



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

ORDER P-1400

Appeal 9600408

Ministry of Municipal Affairs and Housing



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant is a representative of the City of Toronto Urban Development Services Department. On behalf of the City of Toronto (the City), he submitted a number of requests to the Ministry of Municipal Affairs and Housing (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). The requests under consideration in this appeal were for access to “[a]ny study respecting implementation of market value assessment or actual value assessment on neighbourhoods and/or individual properties ... as prepared by the Ministry of Municipal Affairs and Housing or the Ministry of Finance” in relation to the following four municipalities:

- the Town of Markham;
- the City of North York;
- the City of Oshawa; and
- the Town of Kapuskasing.

These four requests were part of a group of 69 submitted to the Ministry on behalf of the City for similar impact studies prepared in relation to various municipalities throughout Ontario.

The Ministry issued one decision letter in response to the 69 requests. One of the 69 requests was forwarded to the Ministry of Finance under section 25 of the Act. The Ministry denied access to the records requested in the remaining 68 requests because “we do not have custody or control of the records”. The Ministry’s decision also advised the appellant that a number of “upper tier” municipalities, including Metropolitan Toronto, had impact studies under their control in relation to their constituent “lower tier” municipalities.

The appellant appealed this decision only with respect to the four requests that dealt with the four municipalities listed above, and accordingly, these four requests, and the Ministry’s response as it applies to those particular requests, constitute the subject of this appeal.

This office sent a Notice of Inquiry to the Ministry and the appellant, seeking representations on the issue of whether the Ministry had custody or control of the records. Only the Ministry submitted representations.

In its representations, the Ministry indicated that it did not have possession of the records. It further advised that these records were “created by the Ministry of Finance for the various municipalities ...”.

In reviewing these representations, I concluded that this comment, as well as the statement in the decision letter that the “upper tier” municipalities had control of records which could be responsive, raised the possible application of the mandatory requirements of section 25(1) of the Act. This section requires institutions to make inquiries about whether another institution has custody or control of requested records, and if so, requires that such requests be forwarded to the institution which has custody or control of the records.

Accordingly, this office sent a Supplementary Notice of Inquiry to the Ministry and the appellant, inviting representations in response to the following questions:

- (1) Do either of the parties have information concerning which “upper tier” municipalities have the requested studies concerning the four municipalities identified above?
- (2) Once it determined that these records were not within the Ministry’s custody or under its control, did the Ministry follow the mandatory provisions of section 25(1) of the Act concerning inquiries to determine whether another institution (which, by virtue of section 25(5), includes institutions under the Municipal Freedom of Information and Protection of Privacy Act) had copies of the requested records?
- (3) Did the Ministry forward the request to the other institutions determined to have custody or control of the records pursuant to section 25(1)?
- (4) Should the decision-maker in this appeal order the Ministry to comply with the provisions of section 25(1)?

Only the Ministry provided representations in response to this supplementary notice.

DISCUSSION:

CUSTODY OR CONTROL

In its initial representations, the Ministry clearly states that the records were created by the Ministry of Finance, and that the Ministry itself is not in possession of the records, and has no right to control or regulate the use or disposal of the records. In the circumstances of this appeal, and in the absence of any evidence to the contrary, I accept this statement. I find that the Ministry does not have records responsive to the four requests which are the subject of this appeal within its custody or under its control.

SHOULD THE REQUEST BE FORWARDED TO ANOTHER INSTITUTION OR INSTITUTIONS UNDER SECTION 25(1) OF THE ACT?

Section 25(1) of the Act states as follows:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,

- (a) forward the request to the other institution; and
- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

I will begin by determining whether I have jurisdiction to consider the issue of section 25(1) on appeal. In my view, a decision to forward a request, or not to do so, is a “decision of the head under this Act” within the meaning of section 50(1), which establishes the right of appeal under the Act. Therefore, I find that a head’s decision in relation to section 25(1) is a proper subject for consideration on appeal, and in an inquiry.

I will now consider whether I should order the request to be forwarded under section 25(1), and if so, to whom.

In my view, the Ministry’s statement in its initial representations, referred to above, that the impact studies were “created by the Ministry of Finance for the various municipalities ...”, strongly implies that the Ministry of Finance has copies of the requested records. It also suggests that the four municipalities may each have a copy of the study concerning their area.

In its supplementary representations, the Ministry advises that in its initial decision letter, it indicated that the Municipality of Metropolitan Toronto has a 1992 study relating to the City of North York.

With respect to the other “upper tier” municipalities that could be relevant to the three other local municipalities which are referred to in the requests under consideration in this order, the Ministry indicates that “upper tier” studies were not done for the Regional Municipality of York (in which the Town of Markham is located) nor for the Regional Municipality of Durham (in which the City of Oshawa is located). The Town of Kapuskasing is not part of a “two-tier” municipality.

The Ministry’s supplementary representations also indicate that, upon receipt of the Supplementary Notice of Inquiry, it contacted six institutions to determine whether they have copies of the requested records. I will now summarize their responses.

- The Ministry of Finance indicates that the requested records are in the custody and control of the municipalities.
- The Town of Kapuskasing indicates that it does not have, and never has had, such a record in its custody or control.
- The City of Oshawa indicates that it has a document entitled “1996 Equalized Assessment Report for the Regional Municipality of Durham based on 1995 Assessment Rolls as Returned”, but that this document is not an actual value assessment or market value study.
- The Town of Markham indicates that it has a record entitled “Report on Reassessment at Full Market Value prepared by Assessment Region # 14 for the Municipal Council of the Town of Markham”. The Ministry does not comment on the responsiveness of this record, although its title suggests that it has some relation to the type of information requested.

