



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-46

Appeal M-910268

The Corporation of the City of Mississauga



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ORDER

BACKGROUND:

The Corporation of the City of Mississauga (the City) received two requests pursuant to the Municipal Freedom of Information and Protection of Privacy Act, (the Act). One, "Request 7", was a request for general information, the specific details of which were outlined in Appendices A, B and C of the request. The other, "Request 8", was a request for personal information, the specific details of which were outlined in Appendices A, B and C of the request.

The City granted the requester partial access to the information responding to Appendix B of Request 7, and Appendix C of Request 8. In its decision letter, the City advised the requester that it was refusing to confirm or deny the existence of a record responding to Appendix A and C of Request 7 and Appendix A and B of Request 8, pursuant to section 8(3) of the Act. The City claimed that if such a record existed, it would be exempt from disclosure under sections 8(1)(a), (b), (c), (d), (g) and 8(2)(c).

The requester appealed the City's decision. Notice of the appeal was given to the City and the appellant. An Appeals Officer was assigned to investigate the circumstances of the appeal and attempt to mediate a settlement.

During the course of mediation, the City agreed to provide the appellant with additional information responsive to Appendix B of Request 7, and Appendix C of Request 8. As a result, all of the issues relating to these appendices have been resolved.

Remaining at issue in this appeal is the City's refusal to confirm or deny the existence of a record which may respond to Request 7, Appendix A and C and Request 8, Appendix A and B.

In Appendix A and C of Request 7, the appellant is seeking information relating to: the development and implementation of policy guidelines regarding the use of private investigation services by the City; a copy of the policy or guidelines authorizing the use of investigative services and statistical information on the use of these services. In Appendix A and B of Request 8, the appellant is seeking access to any record relating to the use of investigative services in his case. He is also seeking all investigation reports produced about him for the City by private investigators.

In his original requests and in a subsequent conversation with the Appeals Officer, the appellant indicated that he is not seeking identifying information of any individuals including information relating to employees of the City, past or present, who have been investigated or to names of private investigation firms or their employees. Therefore, if a record exists, this type of information is not in issue in this appeal.

As further mediation was not possible, notice that an inquiry was being conducted to review the City's decision was sent to the appellant and the City. An Appeals Officer's Report, which is intended to assist the parties in making their representations concerning the subject matter of appeal, accompanied the Notice of

Inquiry. Written representations were received from the appellant and the City.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether a record of the nature requested, if it existed, would qualify for exemption under either section 8(1) or (2) of the Act.
- B. Whether the City properly exercised its discretion under section 8(3) of the Act to refuse to confirm or deny the existence of a record of the nature requested.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether a record of the nature requested, if it existed, would qualify for exemption under either section 8(1) or (2) of the Act.

In an appeal from a decision to refuse to confirm or deny the existence of a record, great care is taken not to disclose the fact of whether or not a record exists. The correctness of the decision to refuse to confirm or deny the existence of a record is an issue to be determined on appeal. Obviously, premature disclosure of the existence of any record would render this part of the appeal moot. As a result, it can be difficult to give reasons for my decision, particularly where the decision to refuse to confirm or deny the existence of a record is upheld.

In the present appeal, I feel compelled to state my conclusion at the beginning, so that I might provide a fuller explanation of my decision. Accordingly, I confirm that a record exists which is responsive to the appellant's request. Having confirmed the existence of a record, it can be inferred that I have concluded that the record may not be withheld from disclosure pursuant to section 8(1) or (2) of the Act, a condition which must be satisfied before the City may even consider whether to refuse to confirm or deny the existence of a record. My reasons for reaching this conclusion are set out below.

The record consists of 30 pages (pages 1-30) and contains the following kinds of information: an internal memorandum relating to the use of investigative services, investigation reports submitted to the City by a private investigator, notes on the history of the use of private investigators by the City, a "Corporate Report" to the Mayor and members of council relating to the investigation of the appellant, a "Summary of Investigations" carried out on behalf of the City, and, "Guidelines" for the use of investigative services. Page

9 of the record is a duplicate of page 2.

The City has claimed that sections 8(1)(a), (b), (c), (d), (g) and 8(2)(c) of the Act apply to the record. These sections provide:

- (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
 - (a) interfere with a law enforcement matter;
 - (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
 - (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
 - (d) 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;
 - (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons;

- (2) A head may refuse to disclose a record,
 - (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

In order for the record to qualify for exemption under the sections claimed, the matter to which the record relates must first fall within the definition of the term "law enforcement" contained in section 2(1) of the Act. "Law enforcement" is defined as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

In its representations, the City states that:

The law enforcement matter is an investigation that could lead to court proceedings or proceedings before a tribunal in which a penalty or sanction could be imposed. Employees are investigated when the City has reasonable grounds to believe that the employee has committed a theft or fraud on the City. In appropriate cases, the police will be advised and criminal charges would result ... Alternatively, if the investigation reveals evidence that an employee has fraudulently claimed Workers' Compensation Benefits, the City will appeal the worker's entitlement to benefits. This will lead to a hearing at which the benefits may be discontinued. Further, if the evidence collected by an investigation convinces the Workers' Compensation Board that an employee made false statements to the Board in order to obtain benefits, the Board could charge the employee. This would lead to proceedings in Provincial Offences Court in which a sanction would be imposed.

