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

ORDER M-893

Appeal M_9600259

City of Stoney Creek

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BACKGROUND:

On July 10, 1996, former Assistant Commissioner Tom Mitchinson issued Interim Order M-807. That Interim Order dealt with the reasonableness of the search conducted by the City of Stoney Creek (the City) to locate records responsive to the appellant's request in Appeal M-9600099.

Appeal M-9600099 involved a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to documentation regarding communications between the Mayor of the City and certain named individuals. The appellant appealed the City's initial decision that no responsive records existed.

During mediation of that appeal, the City located a copy of one of the documents identified in the request. This document is a copy of a one-page draft letter prepared on or about November 14, 1995 by counsel retained by the City. The letter is addressed to a named individual other than the appellant (the affected person). The City denied access to this letter on the basis of the following exemptions contained in the Act:

- closed meeting - section 6(1)(b)
- solicitor-client privilege - section 12
- discretion to refuse requesters own information - section 38(a)

The City subsequently advised the appellant that it was also taking the position that, because the document was only a draft and was not sent or communicated to anyone, it did not constitute a "record" for the purposes of section 2(1) of the Act. For ease of reference, I will refer to this draft letter as "Record 1" in this order.

The appellant disagreed with the City's position on the non-disclosure of Record 1 and continued to maintain that more responsive records existed.

In Interim Order M-807, the former Assistant Commissioner dealt only with the search issue, indicating that the remaining issues and any additional issues arising out of the Interim Order would be dealt with in a Final Order.

The former Assistant Commissioner ordered the City to conduct further searches for responsive records and outlined in detail the parameters of these searches. In the event that additional records were located, the City was ordered to issue a decision on access to the documents in accordance with the provisions of the Act. The City was also ordered to provide the appellant and this office with the results of this search and to provide this office with affidavits respecting the searches.

Pursuant to the terms of the Interim Order, the City conducted additional searches to locate responsive records. The City identified one additional document as being responsive to the original request. This is a letter dated November 13, 1995 from counsel to the Mayor. The City denied access to this letter on the basis of sections 12 and 7(1) (advice and recommendations) of the Act. I will refer to this letter as "Record 2".

The appellant filed an appeal of this decision. He continues to maintain that there exist additional responsive records under the custody or in the control of the City. He also believes that the exemptions claimed by the City to withhold Record 2 do not apply.

This office opened Appeal M-9600259 to deal with these matters as well as the outstanding issues in Appeal M-9600099.

The issues to be resolved in this order are as follows:

(1) Whether Record 1 is a "record" as defined in section 2(1) of the Act.

(2) If so, whether the discretionary exemptions provided by sections 6(1)(b), 12 and/or 38(a) apply to exempt Record 1 from disclosure.

(3) Whether the discretionary exemptions provided by sections 7(1) and/or 12 apply to exempt Record 2 from disclosure.

(4) Whether the City conducted a reasonable search to locate records responsive to the request.

A Notice of Inquiry was sent to the City, the appellant and the affected person. The parties were advised that they could rely on their representations submitted in Appeal M-9600099 with respect to the outstanding issues in that file. Representations were received from the City and the appellant. The appellant subsequently forwarded additional correspondence dated December 19, 1996 to this office.

DISCUSSION:

WHETHER RECORD 1 IS A "RECORD"

Record 1 is a draft of a letter prepared for the signature of the Mayor, Deputy Mayor and City councillors. It is directed to the affected person.

The City maintains that it is not a record under section 2 of the Act as it is not correspondence. The draft was not sent, was not approved for distribution by City council members and was never signed. The City further states that the Act "... is not clear on the status of draft documents".

I cannot accept the City's position. "Record" is defined, in part, in section 2(1) of the Act as follows:

> "record" means **any record of information however recorded**, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, [emphasis added]
>
> ...

In my opinion, the use of the word "includes" means that the types of documents described are not exhaustive; they merely provide examples of things that constitute records for the purposes of the Act. Therefore, the fact that the draft may not be correspondence because it was not sent is not germaine to this discussion.

Moreover, there is no dispute that the document constitutes "recorded information". In my view, whether the recorded information is a draft or otherwise of some document is likewise irrelevant to the determination of whether it is a "record". Once something is "recorded information" it is, in my opinion, a "record" within the above-mentioned definition.

Accordingly, I find that Record 1 is a "record" for the purposes of the Act.

SOLICITOR-CLIENT PRIVILEGE/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The appellant appears to suggest that both records contain his personal information.

Each record contains only one factual reference to the appellant which appears merely to describe the context in which the subject matter of the records arose. In my opinion, in neither case can it be said that this constitutes his "personal information" as I do not consider it to be akin to the types of information included in the definition of "personal information" in section 2(1) of the Act. Accordingly, I will consider whether section 12 applies to both Records 1 and 2 without reference to section 38(a).

Section 12 of the Act consists of two branches, which provide a head 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).

It is the position of the City that both branches apply to both Records 1 and 2. I will first consider Branch 1.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the City must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

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

[Order 49. See also Order M-2 and Order M-19]

Both records were prepared by the City's counsel. Record 2 is an opinion addressed to the Mayor concerning the legal characterization of the comments made by the affected person. Record 1 is the draft letter prepared by counsel as a response to these comments. In my opinion, both of these records are confidential communications between a legal advisor and his client, the City, directly related to the giving of legal advice. As such, they are exempt from disclosure pursuant to section 12 of the Act.

In his additional submissions of December 19, 1996 the appellant maintained that it is in the public interest to release the record.

Section 16, the "public interest override", states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

It does not override the exemption in section 12 which I have found to apply to the records.

Because I have found that section 12 applies to Records 1 and 2, I need not consider the application of sections 6(1) and 7(1).

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the City indicates that further records do 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 further 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.

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 Interim Order M-807, the City was ordered to conduct further searches to include:

> ... all relevant files in the Office of the Mayor and any other offices of the City which could reasonably be expected to include communications between the Mayor and the various individuals identified in all seven categories specified by the appellant, for the time frames included in each part of the request.

In addition, the City was ordered to:

> ... arrange for a search for responsive records under its control in the possession of outside counsel, in accordance with its statutory responsibilities...

As part of its compliance with the Interim Order, the City provided this office with affidavits from individuals employed in its Planning Department, Engineering Department, Clerk's Department and the Mayor's Office, listing the files that were searched in each of these locations. The City also provided an affidavit sworn by the legal secretary employed by the City's counsel.

Apart from the records noted in the City's letter of August 1, 1996 to the appellant, no other documents were located.

It will be recalled that, notwithstanding the City's further searches and response of August 1, 1996, the appellant still maintains that additional records should exist. While requested to do so in the Notice of Inquiry dated September 30, 1996 with respect to Appeal M-9600259, the City did not provide this office with any additional information concerning its attempts to locate responsive records but relied on the aforementioned affidavits.

I have carefully reviewed the appellant's initial request describing the seven categories of information which he seeks, as well as all the documentation provided by both parties. Given the nature of the request, the circumstances giving rise to it as evidenced by copies of media reports provided by the appellant, as well as the fact that the City subsequently located Record 1 after maintaining that it did not exist, I can understand the appellant's belief that additional records should exist.

However, based on the affidavits provided by the City, I am satisfied that it undertook a reasonable search for the records and this part of the appeal is dismissed.

ORDER:

1. I uphold the decision of the City to deny access to Records 1 and 2.

2. I find that the City's search for records was reasonable and I dismiss this part of the appeal.

Original signed by: January 31, 1997
Anita Fineberg
Inquiry Officer