- The City of North York indicates that it does not have custody or control of any such impact study. North York referred the Ministry to the Municipality of Metropolitan Toronto.
- The Municipality of Metropolitan Toronto indicates that it does not have custody or control of any such impact study. Metropolitan Toronto states that the Metro Urban Affairs Library maintains hard copies of the 1988 Market Value Assessment data for Metropolitan Toronto. In my view, although this data may be of interest to the requester, it is not an impact study and is, therefore, not responsive to the request.

The Ministry concludes its representations by submitting that “the Act was properly applied to the facts of this appeal”. The Ministry does not otherwise comment on the question in the Supplementary Notice of Inquiry as to whether I should “order the Ministry to comply with the provisions of section 25(1)”. As previously noted, the appellant has not submitted representations in response to the Supplementary Notice of Inquiry, which invited submissions on this point.

In my view, section 25(1) is intended to assist requesters by attempting to ensure that, if they submit a request to an institution which does not have custody or control of responsive records, the request will end up in the hands of an institution which does have custody or control, if such an institution exists. In order to accomplish this, however, it is necessary to determine where such records are located. To a significant degree, this question is not answered by the representations I have received.

The information before me which is of assistance in determining the likely location of responsive records is:

- the records were created by the Ministry of Finance;
- the Town of Markham appears to have a responsive record.

In this situation, I must decide what, if any, remedial order to make. Section 25(1) requires a transfer to be effected within fifteen days after a request is received (a time period long since elapsed). This raises the question of whether I have the power to order the request to be forwarded at this stage of the proceedings. In this regard, I note that this office has previously ordered institutions to forward requests under section 25(1)(a) (in Orders P-217, P-229 and P_386).

Section 54(3) of the Act states that “subject to this Act the Commissioner’s order may contain any terms and conditions the Commissioner considers appropriate.” In my view, this section confers sufficient express authority to support an order requiring a request to be forwarded to another institution or institutions.

However, for the sake of completeness, I will also consider whether the Act confers an implied power on me to order a request to be forwarded to another institution or institutions. In Order P_1390, I considered the case law relating to implied powers of tribunals, and summarized the law in this regard as follows:

Based on the cases just cited on implied tribunal powers, I must consider whether order provisions 1 and 2 flow from a power or jurisdiction which exists “by necessary implication” of the statutory provisions I have referred to, or as a matter of “practical necessity” for accomplishing the Commissioner’s statutory mandate under the Act.

I have already found that a head’s decision in relation to section 25(1) is a “decision under this Act” and thus a proper subject to consider on appeal. Given that section 25(1) is mandatory, I find that the power to order a request to be forwarded to another institution or institutions in the context of an appeal exists “by necessary implication”. Moreover, in the absence of such a power, a meaningful review of decisions under section 25(1) would not be possible. Accordingly, I have concluded that such an implied power is of “practical necessity”.

Therefore, in my view, I have both an express and implied power to order a request to be forwarded to another institution or institutions. Moreover, given that the fifteen day period referred to in section 25(1) would in most instances have elapsed by the time an appeal is even commenced, I find that I have this power despite the fact that this fifteen day period has passed.

I will now consider which institutions, if any, should be the recipients of the requests in the circumstances of this case.

The best evidence before me indicates that the Ministry of Finance is likely to have copies of responsive records. It also indicates that the Town of Markham has a record which is likely to be responsive. Therefore, I will order the Ministry to forward all four requests to the Ministry of Finance. I will also order the Ministry to forward the request relating to the Markham impact study to the Town of Markham. In addition, I will order the Ministry to forward a copy of this order to the recipient institutions for their information. Under the circumstances, the recipient institutions will be permitted to treat the requests as new requests, and the times for response and other access procedures stipulated under the Act and the Municipal Freedom of Information and Protection of Privacy Act, respectively, will commence when the requests are actually received by the recipient institutions. The recipient institutions will not be permitted to charge the \$5.00 request fee in connection with these transfers, although they may charge any other fees under the Act or the Municipal Freedom of Information and Protection of Privacy Act which may be applicable.

ORDER:

1. I order the Ministry to forward the four requests which are the subject of this appeal to the Ministry of Finance, together with a copy of this order, by sending them to the Ministry of Finance by **June 11, 1997**. The Ministry of Finance will be entitled to treat these as new requests, and the access procedure specified in sections 24 through 30 of the Act will apply on that basis.
2. I order the Ministry to forward to the Town of Markham the request which relates to that municipality, together with a copy of this order, by sending them to the Town of Markham by **June 11, 1997**. The Town of Markham will be entitled to treat this as a new

request, and the access procedure specified in sections 17 through 23 of the Municipal Freedom of Information and Protection of Privacy Act will apply on that basis.

3. To verify compliance with the provisions of this order, I order the Ministry to send me a copy of its correspondence to the Ministry of Finance and the Town of Markham referred to in Provisions 1 and 2 when it sends this correspondence to these institutions.

Original signed by: _____
John Higgins
Inquiry Officer

_____ June 4, 1997