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

ORDER MO-1259

Appeal MA-990032-1

Regional Municipality of Ottawa-Carleton

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NATURE OF THE APPEAL:

The appellant made a request for access under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Regional Municipality of Ottawa-Carleton (the Region). The request was for access to a list of companies that have Special Discharge Agreements (SDA) with the Region relating to sewer and waste.

The Region denied access to the requested information pursuant to section 8(1)(a) of the Act.

The appellant appealed the Region's decision to deny access.

I sent a Notice of Inquiry to the appellant, the Region and the companies identified on the list (the affected parties). Representations were received from the Region and five of the affected parties. The applicationof sections 10(1)(a) and 11(d) were raised by some of the affected parties and, as a result, I sent a Supplemental Notice of Inquiry to all parties to the appeal. Supplemental representations were received from one affected party only.

RECORDS:

The record at issue consists of a one page list of the names of 15 companies.

PRELIMINARY MATTERS:

Discretionary Exemption Claimed by Affected Party

One of the affected parties has raised the application of section 11(d), which is a discretionary exemption not claimed by the Region. In the Supplementary Notice of Inquiry, I asked all parties to make submissions on the issue of whether an affected party can rely on the application of a discretionary exemption to claim that access to a record should be denied in circumstances where the institution has not claimed the exemption. I provided the parties with the following quote from Order P-257, in which Assistant Commissioner Tom Mitchinson considered the raising of exemptions by an affected party as follows:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1) [of the provincial Freedom of Information and Protection of Privacy Act, the equivalent of sections 10(1) and 14(1) of the Act], it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the commissioner's office, since the record would have been released ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption

> provided by the Act. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

Although I asked the affected party who raised this exemption in its representations to indicate why this section should be considered in the circumstances of this appeal, I received no additional representations from this affected party.

I agree with the view expressed by Assistant Commissioner Mitchinson in Order P-257, and adopt it for the purposes of this appeal. In this case, I find that a proper consideration of the application of section 10(1) of the Act to the record will address the interests of the party who raised this exemption, and that it is not necessary for me to consider the arguments of this affected party with respect to section 11(d) of the Act, which addresses the issues of the institution.

Late Raising of Discretionary Exemptions

In its representations, dated July 22, 1999, the Region argues for the first time that section 8(1)(c) applies to the record.

On March 3, 1999, the Commissioner's office provided the Region with a Confirmation of Appeal, indicating that an appeal from the Region's decision had been received. The Confirmation also stated that, based on a policy adopted by the Commissioner's office, the Region had 35 days from the date of the Confirmation (i.e. until April 7, 1999) to raise any new discretionary exemptions not originally claimed in its decision letter.

The policy referred to in the Confirmation was originally brought to the attention of the Region in the form of a publication entitled "IPC Practices: Raising Discretionary Exemptions During an Appeal", distributed by the Commissioner's office to all provincial and municipal institutions in January 1993. The objective of the policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant in the disclosure of information is prejudiced.

The Region's representations provide no explanation as to why it did not claim this additional discretionary exemption during the permitted 35-day period, or why I should allow this expanded exemption claim at this late stage of the appeal.

Previous orders issued by this office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case. This approach was upheld by the Ontario Court (General Division) Divisional Court in the judicial review of Order P-883 (Ontario (Ministry of Consumer and Commercial

Relations) v. Fineberg (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.)).
In determining whether to allow the Region to claim this discretionary exemption at this time, I must balance the maintenance of the integrity of the appeals process against any evidence of extenuating circumstances advanced by the Region (Order P-658). I must also balance the relative prejudice to the Region and to the appellant in the outcome of my decision.

In the absence of any representations from the Region on this issue, and in light of the obvious inherent prejudice which would accrue to the appellant in delaying the adjudication of this appeal if the Region is permitted to expand its application of a discretionary exemption claim at this late stage, I find that this is not an appropriate case to allow the Region to rely on the application of section 8(1)(c). In my view, the Region had ample time to review the records and confirm the discretionary exemptions it wanted to rely on as the appeal proceeded through the mediation stage of the process.

However, despite the lack of submissions from the Region on this issue, I do recognize an inherent public interest in not undermining law enforcement by revealing investigative techniques. Accordingly, I have examined the material before me to determine whether disclosure of the record would reveal an investigative technique currently in use in law enforcement.

