



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-521

Appeal M-9400541

The Corporation of the City of Oshawa



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Corporation of the City of Oshawa (the City) received a request from a former employee for copies of records pertaining to the position of City Manager and in particular, to a named individual. In addition, the requester sought records respecting the engagement of a named forensic accounting firm. The request specified that it was intended to span the period of June 1, 1993 to March 30, 1994.

The City located 74 responsive records and granted the requester full access to 61 records, partial access to 11 records, and denied access to two records. The City relies on the following exemptions in denying access to the records, in whole or in part:

- draft by-law or private bill - section 6(1)(a)
- advice or recommendations - section 7(1)
- law enforcement - sections 8(1)(a), (c) and (d)
- solicitor-client privilege - section 12
- invasion of privacy - section 14(1)

The requester appealed the City's decision because he believes that information denied to him should be publicly available pursuant to the Act.

A Notice of Inquiry was provided to the City, the appellant and 41 individuals who had been identified in the records by the City as having a personal interest in the records (the affected persons). Representations were received from the City, the appellant and 32 affected persons.

The Records fall generally into the following categories:

- internal memoranda (Records 35, 42 and 43)
- correspondence sent by the City's external counsel to the forensic and investigative accountants (Record 54)
- invoices and other documents from the forensic and investigative accountants outlining details of their activities (Records 64 - 68)
- correspondence from the forensic and investigative accountants to counsel retained by the City regarding accounts (Records 70 - 72)
- correspondence from counsel to the Mayor (Record 73)

During the inquiry stage of this appeal, the Commissioner's office determined that some of the records might contain the personal information of the appellant. A supplementary Notice of Inquiry was provided to all the parties which raised the possible application of sections 38(a) and (b) to the records. Further representations were received from the City, the appellant and 16 affected persons.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

In its representations, the City takes the position that although some of the records refer to the appellant by name, they should not be construed as containing his personal information as the reference to the appellant was simply included for the purposes of identifying the relevant file. The City, however, also indicates that the appellant's position with it was terminated following an investigation which led the City to conclude that he had been involved in unauthorized activities. In my view, where references are made to the appellant, directly or indirectly, they are connected to the investigation into his activities and, therefore, constitute his personal information.

I have reviewed the records at issue and I find that Records 35, 42, 43 and 54 do not contain personal information. Records 64 - 67, 70 - 72 and 73 contain the personal information of the appellant. Records 64 - 67 also contain the names of a number of City employees who were interviewed by the forensic accountants, as well as the names of employees of, or individuals whose services were retained by, the forensic accounting firm and the law firms retained by the City. Record 68 contains only the names of employees of, or individuals retained by, the forensic accounting firm. It is the City's position that the names of employees of the City, the forensic accounting firm and the law firm, all of whom were involved in the investigation, qualifies as "personal information".

I do not accept the City's position with respect to the names of the employees of, or individuals retained by, the forensic accounting firm or law firms. It is clear that their names and any information pertaining to them were provided in their capacity as professionals or employees and in the course of executing their professional and/or employment responsibilities. Accordingly, the information contained in the records pertaining to them does not constitute the "personal information" of these individuals for the purposes of the Act (Orders P-377 and P-427).

It is apparent that the purpose of the investigation conducted by the forensic accountants was to determine whether the appellant and/or other individuals had conducted themselves improperly. In investigating the matter, a number of City employees were contacted and interviewed. As a result of the investigation the appellant's position was terminated which has subsequently resulted in litigation between the appellant and the City. In my view, the City employees' names, and any other information pertaining to them, in the context of the investigation, contained in Records 64 - 67 qualifies as their personal information.

To summarize, I find that Records 35, 42, 43, 54 and 68 do not contain personal information. Records 70 - 73 contain the personal information of the appellant only, and Records 64 - 67 contain the personal information of the appellant and other individuals.

RECORDS WHICH CONTAIN THE APPELLANT'S PERSONAL INFORMATION

I will first consider the exemptions claimed by the City for those records which contain the appellant's personal information. Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 38(a) of the Act, the institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Two of the exemptions mentioned in section 38(a) are the law enforcement exemption in section 8 and the solicitor-client exemption in section 12. In the following discussion, I will consider whether certain records qualify for exemption under these two sections as a preliminary step in determining whether the exemption in section 38(a) applies.

LAW ENFORCEMENT

The City claims that Records 64 - 68 are exempt under sections 8(1)(a), (c) and (d), and that Records 70 - 72 are exempt from disclosure under sections 8(1)(a) and (c). Record 68 does not contain personal information, however, as the following discussion applies equally to it, I will consider the application of section 8 to it at this time. Sections 8(1)(a), (c) and (d) provide:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

In order for a record to qualify for exemption under these sections, the investigation that generated the records must first satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition reads 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);

In a number of past orders it has been held that internal investigations by employers did not fall within the definition of "law enforcement" in section 2(1) .

