



Information and Privacy
Commissioner/Ontario

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

ORDER P-790

Appeal P-9400279

Ministry of Municipal Affairs



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ministry of Municipal Affairs (the Ministry) received a request for access to copies of records concerning the Town of Orangeville's proposal to annex surrounding lands and to change its status to that of a city.

The Ministry located a number of records which were responsive to the request and released some of these to the requester. The Ministry decided, however, to deny access to five of these documents, in whole or in part, relying on the following exemptions contained in the Act:

- Cabinet records - section 12(1)(e)
- advice or recommendations - section 13
- economic and other interests - section 18(1)(e)
- proposed plans, projects or policies of an institution - section 18(1)(g)
- solicitor-client privilege - section 19

A Notice of Inquiry was provided to the Ministry and the appellant. Representations were received from both parties.

In its representations, the Ministry indicated that it was no longer relying on the exemptions contained in sections 12(1)(e) and 13(1) to deny access to Records 4 and 2, respectively. In addition, the Ministry indicated its willingness to release portions of Records 2 and 3 and the three-page Appendix contained in Record 4 to the appellant.

The records which remain at issue in this appeal are described in more detail in Appendix "A".

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Ministry has claimed that section 13(1) of the Act applies to exempt portions of Records 3, 4 and 5 from disclosure.

Section 13(1) of the Act states that:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative

process.

Record 3

Record 3 outlines a number of Ministry-endorsed initiatives or policies which are of particular relevance to the Orangeville situation. In its representations, the Ministry submits that section 13(1) applies to exempt the information described under the headings "Outcome" and "Implications" from disclosure. More specifically, the Ministry argues that this information pertains to advice suggesting particular courses of action, which will ultimately be accepted or rejected by senior management within the Ministry.

I have carefully reviewed the record and the Ministry's representations and, in my view, these portions of the record do not contain advice or recommendations on a suggested course of action to be accepted or rejected by its recipient. Rather, they focus on the steps that may be taken by the Ministry in the course of its participation in the Orangeville consultations to ensure that its province-wide initiatives and policies are complied with. Accordingly, I find that section 13(1) does not apply to this record and it should be disclosed.

Records 4 and 5

Record 4 is a paper prepared by the Orangeville Technical Committee entitled "Criteria To Use When Evaluating An Application For Separated City Status". This document relates to the proposed policy amendments by which the Town would become a city. Record 5 is a briefing note prepared for the Minister on this subject. With respect to Record 4, the Ministry submits that Pages 1 and 2 are exempt from disclosure pursuant to section 13(1). The Ministry is no longer claiming any exemption for the three-page Appendix in Record 4. The Ministry further submits that the information contained under the heading "Response" on Pages 2 and 3 of Record 5 is exempt from disclosure pursuant to section 13(1) of the Act.

I have carefully examined the undisclosed portions of Records 4 and 5 and have considered the representations of the Ministry. In my view, the disclosure of the information contained in these records would reveal the advice or recommendations of a public servant. Accordingly, I find that Pages 1 and 2 of Record 4 and the "Response" section contained in Pages 2 and 3 of Record 5 properly fall within the exemption provided by section 13(1) of the Act and should not be disclosed.

I further find that none of the exceptions to the section 13(1) exemption which are described in section 13(2) of the Act are applicable to these records.

In addition, because of the manner in which I have dealt with Record 4 above, it is unnecessary for me to consider the application of section 18(1)(e) to this document.

PROPOSED PLANS, PROJECTS OR POLICIES OF AN INSTITUTION

The Ministry originally claimed in its decision letter that section 18(1)(g) of the Act applied to exempt all of Record 2 from disclosure. The Ministry now submits that section 18(1)(g) applies to exempt only portions of Record 2 and that section 18(1)(g) also applies to parts of Record 3.

In order to qualify for exemption under this provision, the Ministry must establish that each 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 will turn first to the second part of the test. It has been established in a number of previous orders that the term "pending policy decision" contained in the second part of the test refers to a situation where a policy decision has been reached, but has not yet been announced. More specifically, the phrase does not refer to a scenario in which a policy matter is still being considered by an institution (Orders M-182 and P-726).

