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

ORDER M-59

Appeal M-910244

City of Peterborough

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INTERIM ORDER

BACKGROUND:

The City of Peterborough (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of the entire correspondence and inspection files and any other correspondence in possession of the Fire department regarding a named address, including the dates and times that a named Fire Prevention Officer inspected and visited the address.

The City responded by releasing fourteen records. The requester was not satisfied with this response, and appealed the City's decision, claiming that additional responsive records should exist.

After receiving notification of the appeal, the City issued a second decision letter to the appellant, providing access to eight additional records, but denying access to other responsive records on the basis that:

> We have been advised by the Fire Chief that any other information actually in their file has been used for the purposes of law enforcement ... . All this information are memoranda between the City Solicitor and Fire Prevention Officers, or vice versa, providing advice or commentary in relation to possible prosecution for [various requirements under the Fire Code, Fire Marshall's Act, or other provincial legislation].
>
> This information is subject to solicitor-client privilege since they are communications from or to the City Solicitor incidental to possible prosecution and law enforcement purposes.
>
> Accordingly, pursuant to section 8 of the Municipal Freedom of Information and Protection of Privacy Act, we will not be disclosing any of these records, or information, since they have actually been used within the context of such law enforcement investigations, and it is our belief that the disclosure of such records, or information, could reasonably be expected to:
>
> (a) Interfere with a law enforcement matter;
>
> (b) Interfere with an investigation undertaken identified with a view to a law enforcement proceeding, or from which a law enforcement proceeding is likely to result;

(c) And is subject to Solicitor/Client privilege.

In accordance with the authority, granted under section 8(3) of the Act, we hereby refuse to confirm or deny the existence of such specific information, or records.

Further mediation was not possible, and notice that an inquiry was being conducted to review the City's decision was sent to the appellant and the City. Written representations were received from both parties.

In its representations, the City withdrew its reliance on section 8(3), and agreed to release additional records.

During the inquiry stage, the scope of the appeal was narrowed to only one of the twenty-two records identified by the City; the remaining twenty-one records had either been disclosed to the appellant in their entirety, or contained severances which the appellant does not dispute. The one remaining record is a three-line memorandum dated February 4, 1991, from the City Administrator to the Fire Chief and City Solicitor, which was identified as Record 8A by the City. The only exemption claimed by the City with respect to this record is section 12 of the Act.

However, the appellant maintains that some records had not actually been disclosed, and that other records, such as Fire Prevention Officers' notes and diary entries, should have been identified as being responsive to his request. The City's position is that the Fire Prevention Officers' notes and diary entries do exist, but that they are neither responsive to the appellant's request, nor in the City's custody and/or control. The City also maintains that other additional records identified by the appellant cannot be located, and asks for an opportunity to present "viva voce" evidence on the issues of the notes and diary entries, and the possible existence of additional records.

Finally, the City submits that the Information and Privacy Commissioner does not have jurisdiction to deal with "law enforcement documents".

ISSUES:

The issues arising in this appeal are:

A. Whether Record 8A qualifies for exemption under section 12 of the Act.

B. Whether the Information and Privacy Commissioner or his delegate has jurisdiction to deal with "law enforcement documents" under the Act.

C. Whether the City will be permitted to provide oral representations regarding Issues D and E.

D. Whether the Fire Prevention Officers's notes and diary entries are in the custody or under the control of the City, as defined by section 4(1) of the Act.

E. Whether the City's search for additional records was reasonable, and whether the appellant has been granted access to certain documents.

ISSUE A. Whether Record 8A qualifies for exemption under section 12 of the Act.

The City claims the discretionary exemption found in section 12 of the Act as the sole basis for exempting the only record remaining at issue in this appeal.

Section 12 of the Act reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege 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.

This section provides the City with the discretion to refuse to disclose:

1. A record that is subject to the common law solicitor-client privilege; or

2. A record which 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.

[Order M-2]

In a number of previous orders it has been established that, for the first part of the section 12 exemption to apply, the following four criteria must be satisfied:

1. there must be a written or oral communication;

2. the communication must be of a confidential nature;

3. the communication must be between a client (or his agent) and a legal advisor; and

4. the communication must be directly related to seeking, formulating or giving legal advice.