The City argues that the situation in this case is unique. While recognizing that the definition of "law enforcement" does not include internal investigations by employers, the City argues that it does include criminal and/or quasi-criminal prosecutions, and that in this case some aspects of both are involved. The City indicates that as a result of the forensic investigation, criminal and/or quasi-criminal charges could be laid against the appellant.

In Order 157, former Commissioner Sidney B. Linden considered whether an investigation by the Ontario Securities Commission qualified as a law enforcement investigation, and stated as follows:

The investigation or inspection was not conducted with a view to providing a court or tribunal with the facts by which it would make a determination of a party's rights, but rather, was conducted with a view to providing the employer ... with information respecting its employee.

In my view, the situation former Commissioner Linden was considering was similar to that in the current appeal, and his analysis is equally applicable here. In this case, the investigation was carried out at the request of the City and its results were relayed back to the City and not to the police or other law enforcement authorities.

As it is my view that the investigation which generated the records at issue in this appeal does not satisfy the definition of "law enforcement" as found in subsection 2(1) of the Act, it is not possible that sections 8(1)(a), (c) or (d) can apply to exempt any of the records from disclosure. This is because each of those exemptions requires the satisfaction of this definitional threshold; sections 8(1)(a), (c) and (d) protect "**law enforcement** matters", "investigation techniques used in **law enforcement**", and "confidential sources of information in respect of **law enforcement** matters" respectively. Accordingly, sections 8(1)(a), (c) and (d) do not apply. As a result, the City is unable to rely on section 38(a) to exempt Records 64 - 67 and 70 - 72 on the basis of these sections.

As no other exemptions have been claimed for Record 68, and no mandatory exemption applies, it should be disclosed to the appellant.

SOLICITOR-CLIENT PRIVILEGE

The City claims that section 12 applies to Records 42 (pages 8 - 14), 54, 64 - 67, 70 - 72 and 73.

Section 12 of the Act 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 counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

For a record to qualify for exemption under the first branch of solicitor-client privilege, the following four criteria must be satisfied:

1. there must be a written or oral communication;
2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal adviser; and
4. the communication must be directly related to seeking, formulating or giving legal advice.

OR

5. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

While the City indicates that it is relying primarily on the first branch of the exemption, it submits that "there are some documents, however, which quite clearly relate legal opinions and/or advice, and fall within the second branch".

Pages 8 - 14 of Record 42, and Record 73 are subject to the common law solicitor-client privilege. They are all confidential communications from legal counsel to the Mayor and/or members of council which are directly related to the seeking, formulating or giving of legal advice. On this basis, I find that these records are exempt from disclosure under the first branch of the section 12 test.

The City states that Records 64 - 67 are invoices from the forensic accounting firm which detail the activities of the investigatory team. Records 54 and 70 - 72 consist of correspondence between counsel and the forensic accountants. The majority of these records have been disclosed to the appellant. Information relating to the details of the investigation which would reveal the nature of the advice sought has been withheld. The City indicates that because of the sensitive nature of the investigation and in anticipation of a finding against the appellant, the City retained an outside law firm to conduct the investigation with a view to advising the City with respect to its options.

None of these records contains confidential communications between a client and his/her legal advisor, nor do they appear to be created or obtained especially for the lawyer's brief for existing or contemplated litigation. I will, therefore, consider them under Branch 2.

Record 54 is a letter from legal counsel to the forensic accounting firm confirming their retainer. The City has released most of the letter, with the last sentence of paragraph 2 withheld. The City maintains that disclosure of this information would provide "direct and indirect indications of the nature of the retainer of the law firm, and the firm of forensic accountants".

In my view, in disclosing a portion of Record 54, the City has provided the appellant with information pertaining to the retainer. The second sentence in paragraph 2 of Record 54 simply conveys procedural instructions to the forensic accounting firm in connection to its retainer and in no way reveals directly, or indirectly, the nature of the retainer, that is, the work that was to be done. I find, therefore, that the portion of Record 54 at issue was not prepared by or for counsel for use in giving legal advice or in contemplation of litigation, or for use in litigation, and accordingly, Branch 2 of section 12 does not apply to it. As no other exemptions have been claimed for this record, it should be disclosed to the appellant.

I find, however, that the information which has been withheld from Records 64 - 67 and 70 - 72 was prepared by or for counsel for use in giving legal advice, or in contemplation of litigation, or for use in litigation. On this basis, I find that these records are exempt from disclosure under the second branch of the section 12 test.

To summarize, I have found that pages 8 - 14 of Record 42, and Records 64 - 67, 70 - 72 and 73 qualify for exemption under section 12. They are, therefore, exempt under section 38(a).

RECORDS WHICH DO NOT CONTAIN THE APPELLANT'S PERSONAL INFORMATION

I will now consider the exemptions claimed by the City for those records which do not contain personal information.

DRAFT BY-LAW

The City claims that section 6(1)(a) applies to Record 35 in its entirety and to pages 2 - 6 and 15 - 20 of Record 42. In its representations, the City raised, for the first time, the application of this provision to Record 43 as well.

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter (Orders P-658 and P-901).