The intent of section 18(1)(g) is to allow an institution to avoid the premature release of a policy decision where that disclosure could reasonably be expected to harm the economic interests of the institution. In my view, it follows that for this section to apply, there must necessarily exist a policy decision which the institution has already made. In the absence of such a determination, the assessment of harm would be an entirely speculative exercise. In addition, the first part of the section 18(1)(g) test makes specific reference to proposed policy decisions. In my view, the nature of this wording also contemplates that the type of decision referred to in the second part of the test will be one that has already been made.

In its representations, the Ministry submits that the release of Record 2 would result in the premature disclosure of a pending policy decision as Record 2 contains proposed criteria for evaluating applications for city status. The Ministry explains that these criteria have been recommended by Ministry staff for use on a pilot basis but have not yet been approved by the Minister.

The Ministry submits further that a future Ministry decision will very likely be based on the recommendations in the record.

Having carefully reviewed Record 2 and the representations of the Ministry, I am of the view that a policy decision in this matter has not yet been reached. Accordingly, I find that section 18(1)(g) does not apply to exempt any portion of Record 2 from disclosure.

Further, I find that the Ministry has not provided sufficient evidence to establish that the disclosure of any information in Record 3 could reasonably be expected to result in premature disclosure of a pending policy decision.

In addition, following a careful review of the Ministry's representations, I find that I have not been provided with sufficient evidence to establish that disclosure of the information contained in Records 2 and 3 could reasonably be expected to result in undue financial benefit or loss to a person.

Accordingly, I find that the Ministry has failed to establish that either of the harms set out in the second part of the test in section 18(1)(g) have been met and, therefore, this exemption has no application in the circumstances of this appeal.

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that section 19 of the Act applies to exempt Record 1 from disclosure. Section 19 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1);
and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

Previous orders issued by the Commissioner's office have held that for a record to be exempt under the second branch of section 19 of the Act, it must meet the following criteria:

1. the record must have been prepared by or for Crown counsel **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

I have examined Record 1 and I am satisfied that, as the Ministry submits, it is a memorandum prepared by Crown counsel. I find, therefore, that the first criterion for the application of the second branch of the test has been satisfied.

The Ministry submits further that the memorandum contains specific recommendations on a course of action on a legal matter and was prepared for the purpose of giving legal advice.

The term "legal advice" is not defined in the Act but has been interpreted in a number of previous orders. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.

I have examined the memorandum and considered the representations of the Ministry. I am satisfied that the memorandum was prepared for the purpose of giving legal advice. I find, therefore, that the memorandum satisfies the second criterion of the second branch of the test. Accordingly, the exemption in section 19 of the Act applies and Record 1 should not be disclosed.

ORDER:

1. I uphold the Ministry's decision to deny access to Record 1 in its entirety. I also uphold the Ministry's decision to deny access to Pages 1 and 2 of Record 4 and the "Response" section contained in Pages 2 and 3 of Record 5.
2. I order the Ministry to disclose to the appellant Records 2 and 3 in their entirety, the three-page Appendix attached to Record 4 and all of Record 5 with the exception of the "Response" section within fifteen (15) days of the date of this order.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Donald Hale
Inquiry Officer

November 1, 1994

APPENDIX "A"

INDEX OF RECORDS AT ISSUE

RECORD NUMBER	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
1	Memorandum dated 12/14/93	13(1), 19	Withheld
2	Memorandum containing Orangeville Technical Committee Report dated 12/06/93	18(1)(g)	Disclosed
3	Summary of Issues Related to Orangeville Situation dated 10/07/93	13(1), 18(1)(g)	Disclosed
4	Paper on Separated City Status dated 12/09/93 and Appendix	13(1), 18(1)(e), 18(1)(g)	Disclosed in part
5	Response section of Briefing Note dated 10/28/93	13(1)	Withheld