



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

ORDER M-90

Appeal M-9200127

The Corporation of the Town of Markham



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ORDER

BACKGROUND:

The Corporation of the Town of Markham (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the following records:

1. The Insurance Advisory Organization report on the current operational status of the Fire Department in Markham
2. The M.M. Dillon Report concerning the location of the fire stations in the Town of Markham

The Town denied access to the records, claiming section 11(f) of the Act. The requester appealed the Town's decision.

The record responsive to Part 1 of the request (Record 1) consists of a three page letter dated December 20, 1991 with four attachments: one page titled "Survey Recommendations", one page titled "Water Supply", two pages titled "Fire Department - Fire Suppression Forces", and a three page table. The record responsive to Part 2 of the request (Record 2) is titled "Town of Markham Fire Station Location Study". This record is 112 pages in length and is made up of a title page, a table of contents, 12 chapters, a two page table and 64 pages of "Figures".

Mediation of the appeal resulted in the Town reconsidering its position. A revised decision was issued by the Town which granted the appellant partial access to both records. With respect to Record 1, access was denied to page 2 of the letter, the identity of the author of the letter (found on page 3 of the letter), the page titled "Survey Recommendations", and the two pages titled "Fire Department - Fire Suppression Forces". With respect to Record 2, access was denied to the title page, table of contents, part of Chapter 3, Chapters 7, 9, 10, 11 and 12, and the table and figures. Access was denied pursuant to section 11(f) of the Act and additional exemptions under sections 11(e) and (g) were claimed by the Town.

The appellant indicates that he does not require the identity of the author of Record 1. Accordingly, the severed portion of page 3 of the letter of Record 1 and the name of the author as it appears on the document titled "Survey Recommendations" of Record 1 are not at issue in this appeal.

Further attempts to mediate the appeal were not successful, and notice that an inquiry was being conducted to review the Town's decision was sent to the Town and the appellant. Written representations were received from both parties.

PRELIMINARY MATTER:

In his representations, the appellant states that the Town has not complied with section 22 of the Act, because it failed to include the reason the exemptions apply to the withheld records in its decision.

Section 22(1)(b) of the Act reads as follows:

Notice of refusal to give access to a record or part under section 19 shall set out,

- (b) where there is such a record,
 - (i) the specific provision of this Act under which access is refused,
 - (ii) the reason the provision applies to the record,
 - (iii) the name and position of the person responsible for making the decision, and
 - (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

Section 22(1)(b) of the Act is identical to section 29(1)(b) of the provincial Freedom of Information and Protection of Privacy Act. In Order 158 former Commissioner Sidney B. Linden addressed the requirements of section 29(1)(b)(ii). He pointed out that specifying which part of a provision applies to a record is not the equivalent of providing the reason a provision applies, as required by section 29(1)(b)(ii). At page 4 of Order 158, he stated:

In my view, a head is required to provide a requester with information about the circumstances which form the basis for the head's decision to deny access. The degree of particularity used in describing the record at issue will impact on the amount of detail required in giving reasons, and vice versa. For example, if a record is described not in general terms, but rather as a memo to and from particular individuals on a particular date about a particular topic, then the reason the provision applies to the record could be given in less detail than would be required if the record were described only as a memo. The end result of either approach is that the requester is in a position to make a reasonably informed decision as to whether to seek a review of the head's decision.

The Town's decision in the present appeal simply states the wording of sections 11(e), (f) and (g) without further reasons for applying the exemptions.

In my view, this is not sufficient to satisfy the requirements of section 22(1)(b)(ii) of the Act. However, I do not see that any purpose would be served in ordering the Town to provide a proper notice of refusal letter at this stage of the appeal. Accordingly, I will proceed to dispose of the issues relating to access to the records. I remind the Town, however, of the importance of issuing proper and comprehensive notice of refusal letters when responding to requests under the Act.

