



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

ORDER P-1274

Appeal P-9500643

Ministry of Municipal Affairs and Housing



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BACKGROUND:

The appellant represents a non-profit housing corporation (for ease of understanding, I will refer to the corporation as the appellant). In December 1993, the appellant entered into an agreement with the Province of Ontario regarding the development of a building project (the project) on government owned lands at a specific location (the site). Under this agreement, the appellant received an allocation of 60 units. In April 1995, this agreement was amended to increase the site specific allocation by an additional 10 units. In July 1995, the appellant received a letter from the Minister of Municipal Affairs and Housing which revoked the appellant's building allocations.

NATURE OF THE APPEAL:

The appellant requested information from the Ministry of Municipal Affairs and Housing (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The requested information pertains to all internal memoranda and recordings relating to the project, and includes, but is not limited to, the following:

- (a) minutes of all Ministerial approvals for the site,
- (b) all minutes of the Issues Resolution Committee relating to the appellant, and
- (c) all documentation relating to a review conducted pursuant to a Cabinet request, such as:
 - the terms and scope of the review;
 - any reports regarding the cancellations;
 - the result of the review;
 - legal opinions regarding the possible liability of the Government regarding the review.

The Ministry located records responsive to the request and, in processing the request, divided them into 154 pages of general records and 10 record categories. The Ministry then provided partial access to these records. The Ministry denied access to the remainder pursuant to the following sections of the Act:

- cabinet records - sections 12(1)(b), (c), (d) and (e);
- advice or recommendations - section 13;
- economic and other interests - section 18;
- solicitor-client privilege - section 19.

The Ministry also indicated that a number of pages were withheld as they were not responsive to the request.

The appellant appealed this decision.

During mediation, the Ministry issued a supplemental decision in which it released in its entirety the one record comprising category six to the appellant, and portions of a second record comprising category two with a severance made pursuant to section 18(1)(e) of the Act (economic and other interests). The Ministry also clarified its decision and the application of the other exemptions claimed to the different records and record categories as follows:

- section 13(1) is claimed for those records exempted from within the 154 pages;
- section 12(1) is claimed for categories three to five and seven to ten;
- section 19 is claimed for category ten as well as for parts of records comprising categories four, five, seven and eight;
- the records in category one were identified as non-responsive to the request on the basis that they postdate the request;
- pages 28, 29, 30 and 31 were classified as non-responsive as the information contained in them concerns matters recorded in meeting minutes which are unrelated to the request; and
- one paragraph on page 70 was classified as non-responsive as it relates to a matter unrelated to the request.

This office sent a Notice of Inquiry (NOI) to the Ministry and the appellant. Representations were received from the Ministry only at this time. In its representations, the Ministry indicates that it has withdrawn its reliance on section 18. The Ministry originally claimed section 18 for two lines on the record comprising category two. As no other exemptions have been claimed for this information, it should be disclosed to the appellant. The Ministry indicates further that it is no longer relying on section 12(1) to exempt the records in category ten from disclosure. However, the Ministry continues to rely on section 19 for these records.

In the NOI, the Appeals Officer asked the appellant to confirm whether it was interested in pursuing those records identified as non-responsive. As I indicated above, the appellant did not submit representations. As a result, this office contacted it to determine this issue. The appellant indicated that it believes that all records are responsive to its request. The issue of responsiveness of the records was not raised as an issue in the NOI. Accordingly, both the appellant and the Ministry were given an opportunity to provide supplemental representations to address this issue.

Supplemental representations were received from both parties. Along with its representations regarding the responsiveness of records, the appellant also submitted representations on the substantive issues in this appeal, and I will consider them in my final determination.

In its supplemental representations, the Ministry indicated that upon further review of this file it has decided to release the records in category one to the appellant (previously withheld as non-responsive to the request). The Ministry indicated further that it was releasing the previously severed portions of pages 23, 27, 31 and 40 to the appellant. The Ministry had previously exempted these portions under section 13(1). The Ministry provided a copy of its supplemental decision addressed to the appellant to this office. Accordingly, pages 23, 27, 31 and 40, and category one are no longer at issue in this appeal.

