



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

ORDER M-802

Appeal M_9600049

Cornwall Police Services Board



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NATURE OF THE APPEAL:

The Cornwall Police Services Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to several categories of information related to the competition to select a new Chief of Police. The requester was an unsuccessful candidate in that competition.

The Board identified several records as being responsive to the request and provided partial access to them. The Board denied access to some records, either in whole or in part, on the basis of the following exemptions in the Act:

- closed meetings - section 6(1)(b)
- advice and recommendations - section 7(1)
- information publicly available - section 15
- invasion of privacy - sections 14(1) and 38(b)
- evaluative or opinion material - section 38(c)

The Board also indicated that certain records did not exist.

The requester appealed the denial of access and maintains that additional responsive records should exist.

During mediation of the appeal, the appellant indicated that he was not seeking access to the personal information of other individuals. He also confirmed that he was not seeking access to the **newspaper** media release which the Board had exempted under section 15. However, the existence of additional **radio** media releases remains at issue in the context of the reasonableness of the Board's search for responsive records.

This office sent a Notice of Inquiry to the Board and the appellant. The Notice raised the issue of the application of section 38(a) to the records. This section gives the Board the discretion to deny an individual access to his or her own personal information in circumstances where other exemptions, including sections 6 and 7, would apply. The Notice also requested the Board to forward the balance of the records at issue to this office.

In its submissions, the Board identifies the records at issue as consisting of notes taken at four meetings involving the Chief Selection process (the meeting notes) and the consultant's materials prepared to assist the Board in its recruitment of a Chief (the consultant's materials). The Board included a copy of the consultant's materials with its submissions.

The Board had previously provided this office with a copy of the consultant's materials. This copy differs from the one recently received in that it contains three additional pages which I will consider as forming part of the records at issue in this order.

In addition, the Board had provided this office with copies of two records both of which are entitled "Resume Screening Guide for Chief of Police Position". These documents represent the

results of the screening of the appellant's resume by two different individuals. They contain solely the personal information of the appellant. The Board has not claimed that any discretionary exemptions apply to these records. Nor are they subject to any mandatory exemptions. In these circumstances, they should be disclosed to the appellant.

In its representations on the application of section 7(1), the Board stated that the consultant's materials consist of "... the proprietary materials developed by [the consultant]". As this statement raised the possibility of the application of section 10(1) of the Act (third party information) to these records, a Supplementary Notice of Inquiry was sent to the parties, including the consultant. This Supplementary Notice sought representations on the possible application of section 10(1) to the consultant's materials. Representations were received from the consultant and the Board in response to the Supplementary Notice.

The records to which the Board applied the exemption in section 38(c) of the Act have been disclosed to the appellant. Accordingly, this exemption is no longer at issue.

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 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.

The Board submits that none of the records contain the personal information of the appellant. I have carefully reviewed the records at issue and agree with the position of the Board, with the exception of the Resume Screening Guides which I have addressed above.

The Board also maintains that the meeting notes contain the personal information of other identifiable individuals. The notes contain comments made by individuals at the meeting about the conduct of certain past and present members of the Cornwall Police. I find that this constitutes the personal information of these individuals.

The consultant's materials contain references to the other candidates for the position of Chief of Police. I find that such information constitutes the personal information of these individuals.

Because the appellant is not seeking access to the personal information of any other individuals, it is not necessary for me to consider the application of the exemptions in section 14(1) or 38(b) of the Act.

THIRD PARTY INFORMATION

Section 10(1) of the Act states, in part:

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,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

All three elements of the exemption must be met in order for it to apply.

Type of Information

The Board submits that disclosure of the records would reveal a trade secret, commercial information and labour relations information. The Board maintains that the consultant has a proprietary interest in the materials resulting from their development and marketing to Police Services Boards.

The consultant does not specifically address the type of information contained in the records. Rather it has provided the following background information on the development of the materials:

In 1994, our Association developed a comprehensive program to aid Police Services Boards when they recruit and employ a new chief or deputy chief of police. The Cornwall Police Services Board is one of many who has utilized this process over the past two year period. Information and comprehensive training is provided to Boards including: a methodology through which the skills and competencies required in the new employee are determined; interviewing skills are developed; interview questions form part of the model; and, the methodology through which the Board assesses (scores) applicant responses to interview questions is provided.

In Order M-29, Commissioner Tom Wright defined "trade secret" as meaning information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and

- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Commercial information has been defined as information which relates solely to the buying, selling or exchange of merchandise or services (Order P-493).

In Order P-653, the term “labour relations information” was defined as information concerning the **collective** relationship between an employer and its employees.

Other than stating that the information constitutes a “trade secret” and that the materials were provided to the Board explicitly in confidence, the Board has not provided any further explanation as to how the information may be characterized as trade secrets. With respect to “commercial” and “labour relations” information, the Board merely states that the materials are such information.

