



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

ORDER M-117

Appeal M-9200470

The Corporation of the City of Barrie



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ORDER

The Corporation of the City of Barrie (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for "copies of the notes and scores from each of the Re-evaluation Committee members who conducted the re-evaluation of the Committee Secretary's position ...". The City did not respond to the request within the statutory period of 30 days, and the requester filed an appeal under section 29(4) of the Act on the basis of deemed refusal.

During mediation, the request was clarified to include the handwritten notes and score sheets of two other persons who, while not voting members of the Committee, were present at the Re-evaluation Committee meeting and contributed to the process. The Appeals Officer handling the file confirmed this in writing with both parties.

The City located the records responsive to the request and denied the requester access in full pursuant to sections 11(c), (d), (e), (f) and (g) of the Act. The records consist of five one-page job evaluation forms completed by members of the job re-evaluation committee and 17 pages of notes taken by them with regard to the job evaluation of the position of Council/Committee Secretary.

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

The sole issue in this appeal is whether the discretionary exemptions provided by sections 11(c), (d), (e), (f) and/or (g) apply to the records at issue.

Sections 11(c), (d), (e), (f) and (g) of the Act read as follows:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
- (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;
- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

- (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Sections 11(c) and 11(d)

In order to qualify for exemption under sections 11(c) and (d) of the Act, the City must successfully demonstrate a reasonable expectation of harm to its economic interests, competitive position or its financial interests should the information contained in the records at issue be disclosed. The expectation of harm to these interests must not be fanciful, imaginary or contrived, but based on reason. Furthermore, the evidence to support such an expectation must be "detailed and convincing" (Orders 87, M-27 and M-37).

In its written representations on sections 11(c) and (d) the City states:

The [City's] Job Evaluation Committee is a management committee. Many of the matters discussed by the committee are confidential labour relations matters. Non-management employees and Union representatives are excluded from the Committee's meetings. If access is granted, copies of the requested records will almost certainly be provided to the Union, which may use the documents to the detriment of the Corporation.

The City argues that if the information contained in the records is disclosed, it could be "(mis)used ... to convince an arbitrator to increase the rate of pay for Secretaries in the Clerk's office". It submits that such a pay increase "could possibly result in corresponding pay increases for many other employees ... throughout the organization" and states that "this would have a profound impact on the economic interests of the Corporation".

In my view, the evidence provided by the City is not sufficiently detailed and convincing to demonstrate a reasonable expectation of harm. The City fails to make the necessary connection between the disclosure of the information contained in the records themselves and any specific "use" or "misuse" of it that could reasonably be expected to prejudice or harm the City's financial or economic interests or its competitive position.

Accordingly, I find that the records do not qualify for exemption under sections 11(c) and 11(d) of the Act.

Section 11(e)

In Order 87, former Commissioner Sidney B. Linden established a four-part test for a record to qualify for

exemption under section 18(1)(e) of the provincial Freedom of Information and Protection of Privacy Act which is similar to section 11(e) of the Act. I adopt this test for the purposes of this appeal. For a record to qualify for exemption under section 11(e) of the Act, the City must establish that:

1. the record contains positions, plans, procedures, criteria or instructions;
and
2. the record is intended to be applied to negotiations; **and**
3. the negotiations are being carried on currently or will be carried on in the future; **and**
4. the negotiations are being conducted by or on behalf of an institution.

The City, in the "Background" section of its submissions, characterizes the records at issue as "merely work sheets", and explains that "Committee members often use these forms to jot down their suggested point scores for a job, use of the form is not required".

I have carefully reviewed the records at issue and in my opinion they do not contain positions, plans, procedures, criteria or instructions. The records consist of the score sheets and handwritten notes of those present at two meetings of the City's Job Evaluation Committee.

Since part one of the section 11(e) test has not been met, I find that the records do not qualify for exemption under section 11(e) of the Act.

Section 11(f)

In Order 229, Commissioner Tom Wright established a three-part test for a record to qualify for exemption under section 18(1)(f) of the provincial Freedom of Information and Protection of Privacy Act which is similar to section 11(f) of the Act. I adopt this test for the purposes of this appeal. For a record to qualify for exemption under section 11(f) of the Act, the City must establish that a record satisfies each element of the following three-part test:

1. the record must contain a plan or plans, **and**
2. the plan or plans must relate to:
 - i) the management of personnel or

- ii) the administration of an institution, **and**
3. the plan or plans must not yet have been put into operation **or** made public.

In Order 229, Commissioner Tom Wright adopted the definition of the word "plan" as found in the Eighth Edition of the Concise Oxford Dictionary: "a formulated and especially detailed method by which a thing is to be done; a design or scheme". I agree and adopt this definition for the purposes of this appeal.

I have reviewed the records at issue and as already established, they consist of the point-score sheets (not mandatory) and handwritten notes used by the members of the Job Evaluation Committee and others present during the course of two meetings. In my view the records at issue in this appeal do not contain a plan or plans.

Since part one of the three-part test has not been met, I find that the records do not qualify for exemption under section 11(f) of the Act.

Section 11(g)

In Order 229 discussed above, Commissioner Tom Wright also discussed the interpretation of section 18(1)(g) of the provincial Freedom of Information and Protection of Privacy Act, which is similar to section 11(g) of the Act. Commissioner Wright established the following test in relation to section 18(1)(g):

In order to qualify for exemption under subsection 18(1)(g) of the Act, an institution must establish that a record:

1. contains information including proposed plans, policies or projects; **and**
2. that disclosure of the information could reasonably be expected to result in:
 - i) premature disclosure of a pending policy decision, or
 - ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied.

I agree and adopt this test for the purposes of this appeal.

The City indicates that the rates of pay for all Union jobs (including the position of Council/Committee Secretary), are governed by the Collective Agreement between the City and the Canadian Union of Public Employees, and that the parties will soon commence to negotiate a new collective agreement to replace the current agreement that expires on June 30, 1993.

The City submits that disclosure of the information contained in the records "could significantly prejudice the Corporation's position in the upcoming contract negotiations". The City then goes on to argue how the disclosure of the information could reasonably be expected to result in financial loss to the City.

In my view, section 11(g) protects **proposed** "plans", "policies" or "projects", though this list is not exhaustive. The City has provided no argument or evidence to support its position that the records contain such information. As indicated above, the City itself describes the records as "work sheets" used by the committee members to jot down their suggested point scores for the job. I find that the records do not satisfy the first part of the test.

Even if I were prepared to accept that the records contain proposed plans, policies, projects or other similar information, I am not persuaded by the City's representations that their disclosure could reasonably be expected to result in financial loss to the City.

The City's concern regarding the disclosure of the records appears to be based on possible "misuse" of the information by others, and the ensuing potential of harm to its interests. Former Commissioner Sidney B. Linden made the following comments regarding section 18(1)(g) of the Freedom of Information and Protection of Privacy Act:

Any harm that may accrue to the affected party must result from the disclosure of the records themselves rather than any potential harm as a result of the information in the records being misused.

[Order 154]

I agree.

In my view, the disclosure of records could not reasonably be expected to result in undue financial benefit or loss to any person. Therefore, I find that the records do not qualify for exemption under section 11(g) of the Act.

ORDER

1. I order the City to disclose the records to the appellant within fifteen (15) days of the date of this order.
2. In order to verify compliance with the order, I order the City to provide me with a copy of the records which were disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____
Asfaw Seife
Inquiry Officer

March 31, 1993