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

ORDER M-871

Appeal M_9600180
[Reconsideration]

City of Guelph

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NATURE OF THE APPEAL:

On October 3, 1996, I issued Order M-844, which addressed a decision made by the City of Guelph (the City) to deny access to a copy of a report respecting fire department operations in the City, particularly response times and fire hall locations, which was completed by the Ontario Fire Marshal's office. The City withheld access to this information pursuant to the exemption found in section 9(1)(b) of the Municipal Freedom of Information and Protection of Privacy Act (the Act).

In Order M-844, I concluded that section 9(1)(b) did not apply, and ordered that the report be disclosed to the appellant, the Guelph Mercury (the Mercury).

In correspondence sent on behalf of the City, this office was asked to reconsider Order M-844 as the Ontario Fire Marshal had not been notified of the appeal or provided with the opportunity to make representations regarding disclosure of the record which his office had prepared.

The request for reconsideration was granted and a Notice of Reconsideration which summarized the issues raised by the appeal was sent to the City, the Mercury and the Fire Marshal. The Office of the Fire Marshal is an organizational unit within the Public Safety Division of the Ministry of the Solicitor General and Correctional Services (the Ministry). Accordingly, the Ministry submitted representations on behalf of the Fire Marshal. Representations were also received from the City.

PRELIMINARY ISSUE:

APPLICATION OF THE ACT

The City submits for the first time in its reconsideration submissions that the record at issue contains personal opinions regarding staffing issues. The City argues that because the staffing issues discussed in the record were the subject of negotiations with the Guelph Fire Fighters Association (which it states were concluded four days after the date of the order), clause 2 of section 52(3) of the Act applies. Section 52(3) reads:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

The interpretation of sections 52(3) and (4) is a preliminary issue which relates to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

The City submits that the record is excluded from the scope of the Act by virtue of paragraph 2 of section 52(3). The City has not stated that the record itself was collected, prepared, maintained or used by or on behalf of the City in relation to negotiations or anticipated negotiations relating to labour relations or the employment of a person by the institution. The City merely submits that the staffing issues addressed in the report were also the subject of negotiations with the Guelph Fire Fighters Association.

In order for a record to fall within the scope of paragraph 2 of section 52(3) of the Act, the City must establish that:

1. the record was collected, prepared, maintained or used by the City or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; **and**

3. these negotiations or anticipated negotiations took place or will take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

The Ministry indicates that the record is a Fire Station Location Study which was conducted by the Office of the Fire Marshal. The Guelph Fire Department requested the study on behalf of the City and the Office of the Fire Marshal provided its assistance to the City in accordance with section 3(b) of the Fire Marshals Act, which states that it is the duty of the Fire Marshal to:

> ... assist members of municipal councils and municipal officers in the formation and organization of fire departments, to make recommendations with regard to equipment, operations, duties and administration of fire departments ...

With its representations, the Ministry enclosed a copy of the Terms of Reference proposed for the study, which detail the purpose of the study and its scope as follows:

> Central to a fire department's fire suppression effectiveness are the number and location of fire stations and the companies they house. Therefore, the review will cover an analysis of this effectiveness, which will include an evaluation of the fire

> protection organization, its methods, operations, practices, staffing, apparatus, equipment, training, communications, fire station facilities and locations. Any peripheral departmental functions, operations or recommendations are deemed to be included.

The record itself states that its primary purpose was to evaluate the response capabilities of the fire department from the existing station locations and to provide options or alternatives to improve or enhance the existing response capabilities by suggesting alternative station locations, additional stations and/or other response procedures.

In Order P-1223, former Assistant Commissioner Tom Mitchinson made the following statements:

> ... in my view, the case law does provide a clear indication that in order to be "in relation to" something, the activity or object in question must do more than merely "affect" that thing; there must be a substantial connection between the activity and the thing to which it is supposed to be "in relation".
>
> Applying this interpretation to the particular circumstances of this appeal, in order for me to find that the WDHP report was prepared in relation to the grievance proceedings, it would not be sufficient that this activity had an impact on the grievance proceedings. In my view, in order for the preparation to have been "in relation to" the proceedings, a more substantial connection would be required. The question is, how substantial does this connection have to be?
>
> Following the approach taken in the constitutional cases, the connection must be fairly substantial. In the context of section 65(6), I am of the view that if the preparation (or collection, maintenance, or use) of a record was for the purpose of, as a result of, or substantially connected to an activity listed in sections 65(6)1, 2, or 3, it would be "in relation to" that activity.

I agree with the interpretation advanced by former Assistant Commissioner Mitchinson.

Applying this interpretation to the circumstances of this appeal, I find that the record was prepared for the purpose of evaluating the response capabilities of the fire department and making recommendations about the location of existing or additional fire stations or response procedures. In my view, it is not sufficiently connected to the negotiations relating to labour relations to properly be characterized as being "in relation to" them. Accordingly, section 52(3) does not apply.

Additionally, I am concerned about the ramifications of adopting the City's position that events which postdate not only the request, but also an access decision, an appeal, the commencement of an inquiry, and even an order could exclude the requested records from the scope of the Act under section 52(3). It cannot have been the intent of the Legislature to enable institutions to negate the right of access established under the Act and the Commissioner's jurisdiction by the simple device of applying a "labour negotiations" use or purpose to the records after the date of the request. While I make no suggestion as to the motives of the City in this particular appeal, such a device could be subject to serious abuse by institutions to avoid their obligations under the

Act by artificially injecting a record or its subject matter into otherwise unrelated or marginally related labour or employment negotiations.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

Sections 9(1)(b) and 9(2) read:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

In Order 210, Commissioner Tom Wright determined that in order for records to qualify for exemption under section 15(b) of the provincial Freedom of Information and Protection of Privacy Act, which is the equivalent of section 9(1)(b) of the Act, the records must meet a three part test. The third part of the test reads, "The information must have been received in confidence."

In Order P-278, Assistant Commissioner Mitchinson considered the interpretation of this phrase and stated:

> In my view, in order for the third part of the section 15(b) test to be satisfied, there must be an expectation of confidentiality on the part of the supplier and the receiver of the information.

I agree.

The Ministry points out that the issue of confidentiality was addressed in the Terms of Reference as follows:

> The (OFM) will consult with appropriate stakeholders in conducting the review. Confidentiality will be ensured in conducting the interviews and field work during the course of this study.

The Ministry submits:

> The confidentiality provision was not intended to imply that the Office of the Fire Marshal placed a requirement upon the City of Guelph to keep information relating to the Study confidential.

As there was clearly no expectation of confidentiality on the part of the supplier of the information, I conclude that the record does not contain information received in confidence from the Government of Ontario within the meaning of section 9(1)(b).

ORDER:

1. I order the City to disclose the record to the appellant by sending him a copy by **December 20, 1996**.

2. 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 1.

Original signed by: December 5, 1996
Holly Big Canoe
Inquiry Officer