portions of those records and documents. The institution's arguments focus on subsections 15(a) and (b). These subsections read as follows:

15. A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;

(b) reveal information received in confidence from another government or its agencies by an institution;

...

and shall not disclose any such record without the prior approval of the Executive Council.

With respect to subsection 15(a), the institution argued that a municipality is a "distinct level of government for local purposes". The institution's submissions also explain the place of the subject records and documents in the dispute resolution process under the Municipal Boundary Negotiations Act. To disclose the records would, according to the institution, disrupt this process. Release of the record would therefore interfere with inter_municipal negotiations and cause a loss of faith in the process established by provincial statute. The institution's position is that municipal_provincial relationships would be threatened, and there would be prejudice to the "conduct of intergovernmental relations" under subsection 15(a).

The appellant, on the other hand, has argued that "a document which is essentially a compilation of material already in the public domain in one form or another could not be expected to prejudice intergovernmental relations through its release".

With respect to subsection 15(b), the institution's arguments also focus on the idea that municipalities are "other governments", which is to say governments separate from the government of Ontario. The institution's position is that the record contains information received by the institution in confidence from the municipalities involved in boundary dispute negotiations. To disclose these records would reveal

"information received in confidence from another government" under subsection 15(b).

Concerning subsection 15(b), the appellant has relied on the argument that much of the subject information is in the public domain, and therefore cannot be supplied or received "in confidence".

In my view, for an exemption under either subsection 15(a) or (b) to apply, I must first determine if a municipality is a government for the purposes of section 15 of this Act. An examination of the meaning of the word "municipality" in the context of the Act itself is a necessary starting point to making this determination.

In subsection 2(1) of the Act, the definition of "institution" encompasses a municipality. In subsection 15(b), the pertinent phrase used is "another government". If a municipality is an institution for the purposes of the Act, it would be contrary to the wording of the Act to extend the meaning of "another government" to include "municipality" without specific statutory direction. A plain reading of subsection 15(b), taking into consideration the context of the Act, leads me to the conclusion that "another government" means the federal government, another provincial government, or a foreign government.

The institution relies on several court decisions as authority for the proposition that a municipality is a government. Specific reference is made in the institution's submissions to McCutcheon v. Toronto (1983), 147 D.L.R. (3d) 193 (Ont. H.C.) and McKinney v. University of Guelph (1987), 46 D.L.R. (4th) 193(Ont. C.A.).

In my view, reliance on these decisions to determine the meaning of the word "government" in the context of this Act is

problematic. I have an obligation to rely on the Act's written expression in ascertaining legislative intent in the first instance. As Pierre A. Cote points out in The Interpretation of Legislation in Canada (1984 Les Editions Yvon Blais Inc., at p. 443), "there is a danger in taking the meaning given by one

judge to a word in a specific context, and transposing it to another enactment for which a different context may suggest a different meaning for the same word."

With this in mind, I note that the legal authorities relied upon by the institution deal with entirely different statutory contexts. In McCutcheon v. Toronto and McKinney v. University of Guelph, the courts' comments with respect to the status of a "municipality" were made in the context of the application of the Canadian Charter of Rights and Freedoms.

The interpretation that a municipality is not a "government" for purposes of the Freedom of Information and Protection of Privacy Act, 1987 is supported by the legislative history of section 15. Section 15 of the Act had its genesis in the recommendations contained in the Report of the Williams Commission _ Public Government for Private People (The Report of the Commission on Freedom of Information and Individual Privacy/1980 _ Queen's Printer of Ontario). It is clear from a review of the Commission's discussion leading to the recommendation of a provision very similar to the present section 15 that the intent of such a provision was to exempt sensitive information that may be generated by "international relations or the relations of the province of Ontario with the governments of other jurisdictions". (See pages 304 to 307, Volume 2, The Report of the Commission on Freedom of Information and Individual Privacy/1980).

In the clause_by_clause review of Bill 34 by the Standing Committee on the Legislative Assembly, the comments of the Attorney General with respect to the purpose of the section 15 exemption were unequivocal. The Attorney General stated that

the purpose of the exemption was "to protect intergovernmental relations between the provinces or with the feds or with international organizations". The Attorney General explicitly

stated that a municipality was not intended to be a "government" for the purposes of section 15. (March 23, 1987, Comments made after second reading of the Bill.)

Finally, if a municipality was considered to be a government for the purposes of section 15 of the Act, a letter from a local library board, for example, could be placed on the same footing, and qualify for the same exemption as a document received from the government of another nation. This would greatly expand the number of records that could be withheld from the public indefinitely, not just for the duration of a period of negotiations. In my view, this result would be contrary to the spirit and right of access to information as set forth in the Act. Clear statutory direction would be necessary to justify such a position, and as I have indicated, I see no such direction in the Act.

In view of the above, I am not able to accept the institution's position that a municipality is a government for the purposes of the Freedom of Information and Protection of Privacy Act, 1987. Accordingly, I find that the exemptions claimed under section 15, do not apply.

ISSUE B: Whether the exemption provided by section 17 applies to any part of the record.