RECORDS:

The records at issue in the remaining seven categories have been withheld in full, and consist of the following:

Category three Terms of Reference

Category four Project Status, background note and briefing note

Category five interim progress report and interim report

Category seven Review of Non-Profit Project Development

Category eight Review of Non-Profit Housing Development and Options for Non-Profit Housing Development

Category nine Cabinet minutes

Category ten legal opinions.

The records remaining at issue from the grouping of 154 pages consist of the withheld portions of the following pages: memoranda (pages 80, 83 and 87); minutes (pages 28, 29 and 30); e-mail (pages 59 and 70); handwritten note (page 62); background note (pages 67 and 68); site analysis (pages 74, 76 and 77); program implications (page 91); development schedule (page 112) and briefing note (page 151).

PRELIMINARY MATTER:

NON-RESPONSIVE RECORDS

The Ministry claims that the information in pages 29 and 30, and parts of pages 28, 31 and 70 are not responsive to this request.

Pages 29 - 31 consist of the minutes of the Issues Resolution Committee. The appellant indicates that if a topic in any way deals with it and the ultimate decision regarding the project, then it is relevant to this request. This is the case even where discussion does not directly refer to the appellant. In this regard, the appellant submits that if a discussion impacts on the decision which was made with respect to it, then this information falls within the scope of the request.

Similarly, the appellant indicates that if the information withheld from the bottom of page 70 deals in any way with the site as opposed to the appellant specifically, then it is responsive. The appellant agrees that the information would not be relevant to this request if it only pertains to another company and is not connected in any way with the site.

I do not agree with the appellant regarding the scope of its request to include as responsive any records relating to the site. In my view, the appellant's request as it relates to the site *per se* is restricted to the minutes of Ministerial approvals. However, I agree that the information contained in the records would be relevant if it pertains to or impacts on the Ministry's decision regarding the appellant's project.

The Ministry submits that none of the information withheld from pages 29 - 31 and 70 has any bearing on the decision which was made regarding the appellant, nor does this information pertain to the appellant as set out in the request. I note that the information on page 70 is connected with the site. However, following a review of the information in this record as well as pages 29 - 31, I agree with the Ministry's position. Therefore, I find that the Ministry has properly withheld the information in pages 29 - 31 and 70 as non-responsive.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

The Ministry claims that the withheld portions of pages 59, 62, 67, 68, 70, 74, 76, 77, 80, 83, 87, 91, 112 and 151 are exempt from disclosure pursuant to section 13(1). This section of the Act reads as follows:

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.

Previous orders of this agency have established that advice and recommendations, for the purposes 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. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act.

I have carefully reviewed the information in the records. I find that some of the portions which have been withheld contain specific recommendations of various Ministry staff and many are identified under the headings "Recommendation(s)". The remaining withheld portions of these records would reveal these recommendations.

Further, I find that these recommendations amount to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. Accordingly, I find that the above information is properly withheld under section 13(1) of the Act.

CABINET RECORDS

The Ministry claims that section 12(1) applies to exempt all of the records in categories three, four, five, seven, eight and nine. Originally, the Ministry claimed that it relies on the exemptions in sections 12(1)(b), (c), (d) and (e) of the Act. In its representations, however, the Ministry has

only addressed the application of the introductory wording of this section and sections 12(1)(b) and (e). Although the Ministry did not refer to any other provisions within section 12(1), its representations regarding the records in category nine indirectly refer to section 12(1)(a). As this is a mandatory exemption, I will also consider the application of this section to the records in category nine.

These sections provide as follows:

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,

- (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
- (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- ...
- (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy.

It has been determined in a number of previous orders that the use of the term “including” in the introductory wording of section 12(1) means that the disclosure of any record which would reveal the substance of deliberations of the Executive Council or its committees (not just the types of records listed under the various parts of section 12(1)), qualifies for exemption under section 12(1).

All of the records in categories three to five and seven to nine pertain to the review which was conducted pursuant to a request by Cabinet on June 28, 1995.

Category three

Category three consists of the Terms of Reference (the TR) for the review dated June 30, 1995. The TR provides a summary of the Cabinet’s decision on non-profit housing arrived at on June 28, as well as its direction with respect to the parameters of the review. The TR also sets out the “deliverables” which are to be produced for Cabinet’s consideration. The Ministry submits that disclosure of the TR would reveal the substance of the deliberations of Cabinet on the issue of non-profit housing within the meaning of the introductory wording of section 12(1). In reviewing this record, I agree and find that it is properly exempt pursuant to the introductory wording of section 12(1) of the Act.

