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

ORDER MO-1611

Appeal MA-020239-1

Town of Amherstburg

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NATURE OF THE APPEAL:

The Town of Amherstberg (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a report referred to by the requester as the "visioning statement" prepared by Town Council in the Spring of 2001.

The Town advised the requester that the responsive record had been declared confidential by Town Council and therefore could not be released.

The requester (now the appellant) appealed the Town's refusal to release the report.

After discussions with a Mediator from this office, the Town issued a proper revised decision letter to the appellant, citing section 7(1) of the *Act* (advice or recommendations) as the basis for denying access to the one responsive record. Also during mediation, the appellant clarified that she is only seeking access to the sections of the record dealing with: (1) Town Council's goals for the next three years; and (2) the construction of an arena.

Mediation was not successful in resolving the appeal, so it was transferred to the adjudication stage. I sent a Notice of Inquiry to the Town, setting out the facts and issues in the appeal and seeking written representations. The Town provided representations. I decided it was not necessary for me to seek representations from the appellant in order to dispose of the issues in this appeal.

RECORD:

The one responsive record consists of a 32-page report titled "Visioning Retreat", dated April 19-20, 2001. It was prepared by a management consultant retained by the Town. As clarified during mediation, the portions of the record that remain at issue in this appeal are the sections dealing with the Town's goals and the construction of an arena. These portions are found at Pages 3-5, 20 and the top portion of Page 27.

DISCUSSION:

The Town claims section 7(1) of the *Act* as the only basis for denying access to the record. This section reads:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Section 7(2) provides a list of exceptions to the section 7(1) exemption. If any of these exceptions are present, the Town is precluded from relying on section 7(1) as the basis for refusing to disclose a record. One exception is if the record contains "factual material" (section 7(2)(a)). Section 7(2)(a) of the *Act* requires that, despite section 7(1), factual information must be disclosed. In Order 24, former Commissioner Sidney B. Linden stated:

> .... 'factual material' does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in the record.

The Town states that the record was prepared by a management consulting firm retained by the Town to facilitate a retreat and prepare a report to the Town Council. The Town provided me with a copy of the proposal submitted by the management consultant for this work, which was apparently accepted by the Town. The proposal confirms the scope of the project, the approach to be followed, and the product to be produced by the consultant. I find that the record was prepared by "a consultant retained by an institution" to the purposes of section 7(1) of the *Act*.

As far as section 7(2)(a) is concerned, the Town asserts that there is "no body of fact in [the] report". Although the Town points out that "no factual material was actually developed specifically for the retreat which was essentially a brainstorming session on which the consultant's recommendations were based", it is only the actual report itself that is at issue in this appeal and not any other records that might fit this broader description.

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of the section 13(1) exemption in the provincial *Freedom of Information and Protection of Privacy Act*, which is equivalent to section 7(1) in the municipal *Act*. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as "advice or "recommendations", the information contained in a record must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)). Information in records that would reveal the advice or recommendations is also exempt from disclosure under section 7(1) of the *Act*. (Orders 94, P-233, M-847, P-1709)

In Order PO-2028, I examined the application of the section 13 exemption in the provincial *Act*. After reviewing relevant past orders, I stated:

> What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains "advice" for the purposes of section 13(1), is not determinative of the issue. Rather, the content must be

> carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation [the record at issue in that appeal], careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing "mere information", then section 13(1) applies.

Applying this reasoning to the current appeal, in my view, much of the information contained in the relevant portions of the record consists of "mere information" rather than any advice or recommendations. I will now deal with each portion separately.

Pages 3-5 are contained in a section of the report headed "Retreat Comments". These pages focus on one topic under discussion at the retreat: the Town's arena. The first portion of Page 3 gives a brief historical description of issues involving the arena, and the rest of Page 3, all of Page 4, and the first portion of Page 5 identify various questions and comments about the arena raised during discussions. I find that these portions of the record contain various issues and comments made by attendees at the retreat concerning the use and operation of the Town's arena. After a brief background statement, these pages identify specific questions and record the opinions and views concerning the arena. There is no suggested course of action that could be accepted or rejected by the Town, and I find that Pages 3, 4 and the top portion of Page 5 do not qualify for exemption under section 7(1) for these reasons. Alternatively, I find that these portions of the record contain "factual material", and fall within the scope of the section 7(2)(a) exception.