Subsection 17(1) of the Act reads as follows:

> 17.__(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual

or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or

(c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to fall within the section 17 exemption, the record in question must meet the following three_part test as set out in my Order 36 (Appeal Number 880030) dated December 28, 1988.

1. the records must contain 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 types of injuries specified in (a), (b) or (c) of subsection 17(1) will occur.

All three parts of this test must be satisfied in order for the section 17 exemption to apply.

In its submissions, the institution has relied on the subsection 17(1)(a) exemption. It argued that much of the information at issue here is technical or financial information, in that it is directly associated with the technical and financial aspects of the ongoing boundary negotiations. The institution submitted that this would bring these portions of the record within the categories of information specified in the first part of the test.

The institution claimed that the second part of the test is also satisfied, in that the information was supplied to the institution "in confidence".

The institution also argued that disclosure of the information would interfere significantly with the ongoing boundary negotiation process. The institution cited examples of previous

situations in which premature disclosure of the issues involved in boundary negotiations interfered significantly with the negotiations themselves.

The appellant on the other hand argued that "most financial and technical information regarding municipalities is already public", and that the release of such information "could not reasonably interfere with negotiations in a boundary dispute".

Having reviewed all of the representations and the record itself, I am not satisfied that the institution has met the requirements for either of the first two parts of the three part test for exemption under subsection 17(1). The information does not appear, in my view, to be "technical" or "financial" information of the sort envisaged by the words of that subsection.

Further, there is no clear evidence of any sense in which the information was actually "supplied in confidence implicitly or explicitly" to the institution (emphasis added). It would appear that the information came into the possession of the institution only as a consequence of the function of the institution under the Municipal Boundary Negotiations Act, and in that sense it could be argued that it was not "supplied" at all.

Accordingly, my finding is that the institution has not satisfied the requirements for exemption under subsection 17(1) of the Act.

ISSUE C: Whether the exemption provided by section 21 of the Act applies to any part of the record.

Section 21 of the Act prohibits disclosure of personal information with certain exceptions. In this appeal, an exemption has been claimed under section 21 of the Act for a

one_page document, that document being a letter written by a private individual to a Member of the Provincial Parliament to express concern and opposition with respect to the proposed "annexation". In accordance with subsection 10(2) of the Act, the institution gave access to this document and severed it so as to remove references to the individual's name and address.

In all cases where a request involves access to personal information, it is my responsibility, before deciding whether the exemption claimed by the institution applies, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act.

The institution has provided arguments to support the position that the subject document is in fact "personal information" under subsection 2(1). Further representations made by the institution relate the document to specific provisions under subsections 21(1) and (3) of the Act, and set out a case for exemption from disclosure. The appellant did not mention the section 21 exemption at all in his written notice of appeal, but he did indicate in his comments concerning subsection 15(b) a willingness to see exempted "those portions (of documents) which are private".

Having reviewed all relevant submissions and examined the record itself, I am satisfied that the document in question contains "personal information", and that it falls within section 21 of the Act. I am further satisfied that by removing references to the name and address of the individual, the institution has discharged the duty imposed by subsection 10(2), and has released as much of the document as is reasonable under the circumstances.

ISSUE D: Whether the exemption provided by subsection 18(1) applies to any part of the record.

The institution appeared to have dropped its reliance on subsection 18(1) on October 12, 1988, only to raise it again in the submission provided to me during my inquiry.

The institution referred to subsection 18(1)(e), the relevant portion of which reads as follows:

> 18.__(1) A head may refuse to disclose a record that contains,
>
> ...
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> ...

The institution pointed out that the "chief boundary negotiator is a Ministry appointee who chairs negotiations and makes recommendations to the Minister". The institution argued, therefore, that the Ministry _ which is to say the institution _ is involved in carrying on negotiations, and that 36 portions of the record should be exempt from disclosure under the provisions of subsection 18(1)(e).

Having reviewed the record, it is my view that disclosure would not reveal any "positions, plans, procedures, criteria or instructions to be applied to any negotiations" to be carried on by the institution. Subsection 18(1)(e) does provide an exemption for negotiating positions, but if any negotiating positions are at risk of being revealed by the disclosure of the record, it is the negotiating positions of the municipalities, and not the institution. Due to the functioning of subsection 2(3) of the Act, municipalities are not at present

"institutions", and will not be so until January 1991. At present, I must apply the Act as it stands and in my view, the record cannot be exempted from disclosure under the provisions of subsection 18(1) of the Act.

I am mindful of the fact that this Order may have implications for the manner in which municipal boundary negotiations are conducted in the future. However, my primary responsibility is to ensure that if a given record does not fall within one of the exemptions set out in the Act, then the public has a right to access to that record.

In conclusion, my order is that the institution disclose to the appellant the record, in its entirety, deleting only the references (indicated as "severance No. 35" by the institution) to the name and address of the writer of the letter referred to under Issue C of this Order. I further order that disclosure be made within thirty_five (35) days of the date of this Order. The institution is further ordered to advise me in writing, within five (5) days of the disclosure of the record, of the date on which disclosure was made.

Original signed by: June 28, 1989
Sidney B. Linden Date
Commissioner