



Information and Privacy
Commissioner/Ontario

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

ORDER M-150

Appeal M-9200309

The Corporation of the Town of Markham



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Corporation of the Town of Markham (the Town) received three separate requests under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records. The requests read as follows:

Request 1:

A list of all construction change orders to the Mayor's general office area in the new municipal building, approved by Council after December 1, 1988 showing individual costs for each change.

Request 2:

Records showing the location, ownership and general description of all computer equipment situated on Town premises, installed for or used by members of Council and/or their administrative support personnel.

Request 3:

Photocopies of the consultant's invoice(s) and the Town's cheque(s) in payment for all work performed to date by [an identified accounting firm] management consultants for the Town since September 1, 1991.

Also, please produce all photocopies of purchase orders, or similar authority documents, showing the amount(s) outstanding for all work not complete, or not yet invoiced.

The Town advised the appellant that access to some of the records which contained information responsive to Request 1 (the minutes of meetings of Council and Committee proceedings) were currently available to the public, and a request to inspect such minutes did not require the filing of a request under the Act.

The Town also indicated to the appellant on two separate occasions that a time extension was required to respond to Request 1, and on one occasion that a time extension was required to respond to Request 2.

After receiving the time extension decisions in response to Requests 1 and 2, the requester was not provided with any further decision in response to his requests. Following the expiry of the extended time periods, the requester appealed the decision of the Town not to respond fully to his three requests.

In the course of processing this appeal, an order requiring the Town to provide the Information and Privacy Commissioner/Ontario with any records responsive to the requests was issued to the Town. As well, representatives from the office of the Information and Privacy Commissioner/Ontario attended at the Town offices and discussed the obligations placed on the Town under the Act.

Subsequently, the Town provided the requester with a decision letter which responded to the requests as follows:

In each case I have decided to refuse to disclose the record because the disclosure could reasonably be expected to:

- (a) interfere with a law enforcement matter; or
- (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.

The statutory authority for the aforementioned exemptions are found at subsections 8(1)(a) and (b) of the Act.

In addition, I have decided to refuse to confirm or deny the existence of a record with respect to [requests] 2 and 3 noted above pursuant to subsection 8(3) of the Act.

Finally, with respect to Item 1, I have decided to refuse to disclose part of a record (i.e., minutes of the meeting of Council adopting the reports of the Capital Works and Property Committee) because this part of the record has been published or is currently available to the public ... The statutory authority for this exemption is found at subsection 15(a) of the Act.

The appellant continued to appeal the decision of the Town. Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Town's decision was sent to the appellant, the Town and a representative of the Governmental Affairs Unit (a Joint Forces Investigation of the Metropolitan Toronto Police, the York Regional Police and the Ontario Provincial Police into alleged criminal improprieties involving elected and non-elected Public Officials in the Greater Toronto Area) (the Police). Written representations were received from all parties.

ISSUES/DISCUSSION:

The issues arising in this appeal are:

- A. Whether the Town properly exercised discretion under section 8(3) of the Act to refuse to confirm or deny the existence of records of the nature requested.
- B. Whether records of the nature requested, if they exist, would qualify for exemption under either section 8(1)(a) or 8(1)(b) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the Town properly exercised discretion under section 8(3) of the Act to refuse to confirm or deny the existence of records of the nature requested.

In its decision letter, the Town relies on section 8(3) as applicable to the information requested in Requests 2 and 3. Section 8(3) reads as follows:

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

A requester in a section 8(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 8(3), the Town 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.

The Town did not make representations in support of its application of section 8(3) of the Act. Section 8(3) is a discretionary exemption and, in the absence of representations in support of the Town's position, I do not uphold its application to the records.

ISSUE B: Whether records of the nature requested, if they exist, would qualify for exemption under either section 8(1)(a) or 8(1)(b) of the Act.

In disposing of Issue A, it was necessary for me to confirm that records related to Requests 2 and 3 do in

fact exist. I will now determine whether records responsive to all of the requests qualify for exemption under sections 8(1)(a) and/or (b) of the Act.

Records Responsive to the Requests

The Town originally indicated that the minutes of the meetings of Council and the Civic Centre Building Committee contained information responsive to Request 1, and were publicly available. The Town subsequently indicated that it was actually the Capital Works and Property Committee which apparently dealt with the matter of the construction of the Civic Centre. The Town now indicates that, having reviewed these minutes, there is no specific reference to the requested change orders or any other change orders affecting the Mayor's Office in those minutes and that, accordingly, "there is **no** record of Change Orders affecting the Mayor's Office **approved by Council**".