The consultant refers to confidentiality and to the amount of money it spent to develop the model. However, it too goes no further in providing evidence to support the claim that the records contain the type of information as set out in section 10(1) of the Act.

In these circumstances, I find that I have not been provided with sufficient evidence by either the Board or the consultant to conclude that the consultant’s materials contain trade secrets, commercial or labour relations information for the purposes of section 10(1) of the Act. Nor do I find that they contain any of the other types of information enumerated in this section.

As this element of the exemption has not been established, I find that the consultant’s materials do not qualify for exemption pursuant to section 10(1) of the Act.

CLOSED MEETING

Section 6(1)(b) of the Act 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.

In order to qualify for exemption under section 6(1)(b), the institution must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Order M-64]

The first and second parts of the test for exemption under section 6(1)(b) require the Board to establish that a meeting was held **and** that it was held in camera.

As part of its representations, the Board has submitted an affidavit from the individual who was secretary to the Board at the time at which the events at issue took place (the Secretary). The Secretary states that the records for which the Board has claimed the application of this exemption consist of notes taken at meetings of the Chief Selection Committee on February 2, 9 and 15, 1995 and at a special meeting of the Board on May 28, 1995. The Chief Selection committee was a committee of the Board. It was established to hire a new Chief of Police. Based on this information, I am satisfied that these meetings took place and that they were held in camera. Thus, I find that part one of the test has been established.

With respect to part two of the test, the Board relies on the provisions of section 35(4)(b) of the Police Services Act (the PSA) as its statutory authority for holding these meetings in the absence of the public. This section states:

The Board may exclude the public from all or part of a meeting or hearing if it is of the opinion that,

Intimate financial or personal matters or other matters may be disclosed of such a nature, having regard to the circumstances, that the desirability of avoiding their disclosure in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that proceedings be open to the public.

Other than stating that this section of the PSA authorizes the holding of meetings in the absence of the public, the Board has not submitted any representations on the application of this section to the matters discussed at the meetings as recorded in the notes. The Board has not explained how the criteria in the section have been satisfied.

In its submissions on the application of part three of the test, the Board merely states that "... As the text of the notes reveal, the meetings involved discussions with a view to **making a decision respecting what factors should be considered in selecting the new chief of police ...**" (emphasis added). The Board submits that, as it had not previously been involved in the selection of a police chief, input from community stakeholders would be valuable to its decision on how to implement the selection process. Accordingly, senior officers of the Police were in attendance at the first meeting on February 2, 1995. Community representatives attended the February 9, 1995 meeting. At the meeting on February 15, 1995, the selection committee sought

input from the executive of the Cornwall Police Association. The May 28, 1995 meeting was a special meeting of the Board during which the chief selection process was discussed.

Again, in the context of part three of the test, the Board states that some of the information contained in the notes is of a sensitive nature. This information consists of the personal information of individuals other than the appellant. This information is not at issue in this appeal. The Board also states that it chose to withhold the records because it felt that the confidentiality of the comments made by those in attendance should be respected. This information is also not at issue in that it represents the personal views and opinions of these individuals and thus also constitutes their personal information. Finally the Board submits that its decision not to disclose the meeting notes was “influenced by the fact that no part of the notes contain any personal information of the appellant”. While the presence of the personal information of the appellant is an important consideration which would tend to have the Board exercise its discretion in favour of disclosure, its absence, in my view, is not a consideration which should favour non-disclosure, on the basis of section 35(4) of the PSA.

In effect, section 35(4) of the PSA gives the Board the discretion to exclude the public from all or part of a meeting if it “is of the opinion that” the criteria mentioned in the section are met. On the basis of the above discussion, I find it difficult to conclude that the Board exercised its discretion reasonably, based upon relevant factors. No intimate financial or personal matters are at issue. The Board has not explained how it is in the public interest that avoiding the disclosure of the matters discussed, i.e. the factors to be considered in selecting a new Police chief, outweighs the desirability of adhering to the principle that meetings be open to the public. In my view, it is a relevant circumstance that non-Board members attended three of the four meetings and that the Board actively solicited input from members of the public on these issues. The Board advised the public of the public input part of the selection process in the press release it issued to announce the selection of the new chief.

Accordingly, as the Board has not shown that a statute authorizes holding meetings relevant to these records in the absence of the public, I find that the section 6(1)(b) exemption does not apply to the meeting notes. I have provided the Freedom of Information and Privacy Co_ordinator of the Board with a highlighted copy of these records. The highlighted portions constitute the personal information which is not at issue and which therefore should not be disclosed.

ADVICE AND RECOMMENDATIONS

Section 7(1) of the Act states:

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. Information which would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 7(1) of the Act.

The Board states that it retained a consultant from the Ontario Association of Police Services Boards (the OAPSB) to assist it in developing selection criteria and process guidelines for the recruitment of the new chief of police. The OAPSB had recently developed a program on chief selection which was adapted from materials provided by a management consulting firm.

