



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

ORDER M-627

Appeal M_9500305

City of Cornwall



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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 appellant made a three part request to the City of Cornwall (the City). Part 1 of the request related to information about the negotiations of the contract between the City and the American Hockey League's Cornwall Aces (which operated as a farm team of the Quebec Nordiques of the National Hockey League). Part 2 of the request related to information about certain managerial employees who had resigned or been dismissed in the three years proceeding the request. Part 3 related to budget information about the Nordiques/Aces hockey team and the sports complex.

The City initially provided the appellant with some records which responded to Parts 1, 2 and 3 of the request. The City also claimed that no responsive records exist for some portions of all three parts of the request. The City further relied upon the decision of Assistant Commissioner Irwin Glasberg in Order M-242, which upheld the City's decision to deny access to information about proposed budgets and portions of the contract between the City and the Nordiques/Aces. The City also claimed the following exemption to deny access to information relating to the resignation/dismissal of two individuals:

- invasion of privacy - section 14(1)

The requester appealed both the City's decision to apply the exemption and its claim that no records exist which respond to certain aspects of each part of the request. In his letter of appeal and other correspondence with the Commissioner's office, the appellant raised by implication the application of the public interest override provision contained in section 16 of the Act to the information severed from the contract and to the separation agreements.

During the course of the mediation of the appeal, the City provided the requester with additional budget information responsive to Part 3 of the request. Information originally severed from the contract with the Nordiques/Aces and additional budget documents were provided to the appellant. Therefore, as complete access was granted to the records responsive to Parts 1 and 3 of the request, the City takes the position that these parts of the request have been satisfactorily answered. The appellant maintains, however, that additional records should exist which respond to Part 1 of the request.

Also during the mediation of the appeal, the City explained to the requester why there were no responsive records for two of the four individuals identified by the requester as falling under Part 2 of his request. One individual neither resigned nor was fired. The other individual, the Chief of Police, was employed by and reported to the Cornwall Police Services Board (the Board), a separate institution under the Act. The City informed the appellant that, upon learning that he wished to obtain information about the Chief, it had transferred that part of the request to the Board pursuant to section 18(3) of the Act. The appellant objects to the transfer of this portion of his request to the Board.

A Notice of Inquiry was provided to the appellant and the City as well as the two individuals who resigned or were dismissed from the City's employ (the affected persons). Representations were received from the appellant and the City.

After receiving the Notice of Inquiry, each of the affected persons contacted the City and consented to the disclosure of his Early Retirement Agreement or Memorandum of Settlement. The City forwarded these records to the appellant.

PRELIMINARY MATTERS:

TRANSFER OF PART OF THE REQUEST

In his representations, the appellant states that information about the resignation/dismissal of the Chief of Police should be in the possession of the City as it is common knowledge that this is the case. Therefore, he objects to the transfer of his request to the Board.

Sections 18(3) and (4) of the Act reads as follows:

- (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.
- (4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,
 - (a) the record was originally produced in or for the other institution; or
 - (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

In its representations, the City states that upon learning that the appellant was seeking information about the Chief of Police, it transferred the request to the Board as the Chief was hired by and reported to the Board.

In my view, because of its employment relationship with the Chief, the Board has a greater interest in the record for the purposes of section 18(3) of the Act than does the City. I am further satisfied that the head, in considering the employer/employee relationship between the Board and the Chief, properly exercised his discretion in transferring the request.

The Act specifies that a request is to be transferred within 15 days of its receipt. In this case, the City was not aware that the appellant was requesting information about the Chief until after receiving notification of the appeal and speaking with the Appeals Officer. Once it was aware

the appellant was seeking this information, the City immediately transferred that part of the request to the Board.

I find that the request for information about the Chief of Police was transferred to the Board, a separate institution, in accordance with the Act. Therefore, information about the resignation/dismissal of the Chief does not fall within the scope of this appeal.

RECORDS AT ISSUE

Both the appellant and the City have made representations about the extent of the records which each considers to be at issue in this appeal.

In his representations to this office, the appellant indicates that he expects that the affected persons' employment contracts and other information pertaining to their employment to be part of the record responsive to Part 2 of his request, in addition to the Memorandum of Settlement and Early Retirement Agreement.

