



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2090

Appeal MA-050377-1

The Corporation of the Town of Thessalon



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Corporation of the Town of Thessalon (the Town) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for:

... two documents in relation to sewer and water rates for Thessalon. The first study was done by an engineer that makes suggestions about rates for residents and businesses of the Town of Thessalon, which I believe was used as a basis for the sewer and water rates.

[A named engineering firm] completed a further study in regards to recommendations to sewer and water rates as they relate specifically to the [requester's business].

The Town identified two records as responsive to the request, granting the requester full access to the first report and partial access to the second. The Town denied access to the remaining portion of the second report pursuant to section 7(1) (advice or recommendations) of the Act.

The requester, now the appellant, appealed the Town's decision to this office.

No resolution of this appeal was possible at mediation and it moved to the adjudication stage of the appeals process for an inquiry.

This office sent a Notice of Inquiry to the Town, initially, and received representations on the application of section 7(1) to the portion of the record remaining at issue. A Notice of Inquiry was then sent to the appellant along with a copy of the non-confidential portions of the Town's representations.

Shortly after the appellant's representations were received, I assumed carriage of this appeal from the former adjudicator.

Upon reviewing the appellant's representations, I determined that they raised issues to which the Town should be given an opportunity to reply. In the Reply Notice of Inquiry, I invited the Town to respond to the appellant's representations on the application of section 7(1) and to provide further representations on its exercise of discretion. I sent the representations of the appellant, without attachments, to the Town with the Reply Notice of Inquiry and received representations in response.

RECORD:

The sole record at issue consists of the undisclosed portions of a report prepared by an engineering and surveying firm, dated July 4, 2005. The section titled "4.0 Recommendations" was withheld from the appellant.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

General Principles

Section 7(1) provides:

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.

This exemption is subject to the exceptions listed in section 7(2). The relevant parts of section 7(2) read:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material; ...
- (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
- (g) a report containing the results of field research undertaken before the formulation of a policy proposal ...

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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2006] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways: the information itself consists of advice or recommendations; or the information, if disclosed, would permit one to accurately

infer the advice or recommendations given [Orders PO-2028, PO-2084, upheld on judicial review, as cited above].

Examples of the types of information that have been found not to qualify as advice or recommendations include:

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order 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 PO-2028, upheld on judicial review, as cited above].

Representations

The Town submits that section 7(1) of the *Act* applies to exempt the Recommendations portion of the record because it contains advice or recommendations as contemplated by that section.

To provide context for its claim of the section 7(1) exemption, the Town states:

Council retained the services of [the named engineering firm] to provide guidance and recommendations to Council to assist it in making the decision whether or not to provide metered water supply to [the appellant's business] and other businesses within the Town. ...

[The] implementation of a metered rate system with corresponding rates and costs was the "course of action" that Council had to decide to accept or reject. Council deliberated on the contents of the [record] at a session of Council and ultimately decided against proceeding with the option of metered water services. The [appellant was] notified of this by way of letter...

The Town also refers to the exceptions to the section 7(1) exemption, listed in section 7(2), and asserts that none of the exceptions apply since any information that may have fallen into those exceptions has already been disclosed to the appellant. The Town specifically refers to sections 2.0 and 3.0 of the report and states:

Paragraph 2.0 of the [record] was disclosed to the Appellants because it contained factual information with respect to the unit values and rates for water imposed by the Town pursuant to By-Law No. 1272. Also, paragraph 3.0 of the [record] was disclosed to the Appellants because it contained an analysis of the differing water rates in other municipalities.

The Town describes the potential implications of the withheld portion of the record being disclosed as a consequence of it being ordered out through this inquiry as follows:

... the Town submits that [disclosure] would inhibit the free flow of advice or recommendations to the Town in the future. Municipal Councils have been granted the power under the *Municipal Act* to make complex decisions on a wide host of issues affecting the operation and services provided by a Municipality.