As part of its efforts to expedite the processing of access appeals and in order to sensitize institutions about the prejudice which accrues to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an IPC Practices publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, established a 35 day time limit for the raising of new discretionary exemptions; the time to begin running as of the date of confirmation of the appeal.

The Confirmation of Appeal was sent to the City on September 27, 1994. The City's claim is, therefore, well out of time. Because of the findings I have made with respect to the records in this appeal, however, it is not necessary for me to determine whether or not I should consider the application of section 6(1)(a) to Record 43.

Section 6(1)(a) of the Act states:

A head may refuse to disclose a record,

that contains a draft of a by-law or a draft of a private bill;

Pages 2 - 6 and 15 - 20 of Record 42 contain drafts of the City's by-law to create the position of City Manager. I find that section 6(1)(a) of the Act applies to these pages of the record.

Section 6(2)(a) contains an exception to the draft by-law exemption. The exception states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

in the case of a record under clause (1) (a), the draft has been considered
in a meeting open to the public;

I have been provided with no information which would indicate that these drafts were considered in a meeting open to the public. Accordingly, I find that Record 42 (pages 2 - 6 and 15 - 20) is exempt under section 6(1)(a) of the Act.

Records 35 and 43 do not contain drafts of the by-law per se; rather they contain comments made by the City Clerk pertaining to the draft by-law.

With respect to these records, the City's position is that if the City is not required to release a draft by-law then it is not required to release the comments made by staff on the by-law. It maintains that to do so would indirectly disclose the contents of the by-law or some of its provisions. The City raised this argument in Appeal Number M-9400197 which was resolved by Order M-394. In that order, Inquiry Officer Anita Fineberg stated:

The wording of the draft by-law exemption in section 6(1)(a) may be usefully contrasted with that of the "closed meeting" exemption in section 6(1)(b) which states:

A head may refuse to disclose a record,

that **reveals** the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public. [my emphasis]

Likewise, the analogous provision to section 6(1)(a) of the Act, section 12(1)(f) of the provincial Freedom of Information and Protection of Privacy Act, states:

A head shall refuse to disclose a record where the disclosure would **reveal** the substance of deliberations of the Executive Council or its committees, including, draft legislation or regulations. [my emphasis]

In both of these instances, the wording of the exemption, by the inclusion of the word "reveal", is broader than that in section 6(1)(a) of the Act. In my view, the use of the term "reveal" means that the exemption in which it appears will apply to records from which accurate inferences can be drawn about the types of information described in these sections. By contrast, the wording of section 6(1)(a) applies to records which actually contain a draft of a by-law.

In my view, section 1(a)(ii) of the Act is also a relevant factor in the interpretation of the section 6(1)(a) exemption. That section sets out one of the major purposes of the Act and states that necessary exemptions from the right of access should be limited and specific.

Accordingly, I find that the wording of the draft by-law exemption is not broad enough to bear the meaning which the City would ascribe to it. Rather, I am of the view that it only applies to records which actually **contain** the draft by-law.

I agree with Inquiry Officer Fineberg's analysis. Accordingly, I find that Records 35 and 43 are not exempt under section 6(1)(a).

ADVICE TO GOVERNMENT

The City also claims that Records 35 and 43 are exempt from disclosure pursuant to section 7(1) of the Act.

This section states that:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee 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 7(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 35 is a memorandum from the City Clerk to the Executive Assistant to the Mayor regarding the draft by-law pertaining to the position of City Manager. The Record contains some general comments and factual information relating to the by-law, and includes specific suggestions put forth by the City Clerk for the Mayor's consideration. In my view, these suggestions are in the nature of "advice" as contemplated by section 7(1). Accordingly, I find that section 7(1) applies to these portions of the record.

Record 43 consists of a one-page memorandum from the City Clerk to the City Manager with a two-page draft attachment regarding the City Manager's review of Departmental Reports. The City disclosed to the appellant the two-page draft attachment in full. The only portion of this record at issue, therefore, is the one-page memorandum. The memorandum contains general comments, views and factual information. In my view, such information does not suggest a course of action which can be accepted or rejected by its recipient and does not constitute "advice" or "recommendations" within the meaning of the section. Accordingly, section 7(1) does not apply to this document.

I have highlighted on the copy of the records to be forwarded to the City's Freedom of Information and Privacy Co-ordinator, the portions of Record 35 which qualify for exemption under section 7(1). As no other exemptions have been claimed for the remaining portions of Record 35 and for Record 43, they should be disclosed to the appellant.

Because of the findings I have made in this order, it is not necessary for me to consider the application of section 14 to the records.

ORDER:

1. I uphold the City's decision to exempt Records 42, 64 - 67 and 70 - 73 and the portions of Record 35 which **are** highlighted on the copy of this record which is being sent to the Freedom of Information and Privacy Co-ordinator for the City with a copy of this order.
2. I order the City to disclose to the appellant the portions of Record 35 which have **not** been highlighted, and Records 43, 54 and 68 within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
3. 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 2.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ May 10, 1995