Page 27 is headed "Goals and Values", and lists a series of statements, presumably developed by the Town at the retreat. Only the "Goals" portion at the top of Page 27 remains at issue in this appeal. Again, I would characterize the responsive portion on Page 27 to simply record the comments made by participants regarding the Goals of the Town. There is no explicit advice or any recommendations contained on Page 27, nor could any "advice or recommendations" reasonably be inferred from the contents of this page. Accordingly, I find that the responsive portion of Page 27 does not qualify for exemption under section 7(1), or alternativey that it falls with the exception in section 7(2) of the *Act*.

The bottom portion of Page 5 is headed "conclusions" and consists of a summary of the various comments about the arena discussed at the retreat and reflected in Pages 3, 4 and the top portion of Page 5. It reflects a summary of opinions and a consolidation of views. However, in my view, it does not contain "advice or recommendations" as the terms are used in section 7(1). There is no explicit advice, and clearly no recommendations, nor can any advice reasonably be inferred from the information contained in the bottom portion of Page 5. Therefore, I find that the remaining portion of Page 5 also does not qualify for exemption under section 7(1).

Page 20 is included in the section of the report headed "Recommendations". It consists of a re-statement of the conclusions from Page 5, a summary of the suggested approach to take, three statements identified as specific "recommendations" and a summary statement. The top portion

of Page 20, which contains the conclusions, does not qualify for exemption under section 7(1) for the same reasons as the bottom portion of Page 5. As far as the rest of Page 20 is concerned, on its face, it might appear that, because it identifies a suggested approach and then lists a number of "recommendations", that would be sufficient to satisfy the requirements of section 7(1). However, in my view, this portion does not qualify in the circumstances of this appeal, for the following reasons.

First, I do not accept that disclosing the information on this portion of Page 20 could, as former Commissioner Linden established, interfere with "the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making", or inhibit the free and frank exchange of views. For one thing, the proposal submitted by the consultant for this project states that "the entire report [will be] presented to a meeting of council". The report itself does not contain any explicit reference to confidentiality, nor does it indicate that it would be presented at an *in-camera* meeting. Based on the content of the consultant's proposal (which was identified by the Town as "the terms of the consultancy agreement"), it is clear that the consultant and the Town would have understood and accepted at the time of entering into the agreement that any report produced in this context would be formally submitted to the Town Council. In my view, this understanding would preclude any argument from the consultant that advice and recommendations offered in this context would be inhibited if not restricted to a confidential setting. Indeed, the consultant and the Town would have understood from the beginning that any advice or recommendations offered in preparation for, during or resulting from the retreat would ultimately be formalized into an official Town document. I find that the underlying purpose of the section 7(1) exemption has no application in this context. I also find that, applying the reasoning in Order PO-2028, the format of the record and the fact that the information is included under the heading "recommendations" is not determinative of whether the contents of page 20 qualify as "advice and recommendations" as the term is used in section 7(1) of the *Act*. (See also Order PO-1919, where I applied a similar purposive approach to the application of section 13 of the provincial *Freedom of Information and Protection of Privacy Act*, the equivalent provision to section 7(1) of the municipal *Act*.)

The Town advises me that the "meeting of council" referred to in the consultant's proposal was an *in camera* meeting. The Town submits:

> The subject report was presented to Council in camera by myself as a Consultant in May 2001 (before I was employed by the town) but Council took no action whatever on it nor have since [sic]. However if it is now released publically [sic] the potential exists for serious misunderstanding of Council by the citizens of Amherstburg who will tend to assume (incorrectly) that Council has adopted the recommendations which has not happened.

The Town, like any municipality, is required to hold it meetings in public, subject to its authority to consider certain issues at closed sessions, as outlined in section 239 of the *Municipal Act*. (Although the *Municipal Act* was recently amended, the relevant section dealing with *in-camera* meetings (section 55) at the time the record at issue in this appeal was created was not substantially changed). The relevant portions of section 239 provide:

> (1) Except as provided in this section, all meetings shall be open to the public.