The Region concedes that the Regional Regulatory Code, which prescribes the regulations applicable to SDAs, is a public document. However, it submits that the public at large is not generally aware of the Region's SDA procedure.

In my view, the Region's section 8(1)(c) claim fails on two counts. It is not an **investigative** technique or procedure, but a procedure by which compliance with the Regional Regulatory Code can be attained. Second, the fact that the procedure is codified in a public document defeats any claim that its efficacy in the detection and prevention of unlawful actions would be compromised by its disclosure.

ISSUES:

Law Enforcement

The Region claims that section 8(1)(a) applies to the record. This section reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> interfere with a law enforcement matter;

Is it a "law enforcement" matter?

The words "law enforcement" are defined in section 2(1) of the Act as follows:

> "law enforcement" means,

(a) policing,
(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b);

The Region has jurisdiction over various aspects of sewage treatment in the Regional Municipality of Ottawa-Carleton, pursuant to sections 76 and 78 of the Regional Municipalities Act. The Region has enacted regulations with respect to sewer and waste disposal, which are found in Part 5.2 of the Regional Regulatory Code (the Code). This Code has been adopted by By-Law 252 of 1992 of Regional Council and subsequently by various amending by-laws. Part 5.2 of the Code creates contraventions and prohibits any discharge or deposit into the sewer system of matters specifically prescribed in the Code, and of matters in excess of the amounts specifically prescribed in the Code. Failure to comply with the provisions of the Code will attract prosecutions and fines.

Part 5.2.6 of the Code prescribes the regulations applicable to SDAs. SDAs are created to allow the discharger in question (in this case the affected parties) to discharge waste which exceeds the prescribed limits into the sewers under certain conditions. The types of conditions which may be imposed include:

(1) the payment of surcharge fees by the company for the treatment of the overstrength waste;

(2) placing restrictions on the quantity and/or quality of the sewage allowed to be discharged by the company; and

(3) monitoring and measuring by the company.

When an SDA has been executed with a company, the Region indicates that it will not prosecute violations of the provisions of the Code as long as the terms of the SDA have been complied with by the company. Should the company breach any part of the SDA, the Region retains the option of laying charges and prosecuting the offending company.

The Region submits that the process of entering into an SDA is considered to be a cooperative method of bringing offending companies into compliance with the terms prescribed in Part 5.2 of the Code. The Region argues that because it has clear recourse to invoke its prosecutorial powers with respect to any violation of the Code should an SDA not be fulfilled by the company in question, once a company enters into an SDA with the Region, the aspect of law enforcement is triggered since the potential for laying a charge against a company is present.

Only two of the affected parties addressed the issue of "law enforcement" in their representations.

One of the affected parties agrees with the Region and submits that the definition of law enforcement refers to "records that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed", and has been met because the record "identifies companies which are subject to inspections that could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed."

Another affected party disagrees with the Region. This affected party submits that because the SDA provides a self-reporting mechanism that enables the Region to monitor compliance with its terms, it is distinct from law enforcement procedures such as policing activities, investigations or inspections carried out by institutions. The affected party submits that provided the company abides by the terms of the SDA, very little inspection by the Region occurs with respect to the SDAs and no law enforcement issues arise -- under the SDA, the company essentially polices itself.

In my view, the Region's enforcement of the Code, whether initiated by inspections prior to an SDA or by investigations subsequent to a violation of an SDA qualifies as "law enforcement" as either has the potential to lead to proceedings in court, where penalties or sanctions, specifically fines, could be imposed.

Could disclosure reasonably be expected to interfere with a law enforcement matter?

The purpose of the exemption contained in sections 8(1)(a) of the Act is to provide the institution with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing law enforcement matter. The institution bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing and second that disclosure of the records could reasonably be expected to interfere with the matter (Order M-1067).

The Region submits that much of the information obtained during the monitoring process is volunteered by the companies to Region staff. It argues that one of the reasons for this voluntary exchange of information is the knowledge that the identity of the companies in question will remain confidential. The Region submits that if the names are disclosed, the companies would be less willing to cooperate with the Region, making it more difficult for the Region to effectively obtain information, monitor and inspect a company's activities with respect to its discharges and to its compliance with the specific terms of the SDA.