The definition of "law enforcement" in section 2(1) of the Act is similar in wording to that contained in section 2(1) of the provincial Act. A number of orders issued under the provincial Act have stated that the definition of law enforcement found in section 2(1) does not extend to employment-related disciplinary matters (Orders 157, 170, 182, 192).

In Order 157, dated March 29, 1990, former Commissioner Sidney B. Linden considered whether an internal investigation conducted at an institution satisfied part (b) of the "law enforcement" definition (i.e. investigations or inspections that lead or could lead to proceedings in a court or tribunal ...). At page 10 of that order he stated:

The investigation or inspection was not conducted with a view to providing a court or tribunal with the facts by which it would make a determination of a party's rights, but rather, was conducted with a view to providing the employer [the Ontario Securities Commission]

with information respecting its employee. In this latter instance, the employer can go on to impose an employment penalty without recourse to a court or tribunal.

Commissioner Linden went on to find that while the Ontario Securities Commission had a mandate to conduct investigations in the course of administering the Securities Act, the investigation at issue was conducted by that Commission as an employer, not as a securities regulator or law enforcement agency.

In the circumstances of this appeal the City's guidelines for the use of private investigators were developed and the City's investigation of the appellant was completed in relation to the City's human resources function, not pursuant to legislation which the City has the responsibility for administering, such as zoning or property standards by-laws.

From a review of pages 1, 7 and 30 of the record and the representations of the City, it is evident that the use of private investigators generally, and specifically in the appellant's case, was contemplated with a view to providing the City with information respecting its employees, in order that the City might determine if it wished to take disciplinary action.

The City's investigations may become the impetus for a further investigation by some other body, such as the Workers' Compensation Board, which, in turn, may lead to proceedings in a court or tribunal. However, both the City's guidelines and its representations state that the City cannot rely solely on the results of an investigation to initiate proceedings in a court or tribunal. The "Summary of Investigations" indicates that if an investigator reported inappropriate behaviour, the City would terminate the employee.

In my view, in the circumstances of this appeal, the City's general policies with regard to the use of private investigators and the investigation of the appellant were not undertaken with a view to proceedings in a court or tribunal where a penalty or sanction could be imposed. The investigation of the appellant which generated part of the record at issue was conducted on behalf of the City by a private investigator in order to determine whether the appellant was working while in receipt of Workers' Compensation Benefits. Accordingly, the investigation which generated this part of the record does not satisfy the definition of "law enforcement". In my view, the balance of the record relates to a general policy of the City and is not connected to a particular investigation in any way. Therefore, the exemptions in sections 8(1)(a), (b), (c), (d), (g) and 8(2)(c) of the Act cannot apply to the record.

ISSUE B: Whether the City properly exercised its discretion under section 8(3) of the Act to refuse to confirm or deny the existence of a record of the nature requested.

Since I have found that the record was not prepared in the course of "law enforcement" and the exemptions in sections 8(1)(a), (b), (c), (d), (g) and 8(2)(c) of the Act cannot apply, it follows that the City cannot refuse to confirm or deny the existence of the record under section 8(3) of the Act. However, I thought it

would be useful to set out my views on whether section 8(3) would have been available to the City if sections 8(1) or (2) had been found to apply. Section 8(3) provides that:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

Section 8 of the Municipal Freedom of Information and Protection of Privacy Act is similar in wording to section 14 of the Freedom of Information and Protection of Privacy Act (the provincial Act).

At page 2 of Order P-338, dated August 10, 1992, Assistant Commissioner Tom Mitchinson discussed the application of section 14(3), the equivalent of section 8(3) of the municipal Act. He stated:

A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.

In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

...

In my view, by simply confirming that records associated with an investigation exist, the institution is not required to confirm the content of the records ... Rather, the institution is required to provide a general description of each record, providing enough detail so that the requester has an understanding of the types of records held by the institution. In my view, providing the appellant with a general description of the requested records would not convey information which could compromise the effectiveness of a law enforcement activity in the circumstances of this appeal.

The appellant has provided a copy of a letter, dated February 11, 1991, under the signature of the Mayor of the City. I have reviewed this letter and in my opinion, statements contained in the letter confirm both the existence of a policy regarding the use of private investigators and the use of a private investigator to conduct a surveillance of the appellant. Since the appellant has already been given this information, in my

view, disclosure of the existence of a record which responds to his requests would not convey information to the appellant which would compromise the effectiveness of a possible law enforcement activity. Therefore, section 8(3) would not have been available to the City.

The appellant has indicated that he is not seeking access to the "identifying information" of others which is contained in the record. Since this information is not in issue in this appeal, I have identified it in "highlighting" on the copy of the record which is being sent to the City with this order.

ORDER:

1. In this order, I have disclosed the existence of a record which is responsive to the appellant's request. Since the City may apply for judicial review, I have released this order to the City in advance of the appellant. The purpose for doing this is to provide the City with an opportunity to review this order and determine whether to apply for judicial review.
2. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I order the City to disclose the portions of the record which are **not** highlighted in the copy of the record included with the copy of this order sent to the City, within twenty (20) days of the date of this order, and advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1. A copy of this order will be sent to the appellant upon the expiration of the fifteen (15) day period referred to above, unless a Notice of Application for Judicial Review has been served on me.
3. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2, **only** upon my request.

Original signed by: _____
Tom Wright

October 8, 1992

Commissioner