Categories seven and eight

In its representations, the Ministry claims that the records in these two categories must be withheld under section 12(1)(b) of the Act. For this exemption to apply to a document, the record in question must contain policy options or recommendations and it must have been submitted or prepared for submission to the Executive Council or its committees.

Category seven contains a Review of Non-Profit Project Development, dated July 21, 1995. This document was prepared by the Ministry and is one of the documents described as one of the "deliverables" in the TR which was to be produced to Cabinet. The Ministry indicates that the information contained in this document was also the basis for a Cabinet Submission dated July 19. This Cabinet Submission, and another Cabinet Submission dated June 26, 1995 form the records in category eight. The Ministry states that the Cabinet Submissions were submitted directly to Cabinet for their deliberation. I am satisfied that the records in both categories were submitted to the Executive Council (Cabinet).

In reviewing these records I find that they all contain a number of policy options and/or recommendations regarding non-profit housing projects. Therefore, I find that the Ministry can rely on section 12(1)(b) to exempt the records in both categories from disclosure.

Category nine

Category nine contains the minutes of Cabinet meetings held on June 28, 1995 and July 25, 1995. In my view, both of these documents record the deliberations of Cabinet regarding non-profit housing. Accordingly, category nine documents qualify for exemption under section 12(1)(a) of the Act.

Categories four and five

The Ministry claims that the records in categories four and five qualify for exemption under section 12(1)(e). These records consist of a Program Status, background note, briefing note, interim progress report and interim report. In reviewing the Ministry's representations on this issue, I have considered the records in these two categories in light of the introductory wording of section 12(1).

The Ministry submits that the briefing note which is dated June 27, 1995 was prepared to provide the Minister with a comprehensive summary of the non-profit housing program and the implications of a decision regarding this program. The Ministry states further that the other information contained in these two categories was included with the briefing note as part of the materials provided to the Minister.

The Ministry submits that the information contained in these records was prepared to brief the Minister on a matter under consideration by the Cabinet. In addition, the Ministry indicates that this material was to be reviewed by the Minister and considered in the preparation of the Cabinet Submission.

In reviewing the contents of these records, I find that their disclosure would reveal the contents of the Cabinet Submission (category eight) and the document in category seven, which I have

found to be exempt under section 12(1)(b). On this basis, I find that these records are properly exempt pursuant to the introductory wording of section 12(1) of the Act. In so finding, it is not necessary for me to consider whether these records are exempt under section 12(1)(e).

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that all of the records in category ten are exempt from disclosure pursuant to section 19 of the Act, which states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

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).

The Ministry submits that the records qualify for exemption under Branch 2.

The appellant submits that unless there is litigation pending or contemplated with the Ministry on this issue, then section 19 cannot apply. The appellant believes that the legal memoranda may have dealt with the broader impact concerning the Ministry's actions. In this regard, the appellant argues that section 19 should be narrowly construed to remove this type of document from the scope of the exemption.

All of the records in category ten are memoranda prepared by counsel in the Crown Law Office, Civil, of the Ministry of the Attorney General for the Director of the Ministry's Legal Services Branch. All of the memoranda contain legal advice regarding the legal implications of certain proposed actions by the Ministry.

I find that all of the records in category ten were prepared by or for Crown counsel for use in giving legal advice. To fall within the scope of Branch 2 of the section 19 exemption, the Ministry must demonstrate that: (1) the record was prepared by or for Crown counsel; **and** (2) that the record was prepared for use in giving legal advice, **or** in contemplation of litigation, **or** for use in litigation (Order 56). Thus, there is no requirement that the legal advice be given in the context of pending or contemplated litigation. Accordingly, these records qualify for exemption under section 19 of the Act.

ORDER:

1. I order the Ministry to disclose the record in category two in its entirety to the appellant by providing it with a copy of this record on or before **October 29, 1996**.

2. I uphold the Ministry's decision to withhold the remaining records from disclosure.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ October 9, 1996