



Information and Privacy
Commissioner/Ontario

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

ORDER M-364

Appeal M-9300422

The Corporation of the City of York



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NATURE OF THE APPEAL:

This is an appeal made under the Municipal Freedom of Information and Protection of Privacy Act, (the Act). The Corporation of the City of York (the City) received a request for access to information related to occupancy approval for the parking facilities of a named building complex. Partial access to the records was granted to the appellant.

In its decision letter dated November 16, 1993, the City cited section 8(2)(a) of the Act to deny access to the remaining records. On March 2, 1994, the City raised sections 7(1), 8(1)(a), (b) and (d), 10(1)(a) and 14(1) as additional exemptions which it claimed also applied to the records. The raising of additional exemptions at a late stage in the appeal process will be addressed as a preliminary matter below.

The appellant has indicated that he is not seeking access to the personal information of other individuals. Record 3.1, withheld by the City on the basis of the exemptions provided by sections 8(1)(d) and 14(1), contains the name and address of an individual. On that basis, Record 3.1 is not at issue in this appeal and I will not address the applicability of the exemptions claimed in respect of this record.

The records and the specific exemptions claimed by the City to deny access to the remaining records are described in Appendix "A" to this order.

The City relies on the following exemptions to deny access to the records:

- advice or recommendations - section 7(1)
- third party information - section 10(1)(a)
- law enforcement - sections 8(1)(a), (b) and (d) and 8(2)(a)

A Notice of Inquiry was provided to the City and the appellant. Notice was also provided to the original owner of the named building complex and the architectural company named on the application for the building permit for the complex (the affected parties).

Representations were received from the City only.

DISCUSSION:

PRELIMINARY MATTER

The Raising of Additional Discretionary Exemptions Late in the Appeals Process

On September 14, 1993, the Commissioner's office provided the City with a Confirmation of Appeal which indicated that an appeal from the City's decision had been received. The Confirmation of Appeal also indicated that, based on a policy adopted by the Commissioner's office, the City would have 35 days from the date of this correspondence (i.e. October 20, 1993) to raise any additional discretionary exemptions not claimed in the decision letter. No additional exemptions were raised during this period.

On March 2, 1994, City forwarded the records relating to the appeal to the Commissioner's office. It was at this time that the City raised, for the first time, the application of the discretionary exemptions provided by sections 7(1), and (8)(1)(a), (b) and (d) of the Act. The City also raised the application of the mandatory exemptions provided by sections 10(1) and 14(1) of the Act.

Previous orders issued by the Commissioner's office have determined that the Commissioner has the power to control the process by which the inquiry process is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and a limit on the time during which an institution can raise new discretionary exemptions not originally raised in its decision letter.

In Order P-658, Inquiry Officer Anita Fineberg set out the reasons why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. Inquiry Officer Fineberg concluded that in cases where a discretionary exemption(s) is claimed late in the appeals process, a decision maker has the authority to decline to consider the discretionary exemption(s). In the circumstances of that case, the institution gave no explanation nor did it advance any "extenuating circumstances" which may have justified the four month delay in raising the additional discretionary exemptions. I agree with the reasoning and determination of Inquiry Officer Fineberg and adopt it for the purposes of this appeal.

In its representations, the City states that the delay in claiming the additional discretionary exemptions occurred as a result of confusion between the subject appeal and another request filed by the same appellant. The City submits that this confusion was clarified by letter dated November 16, 1993.

I note, however, that the additional discretionary exemptions were not raised until March 2, 1994. In my view, the confusion over the two requests which, by the City's own admission, was clarified by November 16, 1993, does not qualify as the "extenuating circumstances" necessary to remove this appeal from the policy parameters established by the Commissioner's office. On that basis, I will not consider the application of sections 7(1) and 8(1)(a), (b) and (d).

As I have noted above, the appellant is not interested in obtaining access to the personal information of other individuals and, therefore, the additional mandatory exemption provided by section 14(1) will not be addressed in this appeal.

Finally, the City has also raised the possible application of section 10(1)(a) to Record 2.2. Since this is a mandatory exemption, I will consider its application below.