The City submits that by providing the Agreement and Memorandum relating to the two affected persons, they have now responded to Part 2 of the request in full. The City explains that prior to making its original decision, it consulted with the appellant regarding Part 2 of his request. According to the City, the appellant indicated that he was seeking only the letters of resignation and the separation agreements of individuals who had been dismissed or resigned. The City immediately disclosed the Minutes of Settlement and letter of resignation of one individual to the appellant because that individual's settlement agreement did not contain a confidentiality clause. Access to any other information about that individual has not been raised as an issue in this appeal.

When it provided the agreement and memorandum of the other two individuals during the Inquiry stage of this appeal, the City indicated to the appellant in the covering letter which accompanied disclosure of these documents that, in its view, it had now responded to Part 2 of the request in full as there were no letters of resignation tendered by these individuals.

After making his representations and receiving the Early Retirement Agreement and Memorandum of Settlement for the two remaining individuals, the appellant stated in a letter that he is still seeking additional information about these individuals, though not any of their personal information. In the same letter, the appellant also indicates that he is now seeking additional information under Part 3 of his request.

I have carefully reviewed the appellant's request and his correspondence to this office. In my view, in order to process requests and appeals as efficiently as possible, both the institutions and the staff of this office need to know with some degree of certainty what is at issue in an appeal. Accordingly, I make the following findings:

1. I find that in the course of this appeal, the appellant has altered positions previously communicated by him to both the City and this office on the nature and scope of the information sought.

2. In his original request, and in the course of the mediation of this appeal, the appellant has made no reference to the employment contracts and other correspondence relating to the employment of the affected persons.
3. I accept the position of the City that the appellant had previously confirmed with the City that he was seeking only certain information about the individuals who resigned or were dismissed and that he now has this information. Therefore, I find that there is no other information about these individuals at issue and that Part 2 of the appellant's request, as originally framed, has now been completely responded to by the City.
4. I find that when additional material responding to Part 3 of his request had been disclosed to him by the City, the appellant failed to indicate that he was still seeking additional records responsive to this part of the request. This fact was communicated for the first time in his representations to this office and is in contradiction with his previous correspondence. I find that the City has provided the appellant with all of the records in its possession which are responsive to Part 3 of his request, as originally framed.

The only remaining issue in this appeal is the reasonableness of the City's search for additional records which are responsive to Part 1 of the request.

DISCUSSION:

REASONABLENESS OF SEARCH

The City has provided an explanation of its efforts to locate records which are responsive to the appellant's request. In addition, the City has included as part of its representations an affidavit signed by the City's chief administrative officer. In the affidavit, he states that he was personally involved in the negotiations between the City and the Nordiques/Aces. He also states that he has searched all files pertaining to the Nordiques/Aces and has not located any additional records. The appellant has not provided any information as to why he believes that additional responsive records exist other than to state that, in his opinion, they should exist.

Where a requester provides sufficient details about the records which he or she is seeking and the City indicates that such a record does not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. The Act does not require the City to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

I have considered the representations of the parties and I find that the City's search for responsive records was reasonable in the circumstances of this appeal.

EXCHANGE OF REPRESENTATIONS

The appellant has asked to receive a copy of the affidavit evidence submitted by the City as part of its representations in support of the reasonableness of its search. A number of previous orders

have found that a party to an appeal under the Act does not have the right to receive the representations of another party to the appeal.

Sections 41(1) and (13) of the Act state:

- (1) If a settlement is not effected under section 40, the Commissioner shall conduct an inquiry to review the head's decision.
- (13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

It is the practice of the Commissioner or his/her delegate during the course of an inquiry to review the representations of the parties to an appeal and to consider whether the appellant should be given access to all or part of the representations, whether there is a need for clarification of representations or whether a party should be given the opportunity to respond to the representations. It is essential to the integrity of the inquiry system and to the effective operation of the appeal process set out in the Act that either the Commissioner or his/her delegate be the one who decide the question of whether an appellant will have access to the representations made by an institution in the course of an inquiry.

In my view, in the circumstances of this appeal, there is no need to provide the appellant with the affidavit submitted by the City with its representations.

ORDER:

I uphold the decision of the City.

Original signed by:
Donald Hale
Inquiry Officer

October 25, 1995