ORDER MO-1815

Appeal MA-030218-1

City of Toronto

NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), and on behalf of a company (the requester), a lawyer asked the City of Toronto (the City) for access to all of the health inspection records held by the City's Health Department pertaining to the requester.

The City decided to give the requester some of the information. It denied access to the remainder of the information on the basis of these sections of the *Act*

- section 12 (solicitor-client privilege)
- section 14 (invasion of privacy)

The requester (now the appellant) appealed the decision.

During mediation of the appeal, the parties resolved a number of issues.

- The appellant indicated that he was not interested in some of the information and so those records were removed from the scope of the appeal.
- The City decided to disclose some more information.
- In issuing this revised decision, the City also decided to apply a new exemption, section 7 (advice to government), to one of the records (page 56).

As the parties could resolve no other issues, the matter moved to the adjudication stage and I have conducted an inquiry under the *Act*.

I initially sought and received representations from the City. I then sought the representations of the appellant. I received no representations from the appellant, nor did the appellant otherwise communicate with this office during my inquiry.

The only record remaining at issue is numbered page 56 and is an email dated May 30, 2002.

ANALYSIS:

RAISING NEW DISCRETIONARY EXEMPTIONS LATE

Institutions are required to claim discretionary exemptions no later than 35 days after the Confirmation of Appeal and a decision maker can refuse to consider discretionary exemptions raised after that date. In the City's revised decision of August 20, 2003, the City dropped its section 12 claim and instead applied section 7 of the *Act* to the record, an exemption it did not claim in its original decision letter. The Confirmation of Appeal notice sent to the City indicated that the City would be permitted to claim additional discretionary exemptions no later than July 28, 2003.

Where an institution is claiming a discretionary exemption later than 35 days after the Confirmation of Appeal, it must explain why it is claiming a discretionary exemption at this stage and why the discretionary exemption should apply [See Orders P-1014 and P-1137].

Moreover, previous orders have recognized that the late raising of discretionary exemptions can cause the integrity of the process to be compromised or the interests of the appellant to be prejudiced [see Order P-658, for example].

The City provided several reasons for being permitted to raise the section 7 including that

- the City had already indicated that it intended to exempt the record from disclosure
- the additional claim was made during the mediation process and just 23 days after the expiration of the 35 day period, therefore it did not have a negative impact on the integrity or timing of the adjudicative process
- the raising of the new exemption did not prejudice the appellant because an exemption had already been claimed for the record and there was no delay in the process because the Notice of Inquiry had not yet been issued

As also noted by the City in its representations, this office routinely considers a number of factors when deciding whether to permit the late raising of a new discretionary exemption (see, for example, Orders PO-2034, PO-2113 and PO-1888). In this case, those factors operate in favour of the City and they are

- the City had already demonstrated an intention to withhold the record by claiming the section 12 exemption
- the new exemption was raised only 23 days after the expiration of the 35 day period, during the mediation stage and before the adjudicative process had commenced
- the City's new exemption claim did not cause a delay in the appeal process
- despite the new exemption, the City participated in the mediation process in a meaningful way and, in fact, disclosed further information to the appellant

In the circumstances of this appeal, I am satisfied that the integrity of the process is not compromised by the new exemption claim, nor has any prejudice to the appellant been demonstrated. I therefore find that the City is entitled to raise the possible application of the section 7 exemption.

I will now examine whether this exemption applies to the record at issue.

ADVICE TO GOVERNMENT

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of

government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)] (leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)).

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)] (leave to appeal granted (Court of Appeal Doc. M30913 and M30914, June 30, 2004)).

The City states that small portions of the email record may be disclosed to the appellant as they do not reveal advice. The City does not object to disclosure of the names of the sender and the recipient, the date, the salutation, and the closing line and name.

The City asserts, however, that the main body of the email, which is one short paragraph, contains direct advice and recommendations. It submits that a large portion of this part of the record

> suggests on its face a course of action with respect to an enforcement matter that will ultimately be accepted or rejected by the person being advised. The author of the email is suggesting a course of action to be taken in the event of a certain scenario.

And, further

> … [A]lthough the subject line of the email and the first sentence of the first paragraph of the body of the email appear to contain factual information, disclosure of this information would permit the appellant to accurately infer the nature and substance of the advice which begins in the next sentence of the email.

I agree with the City that the email contains advice or recommendations. When the entire context is examined, it is clear that the author of the email is suggesting a course of action with respect to a particular matter germane to the enforcement procedure. It is also clear to me that the subject line and opening sentences of the email are the factual information founding the advice and from which, if disclosed, one could accurately infer the advice or recommendation given.

Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. Having examined the record, I find that none of the exceptions applies in the circumstances of this appeal.

Therefore, I conclude that the main body of the email record at page 56 is exempt from disclosure on the basis of section 7(1) and should not be disclosed to the appellant. While I agree with the City that small portions of the record are not advice or recommendations, those portions disclosed alone provide only meaningless information and therefore need not be disclosed either.

EXERCISE OF DISCRETION

The section 7 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. When an institution decides that this exemption is available to deny access it must exercise its discretion.

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

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].

The City submits that it has properly exercised its discretion.

> In doing so the City has taken into account the provisions, spirit and purposes of the *Act* and has specifically considered the impact of disclosure of the record on the operation of the inspection and enforcement process that is the subject of the appellant's request.

I am satisfied that the City properly exercised its discretion in the circumstances. I am satisfied that the City considered the relevant circumstances and did not take into account irrelevant

considerations. In this case, the City bore in mind the purposes of the *Act* by disclosing much of the information sought by the appellant and exempting only a fraction of the information on the basis of a limited and specific exemption.

ORDER:

I uphold the City's decision.

Original signed by: July 16, 2004
Rosemary Muzzi
Adjudicator