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

ORDER MO-2433

Appeal MA08-51

City of Toronto

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BACKGROUND:

The requester explains the background to his request in the following manner:

> In the summer/fall of 2007, the City of Toronto [(the City)] made a distinction among the four types of bows and arrows which had been previously allowed at the E.T. Seton archery range for decades. Specifically in the fall of 2007, crossbows were prohibited without a permit [in City parks] in the mistaken belief that crossbows were firearms...

NATURE OF THE APPEAL:

The requester submitted a request under the *Municipal Freedom of Information and Protection Act* (the *Act*) to the City of Toronto (the City) for access to the following information:

> 1. A memo prepared by [a named lawyer] of the City's legal department concerning an interpretation of Section 608-4 of By-law 854-2004 pertaining to bows and arrows, specifically cross bows. I believe this memo was prepared at the request of [the] Parks Manager of the Northern District. [The Parks Manager] has a copy of this memo as does my local Councillor … and [another named] Councillor.
>
> 2. Notes or background information pertaining to Section 608-4 of By-law 854-2004 at the time of adoption. [The Parks Manager] has informed me that this is one page showing a hand written addition of the word "crossbow" in 608-4 A but otherwise no notes to indicate any rationale or discussion by Council when the revised 608-4 was approved.
>
> 3. A recent report by [the Parks Manager] concerning possible alternatives for restoring the use of the archery range at E.T. Seton Park. [The Parks Manager] has informed me that he has submitted this report to … [the] Chair of the City's Parks and Environment Committee.

The City identified several records responsive to the request and issued a decision letter granting partial access to them. The City denied access to the remainder of the records pursuant to sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) of the *Act*.

The appellant appealed the City's decision to this office. In his letter of appeal, he conveyed his belief that there should be additional records responsive to part 2 of his request other than the one-page excerpt from section 608 of By-law 854-2004 (the By-law) released to him by the City. The appellant noted that the record he received "… is different from the By-law copy previously provided by [a named individual] and the City Clerk's office." Accordingly, he maintained that there must be a record showing a handwritten notation regarding crossbows.

This office appointed a mediator to try to resolve the issues between the parties. When the mediator contacted the appellant to discuss the concern about the By-law excerpt, he confirmed that it is not simply a different version of the By-law he wanted but, as indicated in the request itself, "… [all] the notes and existing background information for the rationale of the changes between the previous and current By-law concerning section 608-4 (A) and (B)."

At that point, the mediator contacted the City to request that a further search for records responsive to part 2 of the request be conducted. The City's response was that the record provided to the appellant in response to his access request and the apparently differing version to which he refers are the same. Specifically, the City stated that the only record that exists is one with the word "cross bow" underlined. The City did not comment on whether its search located other notes or background information pertaining to section 608-4 of the By-law at the time of adoption. Upon learning this information, the appellant questioned the adequacy of the search conducted by the City. Accordingly, the adequacy of the City's search for records responsive to part 2 of the request was added as an issue in this appeal.

As this appeal could not be resolved by further mediation, it was transferred to the Adjudication stage of the process, where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry to the City, initially, seeking representations on the issues, which I received. I then sent a modified Notice of Inquiry to the appellant, along with a copy of the non-confidential representations of the City, inviting him to provide representations for my consideration in this appeal.

The appellant submitted representations. Based on my review of them, I was concerned that the appellant was under a mistaken impression that this inquiry could influence City decision-making with respect to the use of the archery range at E.T. Seton Park. Accordingly, I asked a staff member from this office to contact the appellant to provide information about the limits of an inquiry under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Under the *Act*, my authority is limited to reviewing the decision made by the City as regards access to the information requested by the appellant, and the adequacy of the City's search for records responsive to his request. I have no jurisdiction to review any decisions made or actions taken by the City in relation to the use of its archery facilities, and I will not be reviewing or commenting upon them in this order written to dispose of the issues under the *Act*.

In addition, after considering the appellant's submissions about the City's interpretation of the request, I decided to seek representations from the City on the scope of the request. I also asked the City to respond to the appellant's representations on the issue of the exercise of discretion. Having been provided a copy of the appellant's submissions, in part, the City provided supplementary representations.

In the initial stages of preparing this order, I decided that I required representations from the City on the possible application of section 38(a), as it appeared that the records contained the appellant's personal information. The City subsequently provided submissions.