[Orders M-2, M-11, M-19]

Having examined Record 8A, I find that it does not satisfy the requirements of the common law solicitor client privilege. The record is a 3-line transmittal memorandum, which was attached to a letter from the appellant's company and a letter acknowledging receipt of the first letter, both of which have already been released to the appellant. The City has not established that the record was intended to be treated confidentially, and the content of the record itself does not appear to deal with confidential issues. I also find that the record cannot accurately be characterized as "seeking, formulating or giving legal advice", as required to satisfy the test for exemption under the first part of the section 12 exemption.

In order to qualify for exemption under the second part 2 of the section 12 exemption, the following two criteria must be satisfied:

1. The record must be prepared by or for counsel retained or employed by the institution; and

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

A record may be exempt under the second part of section 12 regardless of whether the common law criteria relating to the first part are satisfied.

In Order 210, Commissioner Tom Wright discussed the meaning of the term "for use" in section 19 of the Freedom of Information and Protection of Privacy Act, which contains similar wording to section 12. At page 15, he stated:

> The second branch of the section 19 exemption requires that the record be prepared for use in giving legal advice, or in contemplation of or for use in litigation. This is a narrower wording than if the requirement were that the record be prepared for the purpose of giving legal advice. In my view, it contemplates that the record itself will be used in giving legal advice.

In its representations, the City states:

> The subsequent charge under the Fire Marshall's Act clearly demonstrates that the record was prepared in contemplation for use of proceedings incidental to law enforcement. In addition, the Appeals to the Fire Marshall's Office ... conclusively establishes that the advice was provided and prepared in contemplation or use of litigation or other law-related matters ...

Having reviewed the record (which I have noted is a 3-line transmittal memorandum), in my view, it clearly has not been used in giving legal advice or in contemplation of litigation, and I find that it does not qualify for exemption under the second part of the section 12 exemption.

ISSUE B: Whether the Information and Privacy Commissioner or his delegate has jurisdiction to deal with "law enforcement documents" under the Act.

The City questions the Commissioner's authority to review "law enforcement documents" in situations where an individual has been charged with an offence, and appears to be taking the position that all the records which might respond to the appellant's request are "law enforcement documents".

In its representations, the City states:

> ... [O]nce it has been established that certain documents are privileged pursuant to the Municipal Freedom of Information and Protection of Privacy Act because they are legitimately "law enforcement documents", then it is not now open to the Freedom of Information Commissioner to question whether such law enforcement documents should be released in his\her discretion because they would pose no risk to the informant or jeopardize a past law enforcement investigation ... [T]he exercise of discretion in determining whether such documents are to be released no longer resides in the Commissioner if a charge is, in fact, laid ... The discretion to compel production and disclosure of such documents then vests exclusively with the courts in accordance with the principles outlined in [R. v Stinchcombe]. [The owner of the property] did not exercise that right. The issue of production and disclosure does not now revert back to the Commission in reference to such "law enforcement documents". In essence, we submit that there is a form of estoppel incidental to such an appeal if, in fact, disclosure is not made in reference to law enforcement documents that are available for disclosure incidental to a prosecution that has actually ... been before the courts.

I do not agree with the City's position on this issue. The Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act introduce a separate scheme for access to records in the custody or under the control of government institutions. Section 1(a) of both statutes outlines the purpose of the Acts as it relates to access, as follows:

> The purposes of this Act are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
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> (i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government;

One of the recognized exemptions in the Acts, namely section 8 of the municipal Act, deals with so-called "law enforcement" records. In general, this section provides institutions with discretion to exempt a record if the matter which generated the record satisfies the definition of the term "law enforcement" found in section 2(1) of the Act, and the requirements of one of the enumerated situations outlined in sections 8(1) or (2) are present.

If a record has been exempted by an institution under section 8, and the institution has exercised its discretion not to disclose the record, the requester has the right to appeal that decision to the Commissioner. The Commissioner or his delegate has a duty to review the decision made by the institution, to determine whether the record falls within the discretionary exemption, and may order the disclosure of the record where section 8 does not apply. Further, during an inquiry to review an institution's decision, the Commissioner or his delegate has the authority to require any record referred to in section 8 to be produced for examination, provided the record is in the custody or under the control of the institution. (Section 41(4) and 44).

ISSUE C: Whether the City will be permitted to provide oral representations regarding Issues D and E.

In its representations, the City requests the opportunity to make oral representations with regard to Issues D and E.

With regard to Issue D, the City states:

> ... [W]e would view it as a violation of the Act, ... to compel the production of such diary notebooks. If you require further elaboration in regard to this claim, then please contact [the City's solicitor]. We would also request a viva voce hearing incidental to the production of such diary entries.

