



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1871-F

Appeal MA-030222-1

City of Windsor



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This is my final order dealing with the outstanding issues remaining from Interim Order MO-1851-I.

NATURE OF THE APPEAL:

The City of Windsor (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records sent to or received by specified companies and their affiliates relating to certain municipal infrastructure projects. After conducting an inquiry and receiving representations from the City and an affected party, I issued Interim Order MO-1851-I. In that order I found, among other things, that Record 4 and the second page of Record 3 satisfied the requirements of sections 12 and 7(1), respectively. However, I found that the City had failed to exercise its discretion under these sections. I therefore included a provision in Interim Order MO-1851-I requiring the City to exercise its discretion under these sections with respect to the relevant records and to provide me (and the appellant) with an outline of the factors considered in doing so. I also gave the appellant an opportunity to submit representations on whether the City properly exercised its discretion.

I received representations from the City. I have not received representations from the appellant.

DISCUSSION:

EXERCISE OF DISCRETION

The section 12 and 7(1) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In its representations, the City states that it took into consideration that that the records do not contain the personal information of the appellant. It states that the advice in the records is in relation to meetings with third parties and potential conflict of interest allegations. The City submits that solicitor-client privilege is a concept of long standing. Its importance to the ability of clients to communicate with their legal counsel and vice versa in a straightforward and confidential manner has always been greatly protected. The advice was given in the context of that type of confidence.

The City submits that it has ongoing issues related to cross-border transportation and rail transportation, and it needs to reinforce for its staff that they may express opinions on sensitive topics and this will not come back to harm the City. This is as much a protection for the staff as it is for the City. Further, the City submits that it and all of its residents benefit when this type of discourse can take place.

Having reviewed the reasons and rationale provided by the City for exercising its discretion against the disclosure of Record 4 and the portion of Record 3 at issue, I am satisfied that it has taken into account the particular circumstances of this case, and that there is nothing improper in its exercise of discretion.

ORDER:

I uphold the decision of the City to deny access to Record 4 and the second page of Record 3.

Original signed by: _____
Sherry Liang
Adjudicator

_____ November 23, 2004