Exceptions

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(a) the security of the property of the municipality or local board;

(b) personal matters about an identifiable individual, including municipal or local board employees;

(c) a proposed or pending acquisition or disposition of land by the municipality or local board;

(d) labour relations or employee negotiations;

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

(f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

(g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.

Other criteria

(3) A meeting shall be closed to the public if the subject matter relates to the consideration of a request under the Municipal Freedom of Information and Protection of Privacy Act if the council, board, commission or other body is the head of an institution for the purposes of that Act.

Resolution

(4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,

(a) the fact of the holding of the closed meeting; and

(b) the general nature of the matter to be considered at the closed meeting.

If the requirements of section 239 are established, section 6(1)(b) of the *Act* provides a discretionary exemption that allows an institution to refuse to disclose a record that reveals the substance of deliberations of an *in camera* meeting, as long as the subject matter of the deliberations has not been considered in an open public session.

In the circumstances of this appeal, the Town chose not to rely on section 6(1)(b) to deny access to the record. In addition, other than the statement made by the Town that the report was presented at an *in camera* meeting, I have no evidence before me, such as an agenda, a resolution, or minutes to establish that the properly constituted *in camera* meeting was held to discuss the report. In order for the Town to rely on the *in camera* exemption the Town would have had to provide sufficient evidence to establish its authority to hold an *in-camera* meeting for the purpose of discussing the "visioning retreat" report. As I stated in Order MO-1215 when dealing with a Township's reliance on the section 6(1)(b) exemption:

> As far as section 55(5)(b) [of the *Municipal Act*] is concerned, I accept the Reeve's sworn evidence that a meeting of some sort was held on April 25, 1998, but the Township has not provided me with sufficient evidence to establish that it was a properly constituted *in camera* meeting of Council or one of its committees. The appellants and the Township obviously have conflicting views on this issue. However, the burden of proof lies with the Township and, in my view, it has not provided sufficient evidence to establish that it was authorized to hold its April 25, 1998 meeting in camera, pursuant to section 55(5)(b) of the *Municipal Act*.
>
> Similarly, the Township has not provided sufficient details of the subject matter or substance of the deliberations which took place at the April 25, 1998 meeting to persuade me that disclosure of the record would reveal the actual substance of any such deliberations.

Similarly in this appeal, the Town has not provided sufficient evidence to establish that it was authorized to hold an *in camera* meeting to discuss the "visioning retreat", pursuant to section 239 of the *Municipal Act*.

In addition, having carefully reviewed the content of the record, in my view, it would appear unlikely that any of the section 239 requirements would apply in any event. The "Visioning Retreat" report deals with a wide range of topics, but none of them, on their face, would appear to fall within the list of circumstances outlined in section 239.

Finally, and in the alternative, I do not accept that the "recommendations" on page 20 reflect recommendations made by the consultant. In my view, the role of the consultant, as described in the proposal, was to conduct interviews, facilitate discussions, and assist representatives of the Town to reach decisions on various visions, goals and operational undertakings. The consultant was not retained for the purpose of providing independent advice or recommendations. Rather, his role was to assist the Town in developing its own set of priorities and recommended actions. In my view, any recommendations contained on page 20 (or any advice or recommendations found elsewhere in the report for that matter) are recommendations developed by the Town itself, and not by the consultant. Accordingly, they are not "advice or recommendations of … a consultant retained by an institution" as required in order to satisfy the requirements of section 7(1).

For all of these reasons, I find that none of the relevant portions of the record qualify for exemption under section 7(1) of the *Act*, and they should be disclosed to the appellant.

ORDER:

1. I order the Town to disclose Pages 3-5, 20 and the top portion of Page 27 of the record to the appellant by **March 5, 2003**.

2. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Town to provide me with a copy of the pages of the record that are disclosed to the appellant.

Original signed by: February 12, 2003
Tom Mitchinson
Assistant Commissioner