RECORDS:

There are two records at issue in this appeal:

- Record 1: an email exchange between City Legal Services and the Manager of Parks, North York District, dated October 23 and 30, 2007 (2 pages) - *denied in full*; and

- Record 2: a briefing note regarding the E.T. Seton Archery Range, dated December 7, 2007 (6 pages) - *denied in part*.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

In my view, determination of the scope of the appellant's request is an important first step in setting the proper context for a review of the adequacy of the City's search for responsive records. As stated previously, the appellant asserted that the City's search for records responsive to part 2 of his request - background information and notes related to the approval of the By-law - may have been inadequate. Accordingly, I set out my request for representations on the issue in the reply Notice of Inquiry as follows:

> In a letter [sent during mediation], the appellant wrote the following:
>
> > My request for the items in [part] (2) will be satisfied if the City confirms in writing that there simply was no council discussion of the addition of crossbow in (A) [of section 608-4 of City By-law 854-2004] **and** that notes, supporting rationale, position papers, background information etc. do not exist.
>
> I am asking the City to respond to the appellant's position …, as well as providing representations on the issue of search in the format described below [emphasis added]**.**

Representations

The City did not respond to the request for clarification outlined above. However, in the City's initial representations, the City confirmed its understanding that the appellant was "seeking all notes and existing background information" with respect to part 2 of the request. More specifically, the City advised (in its search representations) that the Corporate Access and Privacy office received copies of the records responsive to parts 1 and 3 of the request from the named City solicitor. The City submitted that "non-responsive records such as her drafts of the By-law were not provided as these working papers were not 'notes or background information indicating any rationale or discussion by Council pertaining to [the By-law] at the time of adoption'."

The appellant expressed the view in his representations that the City's above-noted submissions represent an "excessively literal and a unilateral interpretation of his request." In correspondence submitted during mediation, the appellant states:

> …#2 Notes and Background Information. My request is for the notes, supporting rationale, position papers, existing background information, or records of any discussion for the rationale for the changes between the previous and current bylaw concerning section 608-4 (A) and (B). This new bylaw was adopted by the Council of the City of Toronto as By-law No. 854-2004 and the word crossbow was added in section (A)…

In response to the inclusion of the Scope issue in the Reply Notice of Inquiry, the City submits that:

> … [It] would not be in keeping with previous orders of the IPC to simply treat any record which may appear to relate to any excerpt of a request divorced from the context of the entire request, as responsive to the request as a whole. The City submits that the well-established test for a record to be responsive to a request is that the record must be "reasonably related" to the content of the actual request.
>
> … [T]here was no ambiguity in the original request, nor did the City need to contact the requester to clarify the intent of the request. The wording of the request plainly sets out the appellant's desire for access to three "classes" of items:
>
> 1. A specific memo from Legal Services;
> 2. A specific report from the Parks Manager to the Chair of the City's Parks and Environment Committee; and,
> 3. Notes or background information pertaining to Section 608-4 of Bylaw 854-2004 at the time of adoption to indicate any rationale or discussion by Council when the revised 608-4 was approved.

Findings

The City submits that the request contains clearly worded restrictions on its scope with respect to the three types of records sought. I agree. On a plain reading of the wording of the request, I am satisfied that the description of the records of interest to the appellant was sufficiently detailed to provide a reasonable basis for a search by City staff. In his own words, the appellant stated that he, and other recreational archers, sought to understand whether the addition of crossbows to the By-law was "for some purpose with supporting rationale or simply an error or an incorrect belief that crossbows were firearms." The appellant's reasons for filing this access request were clear and, in my view, this clarity of purpose likely assisted the City in its interpretation of the request.

I find that the scope of the request relates to the inclusion of "crossbows" in Section 608-4 (A) of Toronto City By-law 854-2004, and that it includes: the two records specified by the appellant (a memo prepared by a named solicitor in City Legal Services regarding the interpretation of the aforementioned By-law and a briefing note prepared by the North York District Parks Manager about the archery range at E.T. Seton Park); as well as any records providing the rationale for the revision of the By-law or setting out discussion by City Council at the time of the By-law's approval.

I will now proceed with my review and findings with regard to the City's search for records.

ADEQUACY OF SEARCH

The appellant has expressed concern that the City may not have identified all of the records responsive to part 2 of his request, which relates to the "rationale" for the By-law revision.

General Principles

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the City to carry out further searches.

The *Act* does not require the City to prove with absolute certainty that further records do not exist, but the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. Similarly, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Representations

In describing the steps taken in response to the request, the City advises that senior staff from Parks, Forestry and Recreation (Parks) and Legal Services were contacted. According to the City, the departmental responses regarding the search request came from the Parks Manager and from the City solicitor specifically named in the request. The City submits:

> [Corporate Access and Privacy (CAP)] received an email from [the named solicitor] who had conducted a search of all relevant Legal Services files for responsive records. She advised that she would be providing copies of the records pertaining to items 1 and 3 of the request. She also indicated that [the Parks Manager] would have the record relevant to item 2 which she clarified as a briefing note and not a report.