In making these decisions, Municipal Councils often need to seek advice from consultants and other professionals in order to evaluate and determine the appropriateness of certain decisions or potential courses of action. If Councils were forced to disclose the advice and recommendations that it had sought for assistance in its decision making and deliberation process, this would impede Council's ability to take actions and make decisions without unfair pressure. For example, Municipal Councils may be unduly influenced to accept all advice and/or recommendations received by its consultants, despite the fact that it may not be in the best interest of the Municipality... [In] order to ensure the proper decision making ability of Municipal Councils they must be free to seek advice and deliberate on such advice through the legislated decision making process, without fear that the advice will have to be disclosed thereafter to the public.

The appellant's representations convey an apparent desire to better understand the decision-making process of the Town with respect to its decision not to proceed with the implementation of a metered water system for his business. The appellant prefaces his representations on the application of section 7(1) to the Recommendations portion of the report by indicating that the consultant who prepared the report "recommended that we see the recommendations in this study, since it has such a large impact on our operating costs". The appellant further submits:

We have been asking the council for a meter to pay on consumption of sewer and water, rather than paying a flat rate, since our business is very seasonal in nature. We operate in a very competitive environment and the viability of our livelihood is dependent on reasonable operating expenses. ...

If this recommendation is kept confidential, the message is the council can act in a random manner, regardless of what the experts have said. If consultants are hired at the expense of the ratepayers, the ratepayers should have a right to know what the consultants have recommended if it impacts their livelihood. If a municipal council fails to follow a recommendation of a consultant, then residents should be

entitled to ask Council why the recommendations were not followed. Will municipal councils only reveal recommendations only if they agree with their decisions? ...

If the council ignores recommendations, what check and balance system is in place for the ratepayer? If there is no check and balance system, what are the rights of the ratepayer? Unlike other levels of government, there is no opposition party or Ombudsman for municipal ratepayers to appeal to.

With respect to the possible application of the exceptions in section 7(2), the appellant submits that the report and recommendations may contain: factual material [paragraph (a)]; a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution [paragraph (f)]; or a report containing the results of field research undertaken before the formulation of a policy proposal [paragraph (g)]. Although the appellant quotes the wording of the exceptions as they are found in section 13(2) of the provincial *Freedom of Information and Protection of Privacy Act*, the similar wording of the exceptions as they appear in section 7(2) of the *Act*, which governs me in this appeal, have been substituted.

In its Reply representations, the Town submitted:

[The] wording of s. 7 suggests that the legislature intended to consider the protection of an institution's freedom to seek advice/recommendations without fear of forced disclosure requirements. The Town believes that the preservation of the integrity and proper functioning of the municipal decision making process is a relevant consideration for using its discretion under s. 7 to withhold said information. ...

The Town respectfully disagrees with the Appellant's implied assertions that the Recommendations of the ... Report relate to its business viability and as such there is a 'sympathetic or compelling need' for him to receive this information. This information was advice given by an engineering firm, retained by the Town, on water rates and costs should the Town decide to go on a metered water system. There is no legislative authority which obligates the Town's Council to implement this consultant's recommendation. ...

The Town submits that the intent of section 7 and of the *Act* is not such as to unduly frustrate an institution's freedom to seek advice and to deliberate on advice without fear that the advice would be the subject of public scrutiny. An Order to disclose in this instance, however, would frustrate Council's freedom to seek advice and deliberate on such advice and may cause Council to succumb to political decisions as opposed to decisions which may be in the best interest of the community.

Analysis and Findings

As previously stated, in order for the information to qualify as “advice or recommendations”, it must suggest a course of action that will ultimately be accepted or rejected by the person or decision-maker being advised.

I have carefully reviewed the entire report and have paid particular attention to the Recommendations portion, which was withheld from the appellant by the Town pursuant to section 7(1). It is clear from the record that it was prepared by the consultant retained by the Town for the purpose of reviewing comparative rates and practices of surrounding municipalities with respect to water metering, and making recommendations in that regard. The advice is clearly stated as a series of recommendations as to how the Town should proceed in the event that water metering is the chosen means of monitoring and recouping costs for water consumption.