It is the position of the Board that **any** information provided by the OAPSB consultant to the Board during his retainer was in the form of "advice" or "recommendations" regarding the implementation of the chief selection process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making".

In Order P-434, Assistant Commissioner Tom Mitchinson elaborated on the comments of Commissioner Linden:

In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the ministry. The pages of the record which have been exempt by the ministry under section 13(1) in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible under section 13(1) of the Act would be to extend the scope of the exemption beyond its purpose and intent.

In my view, the information contained in the consultant's materials is not sufficiently connected to the deliberative process of government decision-making and policy-making referred to by former Commissioner Linden and Assistant Commissioner Mitchinson to bring it within the scope of section 7(1). Furthermore, the Board submits that the OAPSB had recently developed this program on chief selection and the consultant's materials indicate that it promotes this selection system to Police Services Boards at large.

The source of much of the information contained in this record is members of the Board itself as well as the other groups, such as the Police and members of the public, who provided input on the chief selection process, rather than the consultant. I also note that those records disclosed to the appellant consisting of the questions put to him during the interview also form part of the materials provided to the Board by the consultant. Accordingly, I find that the consultant's materials do not qualify for exemption under section 7(1) of the Act. They should be disclosed to the appellant with the exception of the personal information of the other candidates in the competition.

REASONABLENESS OF SEARCH

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

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

In her affidavit, the Secretary has provided a detailed chronology of the process followed by the Board and the Chief Selection Committee of the Board in conducting the competition for the Chief of Police. Based on a comparison of these events and the responsive records identified by the Board, I have concerns as to whether the Board conducted a reasonable search to locate all the responsive records.

First of all, the Secretary states that the Board held a closed meeting on December 6, 1994 at which it was agreed that the Board would use the chief selection model offered by the consultant. No notes or minutes from that meeting have been identified by the Board.

The Secretary indicates that she was present at the Chief Selection Committee meetings of January 25, February 2, February 9 and February 15, 1995 and that she has written notes of these meetings, but that no minutes were prepared as these were not regular Board meetings. The Chief Selection Committee notes at issue in this appeal are dated February 2, February 9 and February 15, 1995. The Board has not identified any notes from the January 25 meeting; nor has it indicated that the three sets of notes at issue are those taken by the Secretary or whether, in fact, they were recorded by other individuals in attendance at these meetings. If the latter is the case, then, as indicated in the affidavit, the Secretary's notes are still outstanding.

The Secretary further indicates that the Selection Committee held additional meetings on February 11, April 20, and April 22, 1995, while the Board as a whole held meetings on March 7, April 26 and June 1, 1995. It appears that some materials from the July 11 meeting are included as part of the consultant's materials for which the Board has claimed the application of section 7(1) of the Act. However, the Board has not identified any other notes or minutes from any of the six meetings at which issues related to the appellant's request were discussed.

The Secretary then outlines the efforts she made to collect all the responsive records to address the appellant's request. It appears that no materials were received from one of the Board members who was also on the Chief Selection Committee. There is also a major discrepancy between the number of question and answer booklets the Secretary received from the Board members (13) and the number which should have existed (25). There should be five booklets for each candidate, including the appellant. Alternatively, there should be some explanation and identification as to which Board member(s) utilized handwritten notes instead of the prepared booklet.

Based on the above, I am not satisfied that the search undertaken by the Board to locate all of the responsive records was reasonable.

ORDER:

1. I order the Board to disclose to the appellant the non-highlighted portions of the meeting notes as indicated on the copies of these records I am providing to the Freedom of Information and Privacy Co-ordinator of the Board with a copy of this order.
2. I order the Board to disclose to the appellant the consultant's materials with the exception of any references to the other candidates in the competition. The materials disclosed should be copies of those provided to this office with the Board's representations.
3. I order the Board to disclose the records described in Provisions 1 and 2 by sending copies to the appellant no later than **July 29, 1996**.
4. In order to verify compliance with Provisions 1 and 2 of this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to these provisions.
5. I find that the Board's search to locate responsive records was not reasonable in the circumstances of this appeal and order the Board to conduct a further search to locate the records. In conducting this search, I order the Board to undertake the necessary steps to locate any materials from the meetings and individuals I have referred to in my discussion of the reasonableness of search in this order. I order the Board to advise the appellant in writing of the results of this search by **July 29, 1996**.
6. If, as a result of this further search, the Board locates additional records, I order the Board to provide a decision letter regarding access to the records to the appellant in accordance with sections 19 and 22 of the Act, considering the date of this order as the date of the request and without recourse to a time extension.
7. In order to verify compliance with this order, I order the Board to provide me with a copy of the letter referred to in Provision 5 and a copy of the decision referred to in Provision 6 (if applicable) by **August 14, 1996**. These copies should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____

Anita Fineberg
Inquiry Officer

July 9, 1996