



Information and Privacy
Commissioner/Ontario

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

ORDER M-183

Appeal M-9200216

Village of Morrisburg



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ORDER

BACKGROUND:

The Village of Morrisburg (the Village) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the following information:

Part 1: Particulars of the final settlement of the lawsuit between the Village and [a named company] regarding the Village sewage system.

Part 2: The amount and terms of the settlement if the Village was successful.

Part 3: How the terms of the settlement were reached.

Part 4: The cost to the Village in legal fees for entire lawsuit.

Part 5: How the Village is handling the cost in legal fees in their budget.

Part 6: The future plans of the Village concerning the malfunctioning sewage system.

Pursuant to section 21(1) of the Act, the Village notified the named company (corporate affected party #1) as a party whose interests may be affected by the request. The corporate affected party #1 did not respond to the notice.

The Village then issued a decision letter denying access to the record responsive to Parts 1 and 2 of the request pursuant to sections 10(1)(a) and (c), 12, 14(1)(f) and 14(3)(f) of the Act. In addition, the Village claimed that as a condition of the settlement of the lawsuit, it was required to sign a confidentiality agreement stating that the Minutes of Settlement would remain confidential. Disclosure of the record would, the Village claimed, be a breach of that agreement.

As far as Parts 4 and 6 of the request are concerned, the Village denied access to any records on the grounds that no responsive records exist. The Village did not address Parts 3 and 5 of the request in the decision letter.

The requester appealed the decision of the Village.

During mediation, the Appeals Officer contacted the Clerk-Treasurer of the Village to request that a further search be conducted for records responsive to the request, and to request that a revised decision which addressed all parts of the appellant's request be issued.

The Village issued a revised decision. It indicated that no records exist in response to Part 3 of the request. The Village provided the appellant with a fee estimate in the amount of \$610.00 for processing Part 4 of

her request. The Village provided the appellant with an explanation in response to Parts 5 and 6 of her request.

As a result of further mediation, the Village provided the information responsive to Part 4 of the request to the appellant at no charge. The appellant advised that she is satisfied with the information and, as a result, Part 4 of the request is not at issue in this appeal.

The remainder of the appeal was not resolved during mediation, and notice that an inquiry was being conducted was sent to the appellant, the Village, the corporate affected party #1, an individual affected party, and another company (corporate affected party #2). Representations were received from the Village and the appellant. The appellant's representations confirmed the scope of the appeal.

On August 6, 1993, while these representations were being considered, Commissioner Tom Wright issued Order M-170 which interpreted several statutory provisions of the Act in a way which differed from the interpretation developed in previous orders. Since a new approach to the operation of the Act was being adopted and because similar statutory provisions are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the parties to this appeal. They were then afforded the opportunity to state whether the contents of Order M-170 would cause them to change or supplement the representations previously made. None of the parties chose to do so.

In response to the initial notice of inquiry, the appellant indicated that she had decided not to pursue her appeal of Parts 3, 5 and 6 of the request.

RECORDS:

The only records at issue in this appeal are those which are responsive to Parts 1 and 2 of the request. They consist of ten pages in total and may be described as follows:

- Record 1: "Minutes of Settlement" dated April 3, 1992 (four pages). These are signed by a representative of the Village, a representative of corporate affected party #1, and the individual affected party. They describe the settlement agreement reached in several lawsuits concerning the construction of the Village sewage system. They were not filed with the court.
- Record 2: "Final Release" dated April 3, 1992 (two pages). This is signed by a signing officer of the Village.
- Record 3: "Release" dated April 28, 1992 (two pages). This is signed by a signing officer of corporate affected party #2.

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Record 4: "Confidentiality Agreements" (two pages). One is signed by a representative of counsel for the Village, as well as present and past councillors of the Village. The second is signed by various Village employees.

PRELIMINARY ISSUES:

Because the Village has submitted no representations on the application of the discretionary exemption provided by section 12 of the Act, I will not consider it in this order.

In addition, I note that the request is for the particulars of the settlement between the Village and **corporate affected party #1**. Therefore, the personal information contained in the records about the individual affected party is not responsive to the request. However, if the identity of this individual is removed from the records, the remaining information no longer constitutes personal information "about an identifiable individual". Accordingly, it would not satisfy the definition of "personal information".

In the copy of the records I have provided to the Freedom of Information and Privacy Co-ordinator of the Village with this order, I have highlighted the personal identifiers of the individual affected party which should not be disclosed.

I would also note that the records contain the names of several individuals associated with the Village and the affected parties. As they appear in the context of these individuals' employment responsibilities or professional capacities, they do not constitute personal information for the purposes of the Act (Orders P-257, P-326 and P-369).

ISSUE:

The sole remaining issue in this appeal is whether the mandatory exemption provided by section 10(1) of the Act applies to the records.

SUBMISSIONS/CONCLUSIONS:

In its revised decision letter, the Village indicates that it is relying on the exemptions provided by sections 10(1)(a) and (c) of the Act. These sections state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

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- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order to qualify for exemption under sections 10(1)(a) and/or (c), the Village and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of injuries specified in (a) or (c) of section 10(1) will occur.

[Orders 36, M-10 and M-130]

Each part of the test must be satisfied in order for a record to be exempt from disclosure.

It has been established in a number of previous orders that the burden of proving the applicability of the exemption lies with both the institution and the affected party who has resisted disclosure (Orders 80, 101, 166, 204, P-228, M-10 and M-29). In this appeal, neither the institution nor the affected parties have provided any representations with respect to the application of the exemptions claimed under sections 10(1)(a) and (c) of the Act. However, as section 10 is a mandatory exemption, I will consider its applicability to the records at issue.

I will first consider part 2 of the test. In order to satisfy this part of the test, the information must have been **supplied** to the Village by a third party which, by definition, is not part of the institution (Order P-348).

Record 4 consists of the two confidentiality agreements signed by Village councillors and employees. The councillors and employees are part of the institution and, in my view, do not qualify as third parties for the purposes of section 10. Therefore, in the circumstances of this appeal, I find that the information in Record 4 was not "supplied" to the Village for the purposes of section 10 of the Act.

Records 1, 2 and 3 were initially drafted by the solicitor retained by the Village. The solicitor advised that the final version of the record is the result of negotiations between the solicitor retained by the Village and the solicitors for the affected parties.

It has been held in a number of previous orders that information reflecting the results of negotiations between an institution and third parties cannot be said to have been "supplied" by these parties to the institution (Orders 36, 87, 204, P-219 and P-385). Accordingly, I cannot conclude that the information in Records 1, 2 and 3 was "supplied" to the Village.

It has also been stated in previous orders that information contained in a record would "reveal" information supplied by an affected person, within the meaning of section 10(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228 and P-241).

In the circumstances of this appeal, it is my view that disclosure of the information contained in the records would not reveal information actually supplied by the affected parties to the Village.

I am, therefore, not able to conclude that the information in the records has been "supplied" by the affected parties, and I find that the second part of the section 10(1) test has not been satisfied.

As stated earlier, failure to meet any one of the three parts of the test will render the section 10 exemption claim invalid. Because I have found that the parties resisting disclosure have failed to establish that the information in the records was supplied in confidence to the Village, it is not necessary for me to consider the first or third parts of the test.

ORDER:

1. I order the Village to disclose the records to the appellant **with the exception** of those portions highlighted on the copy of the records which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator of the Village with this order. The highlighted portions should **not** be disclosed.
2. The records that I have ordered disclosed in Provision 1 should be disclosed within 35 days following the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry 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: _____
Anita Fineberg
Inquiry Officer

September 9, 1993