By the Region's description, the anticipated harm is to a process which is a cooperative method of bringing offending companies into compliance. Should disclosure of this record have a detrimental effect on the willingness of companies to cooperate with the Region by voluntarily addressing the consequences of their discharges, prosecution of the matter is an option which remains open to the Region and, based on my review of the information before me, would not be impeded by disclosure of this record.

If a specific company were not willing to cooperatively provide the Region with information under an SDA, section 5.2.10 of the Code provides that an inspector may enter any industrial premises at any time without a warrant or notice to observe, measure and take such tests or collect any samples as required by the inspector. Further, the Code prohibits persons from preventing, hindering, obstructing or interfering with an inspector in entering a premises, making tests, taking samples, inspecting or observing any plant, machinery, equipment, work or activity for the purposes of administering or enforcing the Code.

In his request letter, the appellant indicated to the Region that he requested and received access to similar information from Halton and Peel Region, and that he has received the names of over 2900 companies in Toronto that are paying surcharges under SDAs.

The Region did not question the veracity of the appellant's claim nor did it provide information respecting the detrimental effect (if any) of the disclosure of similar information by other municipalities.

The Region submits that a very probably consequence of disclosure is that the companies in question willbe labelled as 'polluters" by members of the public or the media, or be portrayed in some other unfavourable manner which would lessen their desire to cooperate with the Region. In my view, there might continue to be an incentive for companies to achieve compliance cooperatively, as managing a prohibited discharge through an SDA appears to be a responsible approach (the companies effectively pay for the cost of treating the excess discharge) which is less of a burden on taxpayers than a full-fledged prosecution.

The Region has not submitted that pursuing prosecutions would be prohibitively expensive were companies no longer willing to participate in an SDA. Such an argument, in my view, might be more appropriately considered under section 11, which the Region has elected not to claim

Accordingly, for the above reasons, I find that the Region has not established a reasonable expectation of interference with a law enforcement matter, and section 8(1)(a) does not apply.

Third Party Information

Some of the affected parties have suggested that the record should not be disclosed because harms like those listed in section 10 would result.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the Region and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

[Order 36. See also Orders M-29 and M-37]
The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

Disclosure of the record would reveal that the companies on the list entered into an SDA as a result of excess discharges into the sewers. However, in my view, it is not accurate to characterize the names on the record as commercial, financial or labour relations information, or a trade secret, as those terms are used in section 10(1) of the Act. Therefore, I find that the first part of the test for exemption under section 10(1) has not been established.

Order P-373 addressed issues very similar to those raised here. In that appeal, the request was made to the Workers' Compensation Board (WCB) for information respecting the names of employers having the highest penalty ratings based on their accident experiences. In upholding the decision in Order P-373 that section 17(1) did not apply to that list of names, the Court of Appeal found:

> With respect to Part 2 [of the test], the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers.

The record at issue in this appeal contains less detailed information about the companies than what

was at issue in Order P-373, which was created in similar circumstances. In Order P-373, the record listed the names and addresses of the top fifty employers in descending order according to the amount of penalty surcharge, and some of the records contained the actual amounts of surcharge. The record at issue in this appeal contains only the name of each company which has entered into an SDA. The record does not contain the amounts of surcharge or the nature and volume of the excess discharge, nor would disclosure of the names reveal this information. In my view, disclosure of the record would not permit the drawing of accurate inferences as to any information supplied to the Region with respect to the discharges, with the exception of the name of the company.

Further, I do not agree that the names of the companies were supplied to the Region in confidence. In my view, it is the financial and commercial information which led to the creation of the SDA and the information provided pursuant to the terms of the SDA which was supplied in confidence, and none of this information would be revealed through disclosure of the records at issue in this appeal. Accordingly, I find that the second part of the test for exemption under section 10(1) has also not been established.

Because all three parts of the section 10 test must be met, I find that section 10 does not apply to the record at issue.

ORDER:

1. I order the Region to disclose the record to the appellant by sending him a copy of the record by January 25, 2000 but not before January 18, 2000.

2. In order to verify compliance with the terms of this order, I reserve the right to require the Region to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by December 16, 1999
Holly Big Canoe
Adjudicator