The City has provided detailed written representations outlining why it believes that the notes and diary entries are not in its custody or control. In light of this and due to the technical nature of Issue D, I have decided that it is not necessary for me to hear oral representations on this issue.

With regard to Issue E, the City states:

> ... [W]e would request that a viva voce hearing be conducted incidental to this appeal. The complexities of this appeal suggest that, in fact, there should be a full hearing, and that a full hearing should be undertaken on the basis of sworn evidence actually taken at a hearing before the ... Commissioner ... We take this position for the following reasons:
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> 1. City Fire Department officials and the City Clerk are adamant that access and disclosure of all uncontested documents have been provided ...
>
> 2. Sworn testimony should be provided in regard to any difference or disputes as to whether access has, in fact, been provided.

I am not persuaded that an oral hearing with respect to Issue E is required at this time. In my view, the most appropriate method of addressing this issue is for the City to provide me with an affidavit by the head or a delegate of the head attesting to the records released to the appellant during the course of responding to his request and appeal, and the searches undertaken by the City in order to determine whether any additional responsive records exist. It should be noted that this is the normal procedure followed by this office in dealing with issues relating to the adequacy of searches for records. Once this affidavit is received by me, I will determine whether it is adequate and whether oral representations are necessary.

ISSUE D: Whether the Fire Prevention Officers's notes and diary entries are in the custody or under the control of the City, as defined by section 4(1) of the Act.

Section 4(1) of the Act states:

> 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 part falls within one of the exemptions under sections 6 to 15.

The City states that certain notes and diary entries made by Fire Inspection Officers who attended at and inspected the property in question do not form part of the record for the purposes of the Act, because they are the personal property of the Fire Prevention Officers, and are not in the custody or control of the City.

It is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation [Orders 120 and P-326].

The following is a non-exhaustive list of factors which can be of assistance in determining whether an institution has "custody" and/or "control" of records in particular situations:

1. Was the record created by an officer or employee of the institution?

2. What use did the creator intend to make of the record?

3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?

5. Does the institution have a right to possession of the record?

6. Does the content of the record relate to the institution's mandate and functions?

7. Does the institution have the authority to regulate the record's use?

8. To what extent has the record been relied upon by the institution?

9. How closely is the record integrated with other records held by the institution?

10. Does the institution have the authority to dispose of the record?

[Orders 120, P-326]

In Order P-326, I found that notes created by a supervisor during the course of discharging her employment-related responsibilities were properly considered to be in the custody or control of the institution, regardless of the fact that they were held for a period of time in her personal filing system.

In its representations, the City states that the notes and diaries are the personal property of the Fire Prevention Officers; the entries are not part of the Fire Department file; the notes and diary entries are not part of the Officers' job requirements and they are kept solely in the possession of the Officers; upon termination the notes are not left with the Fire Department; and, finally, that the diary entries are not used incidental to the prosecution of any case.

Having reviewed the City's representations, I find that the notes and diary entries are clearly related to the employment responsibilities of the Fire Prevention Officers, and are properly considered to be in the custody or under the control of the City. In my view, these records relate

to the properties being inspected by the Officers, and clearly would only have been created as part of the Officers' employment-related responsibilities. As to the concern that disclosure of these records would constitute an invasion of personal privacy, there are provisions in the Act to address these concerns, and it is the responsibility of the City to apply the appropriate provisions in deciding whether to release these records.

ORDER:

1. I order the City to disclose Record 8A to the appellant within twenty (20) days from the date of this interim order.

2. The City is further ordered to advise me in writing within five days of the date on which disclosure was made. Such notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

3. I order the City to provide the appellant with a proper decision letter regarding access to the notes and diary entries of the Fire Prevention Officers, and any other responsive records identified by the City which cover the period of the original request, within 20 days from the date of this interim order. The City is further ordered to advise me in writing within five days of the date on which a decision is made.

4. I order the City to provide me with an affidavit by the head or a delegate of the head within twenty (20) days of the date of this interim order, attesting to the records which were released to the appellant during the course of responding to his request and appeal, and the nature of the searches conducted to determine whether additional responsive records exist.

5. 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 was disclosed to the requester, pursuant to Provision 1, **only** upon request.

Original signed by: November 6, 1992
Tom Mitchinson
Assistant Commissioner