The circumstances of this appeal are unusual. Originally, in response to Request 1, the Town directed the appellant to minutes of a committee which was not responsible for the issue the appellant was interested in. The Town informed the appellant that committee minutes contained publicly available information responsive to the request without actually reviewing the minutes to confirm this assertion. Additionally, the Town twice extended the time for responding to the request and did not provide the appellant with a decision regarding access to records within the specified period of time. Now, the Town submits that records responsive to the request do not exist. Despite this apparent difficulty with the request, I have been provided with no evidence to indicate that the Town attempted to clarify the appellant's request, inform him of any defect in his request, or offer him assistance in reformulating his request. Following the order for production of records issued by this office and the meeting held between representatives of this office and the Town, the Town provided this office with a sample of records which are entitled "Change Order" and various attachments to each. All of the records provided to this office relate to changes to office areas in the Civic Centre, six of which are directly identified as the "Mayor's". All of the records provided to this office are signed by the Project Administrator, authorizing the builders to proceed with the work. In its decision letter and representations, the Town maintains that exemptions apply to these records. In my view, with consideration to the circumstances of this request and appeal, records of this type are responsive to Request 1.

The Town has provided this office with only one record which it indicates is responsive to Request 2. This record is a list of computer equipment for members of Council and their administrative staff prepared by the Director of Management Information Systems. This report was prepared in response to the request on the basis of a "walk-through" of the offices of the members of Council. The Town indicates that the list does not include personal computers which may be on the premises but not actually owned by the Town. It is unclear to me whether this is the only record in the custody or under the control of the Town which is responsive to Request 2.

With reference to Request 3, the Town has identified copies of all invoices and cheques that were paid to
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the named management consultants from September 1, 1991 to the present (the date of the request) as responsive to the request. The Town indicates that there are no purchase orders responsive to the request.

Sections 8(1)(a) and (b)

The Town submits that sections 8(1)(a) and (b) of the Act apply to the requested records. These sections read:

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;

The term "law enforcement" is defined in section 2(1) of the Act 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);

The Town and the Police submit that the requested records relate to the enforcement and prosecution of Criminal Code offences. I am satisfied that the proceedings undertaken by the Police qualify as law enforcement as defined in the Act.

Having found that the matter in issue is a law enforcement matter, I must now determine whether the disclosure of the records could reasonably be expected to interfere with the law enforcement matter or interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

Previous orders have examined the interpretation of the words "could reasonably be expected to" in the context of the Act:

It is my view that [the] section requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the ... exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section [42] of the Act.

[Orders 188, M-10]

I agree.

The Town states that "The release of information could potentially seriously jeopardize present law enforcement investigations and proceedings", and that "in weighing the pertinent factors", the Town decided to rely on the discretionary exemptions in section 8(1)(a) and (b).

The Police submit that Request 1 is related to a matter which "is currently under investigation" and that they have concerns that the release of the requested information to the general public could seriously jeopardize the prosecution of existing charges and the current investigation into other matters. In respect of Request 2, the Police submit that "if the information contained in these documents was released to the general public and or the news media prior to the trial, it could very well prejudice the outcome of the trial proceeding". The Police indicate that they are not opposed to the disclosure of information responsive to Request 3.

Having considered all representations, I find that the Town and the Police have not provided sufficient evidence to convince me that disclosure of the records requested could reasonably be expected to lead to the harms identified in sections 8(1)(a) and/or (b). Other than asserting that disclosure would result in these harms, neither the Police nor the Town have established a connection between disclosure and harm by explaining how or in what way interference would result. Therefore, I find that the requested records do not qualify for exemption under these sections of the Act.

One of the records identified as responsive to Request 3 contains the personal information of an identifiable individual. This information relates to the salary of a named individual, and it is my view that this information should be severed from the record pursuant to the privacy protection provisions of the Act. Subject to the severance of this personal information, I order the records to be disclosed to the appellant.

ORDER:

1. In this order, I have disclosed the existence of records responsive to the appellant's request. Because the Town and/or the Police may apply for judicial review, I have decided to release this order to the Town and the Police fifteen (15) days in advance of the appellant.
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 Town to disclose all records responsive to the three requests (with the personal information severed), to the appellant within twenty (20) days of the date of this order. 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 an Application for Judicial Review has been served on me.
3. In order to verify compliance with this order, I order the Town to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ June 24, 1993