THIRD PARTY INFORMATION

The City has claimed that Record 2.2 falls within the mandatory exemption provided by section 10(1)(a) of the Act because it contains technical information. The record contains drawings and technical specifications of the parking garage.

For a record to qualify for exemption under section 10(1)(a), the City and/or the affected party 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 harms specified in (a), (b) or (c) of subsection 10(1) will occur.

I have reviewed the information in the record and I agree that the record contains technical information for the purposes of section 10(1)(a) of the Act. I also accept that the information in the record was supplied to the City by the affected parties.

The City has made no representations on the application of parts two and three of the test. As I have indicated, neither of the affected parties submitted representations. Accordingly, I have been provided with no evidence from the parties that bear the burden of proof to satisfy parts two and three of the test.

I have reviewed the record and there is nothing on the face of the record itself that would designate it as confidential. Therefore, I find that the section 10(1) exemption does not apply to Record 2.2. Since the City had also claimed that section 8(2)(a) of the Act applied to this record, I will include it in my discussion below.

LAW ENFORCEMENT

The City states that it is relying on section 8(2)(a) of the Act to deny access to all the records. In order to qualify for exemption pursuant to section 8(2)(a), the records must first satisfy the definition of "law enforcement" found in section 2(1). This section defines "law enforcement" as:

- (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 City submits that the records have been prepared in the course of law enforcement, inspections or investigations by the Building Department which has the function of enforcing and regulating compliance with the Ontario Building Code Act and the Ontario Building Code. Infractions under the Ontario Building Code Act could lead to penalties or fines imposed in a court or tribunal. I find that the "law enforcement" definition has been satisfied.

Section 8(2)(a) state as follows:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

For a record to qualify for exemption under section 8(2)(a) of the Act, the institution must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

The word "report" is not defined in the Act. However, previous orders have established that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

The records for which this exemption has been claimed consist of inspection reports (Records 1.1, 3.3 and 3.5), deficiency notices (Records 3.4 and 3.6), a letter (Record 3.2), handwritten notes (Record 3.7), plans and technical drawings (Record 2.2) and a building permit (Record 2.1).

The inspection reports consist of a series of entries on pre-printed forms. These entries are individually dated and consist of observations and recordings of fact on the work completed and the remedial work required to be done.

The deficiency notices are also pre-printed forms which list the deficiencies observed and the remedial work required. The handwritten notes also list the deficiencies and note the work yet to be completed. The letter contains factual information and the plans and technical drawings contain specifications of the garage. The building permit shows the names and addresses of the owner and architect, and the legal and municipal address of the property. Page 2 of the building permit lists the stages to be completed prior to final inspection and contains observations made during Stages 1 and 11 of the process.

I have carefully reviewed all of these records and, in my view, none of them contain a formal statement or account of the result of the collation and consideration of the information by the individuals who prepared them. The records do not qualify as "reports" for the purposes of section 8(2)(a) of the Act.

As all three parts of the section 8(2)(a) test must be satisfied in order for the exemption to apply, the records do not qualify for exemption under section 8(2)(a) of the Act. Therefore, the records must be disclosed to the appellant.

In conclusion, I have found that the exemptions provided by sections 8(2)(a) and 10(1)(a) do not apply to exempt the records from disclosure.

ORDER:

1. I order the City to disclose to the appellant all the records in their entirety within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ July 28, 1994

APPENDIX "A"

RECORD NUMBER	INSTITUTION PAGE NUMBER	DESCRIPTION OF RECORD	EXEMPTIONS CLAIMED
INDEX 1			
1.1	1	inspection report	8(2)(a)
INDEX 2			
2.1	1-2	building permit	8(1)(a) and (b) 8(2)(a) 10(1)(a)
2.2	3-11	plans and technical drawings	10(1)(a)
INDEX 3			

3.1	1	handwritten note	8(1)(d) 14(1)
3.2	2	letter	7(1) 8(2)(a)
3.3	3	inspection report and telephone message slip	8(2)(a)
3.4	4-8	deficiency notice	8(1)(a) and (b) 8(2)(a)
3.5	9	inspection report	8(2)(a)
3.6	10	deficiency notice	8(2)(a)
3.7	11-18	handwritten notes	8(2)(a)