The suggested course of action need only be made for the purpose of “ultimately being accepted or rejected by its recipient” during the deliberative process. In addition, this exemption is not time limited and information may continue to be exempt under section 7(1), even though an institution may have completed its decision-making on a matter [Order P-920].

In the circumstances of this appeal, I find that the advice or recommendations put forward by the consultant engineering firm in the Recommendations portion of the report qualify as a suggested course of action which the Town was in a position to ultimately accept or reject. Accordingly, I find that all of the information contained in the withheld portion of the record qualifies as “advice or recommendations” as contemplated by section 7(1).

I must now consider whether any of the mandatory exceptions contained in section 7(2) of the *Act* apply to the record.

The appellant has suggested that certain exceptions to section 7(1) found at section 7(2) should apply to the Recommendations section of the record. As set out previously, the relevant portions of section 7(2) read:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material; ...
- (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
- (g) a report containing the results of field research undertaken before the formulation of a policy proposal; ...

Based on my review of the Recommendation portion of the report, I am not persuaded that it, or the report as a whole, can be described as matching either of the types of records in paragraphs (f) or (g), that is, a feasibility or other technical study, or field research results.

However, the appellant has also submitted that the Recommendations section contains “factual information” and I agree. The Recommendations section includes factual information relating to, for example, the water metering programs of surrounding municipalities. This raises the possibility of the application of section 7(2)(a).

In my view, however, the manner in which the Recommendations are presented and the nature of the content does not lend itself to severance, under section 4(2) of the *Act*, of what might be deemed “factual information”. The factual information contained in that portion of the report is so intertwined with the recommendations the consultant is making that to attempt to separate it from the recommendations would still reveal the substance of the recommendations or would permit the drawing of accurate inferences as to the nature of the advice and recommendations.

I find, therefore, that section 7(2)(a) does not apply to the information in the Recommendations section of the report and as a result, I find that the Recommendations section of the report is exempt under section 7(1).

EXERCISE OF DISCRETION

As indicated above, the section 7(1) exemption is discretionary and permits the Town to disclose information, despite the fact that it could withhold it. The Town must exercise its discretion and, on appeal, this office may determine whether the Town erred in doing so [Orders PO-2129-F and MO-1629].

This office may find that an 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; or it fails to take into account relevant considerations. In any of these situations, I may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. However, I am not in a position, as an adjudicator, to substitute my own discretion for that of the institution [see section 43(2) of the *Act*].

The Town submits that it exercised its discretion in good faith and not for an improper purpose, or based on irrelevant considerations. The Town claims that it exercised its discretion in a forthright manner by disclosing to the appellant all those portions of the report that were reasonably believed not to fall within in one of the exemptions in the *Act*. The Town further claims that:

... the preservation of the integrity and proper functioning of the municipal decision making process is a relevant consideration for using [the Town’s] discretion under s. 7 to withhold said information. ...

The Town refutes the appellant's "implied assertion" that disclosure of the Recommendations portion of the report is connected to, and important for, the viability of the appellant's business. The Town appears to be suggesting that this factor could not, therefore, constitute a 'sympathetic or compelling need' which would lead the Town to exercise its discretion differently and provide the appellant with access to the information sought.

Finding

I have considered all of the circumstances of this appeal, and the withheld portion of the record. Notwithstanding the appellant's desire to ask Council why the consultant's recommendations were not followed, with that information in hand, I find nothing in the manner in which the Town exercised its discretion that would justify an order requiring it to re-exercise that discretion. The Town took the position that section 7(1) applied to exempt the Recommendations section and determined that no other relevant considerations outweighed the purpose of that section. Accordingly, I find that the Town properly exercised its discretion under section 7(1) in accordance with its obligations under the *Act* and I will not interfere with it on appeal.

ORDER:

I uphold the decision of the Town.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ September 27, 2006