ISSUE:

The issue arising in this appeal is:

- A. Whether the discretionary exemptions provided by sections 11(e), (f) and/or (g) apply.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemptions provided by sections 11(e), (f) and/or (g) apply.

The Town submits that sections 11(e), (f) and (g) apply to the information severed from the records. These sections read:

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;
- (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;

The Town submits:

We are of the opinion that the undisclosed portions of the [records] fully qualify as disclosure exemptions pursuant to the discretionary exemptions provided in the noted subsections of s. 11.

Furthermore, the decision to sever the aforementioned portions of the requested records was based on the need for confidentiality prior to Markham Town Council's consideration of various matters. The disclosure of the location of proposed or recommended fire stations in the Town could and would increase the value of the land to be acquired by the Town as future fire hall sites. The release of a survey of fire defences of the Town could potentially result in the reclassification of various municipal buildings and increase insurance premiums. Moreover, the release of these records could also severely prejudice present and future contract negotiations with Town firefighters.

Section 11(e)

Section 11(e) of the Act is similar in wording to section 18(1)(e) of the provincial Freedom of Information and Protection of Privacy Act. In order for records to qualify for exemption under section 11(e), the Town must establish the following criteria:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**

3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of an institution.

(Orders P-219, P-346)

I have carefully reviewed the records and, in my view, they do not contain positions, plans, procedures, criteria or instructions. Both Records 1 and 2 represent the reported results of two studies in relation to the fire defences for the Town and contain recommendations based on the observations made and data collected. Additionally, the Town's submissions that "release of these records could also severely prejudice present and future contract negotiations with Town firefighters" are insufficient to establish parts 2 and 3 of the test for exemption under section 11(e) of the Act. Therefore, in my view, the section 11(e) test has not been satisfied and I find that the records do not qualify for exemption under this section.

Section 11(f)

In order to qualify for exemption under section 11(f) of the Act, the Town must establish that a record satisfies each element of a 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.

[Orders M-77, P-229]

In Order P-229, Commissioner Wright defined the word "plan" as: "a formulated and especially detailed method by which a thing is to be done; a design or scheme." I adopt this definition for the purpose of this appeal.

In the absence of sufficient representations setting out the facts and circumstances supporting the Town's position, the extent of my consideration of the possible application of the exemption is limited to examining any relevant information that might be contained in the records themselves.

As indicated above, the records are consultant's reports of studies of the fire defences for the Town. These records include the current status of equipment, personnel, fire station location, observations and recommendations for improved service. The records do not contain the sort of detailed methods, schemes or designs that are characteristic of a plan. It is evident from the review of the records that the authors did not intend them to be used as a plan but rather as records which provide advice for developing a plan or plans to resolve the issues identified. Therefore, in my view, the first requirement of the test for exemption under section 11(f) has not been satisfied. Accordingly, I find that the exemption found in section 11(f) does not apply to the records in issue in this appeal.

Section 11(g)

Section 11(g) of the Act is identical to section 18(1)(g) of the provincial Freedom of Information and Protection of Privacy Act. In Order P-229, in discussing the requirements of this section, Commissioner Wright stated:

In order for a record to qualify for exemption under section 18(1)(g) [section 11(g)], the 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.

I concur with Commissioner Wright and adopt the above test in this appeal.

I have reviewed the records and, in my view, they do not contain the type of information necessary to satisfy the first part of the section 11(g) test. It is also my view that the evidence provided by the Town is not sufficient to establish the harm specified in section 11(g), and I find that the records do not qualify for exemption under this section.

In summary, I find that the severed portions of Records 1 and 2 do not qualify for exemption under sections 11(e), (f) and (g) of the Act.

ORDER:

1. I order the Town to disclose the severed portions of Records 1 and 2 to the appellant, with the exception of the severed portion of page 3 of the letter and the name of the author on the page titled "Survey Recommendations" in Record 1, within fifteen (15) days of the date of this order.
2. In order to verify compliance with the provisions of this order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ February 26, 1993