The City notes that it subsequently received the records pertaining to parts 1 and 3 of the request from the City solicitor, and a one-page document with "the word 'crossbow' written in" from the Parks Manager. The City submits that because the appellant had indicated that this latter document was not the one he had previously been given, CAP asked Parks staff to conduct additional searches for further records. According to the City,

> CAP received an email from [a Parks staff member] indicating that she had followed up with [the Parks Manager] and that additional searches by his staff had been conducted. To the best of their knowledge, a record with a handwritten notation did not exist.
>
> [The Parks Manager] sent an email to CAP indicating that he had consulted with [the City Solicitor] as well as [the] Manager of Parks Standards and Innovation whose staff were the division leads during the preparation of the By-law. Both … had conducted further searches of their files. Other than the one page document already provided to the appellant, there did not appear to be any documentation related to the issue of why crossbows were specifically added to the By-law as a prohibited item.
>
> … [T]he [CAP] Manager … contacted Parks and Recreation staff and received confirmation that there are no additional responsive records relating to the request other than what had been provided to the CAP office. In addition, it was determined from a search of the City's website that there were no records relating to any council discussions regarding the revision of the By-law.

The City maintains that since the retention period for legal matters is 21 years and the corresponding period for most Parks records is seven years, no responsive records, "if they existed," would have been destroyed yet. Further, the City adds,

> Staff also provided a possible explanation as to why there are no other records. During the discussions about the By-law, crossbows may have been simply added as a result of an attempt to be as inclusive and as specific as possible when identifying potentially dangerous weapons that should be prohibited in City parks. Because there were no discussions or deliberations specifically about crossbows, no records such as notes or background information exist.

As previously suggested, the appellant's main concern appears to be that records responsive to part 2 of his request relating to the rationale for the inclusion of crossbows in the By-law may not have been located by the searches conducted to date. The appellant concedes that:

> [I]t is difficult for me to comment on this matter. I fully expect the City to do its best. I am encouraged that based on the City's response… [background information on why crossbow was added to [the By-law]], any reasonable person would conclude it was simply a mistake.

The balance of the appellant's representations under this issue identify steps that could be taken to remedy the alleged mistake in adding crossbows as prohibited weapons in City parks. They do not directly address the adequacy of the City's search.

Analysis and Findings

As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.

The appellant admits to a certain uncertainty about whether additional records responsive to part 2 of his request may exist. As noted previously in this order, the appellant's initial concerns with the adequacy of the City's search appear to have arisen following his review of the record disclosed to him as responsive to that part of the request. The appellant claimed, for example, that the By-law copy disclosed to him was a different version of the record than one he had previously been provided by another City department. This discrepancy appears to have led him to question whether there might be additional responsive records, which in turn led to my request to the City in the initial Notice of Inquiry, seeking confirmation of Council discussion and the existence of records related to the rationale for the By-law revision. As noted previously, the City did not directly respond to these queries.

However, notwithstanding the fact that the City declined to clarify this point specifically, I have been persuaded by the available evidence and the overall circumstances of this appeal that the City has made a reasonable effort to identify and locate any existing records. The City has

correctly pointed out that the *Act* does not require an institution to prove with absolute certainty that records or further records do not exist [PO-1954]. Moreover, I accept that relevant City staff were asked to conduct searches and that they were armed with knowledge of the nature of the records said to exist, at least partly because the appellant's interests were well conveyed through his request. Indeed, based on the evidence before me, it appears that relevant City Parks and Legal Services staff conducted several separate searches for records responsive to part 2 of the request in response to the questions raised about the version of the record disclosed to the appellant.

Furthermore, I accept the evidence of the City that responsive records related to Council discussions or deliberations specifically related to crossbows and their addition to the By-law, or additional background information, simply may not exist for the plausible reasons suggested.

Accordingly, based on the information provided by the City and the circumstances of this appeal, I find that the City's search for records responsive to the request was reasonable for the purposes of section 17 of the *Act*. Accordingly, I dismiss this part of the appeal.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. In circumstances where the record contains the appellant's personal information, the relevant exemption for sections 7(1) and 12, as claimed in this appeal, is section 38(a) in Part II of the *Act*, which states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, **7**, 8, 8.1, 8.2, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information.

As a preliminary determination in deciding what sections of the *Act* may apply, it is necessary to determine whether the record contains "personal information" and, if so, to whom it belongs. In section 2(1) of the *Act*, "personal information" is defined as "recorded information about an identifiable individual," and various examples are outlined by paragraphs (a) to (h). The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The parties did not initially submit representations on this issue. However, in its supplementary representations on section 38(a), the City appears to concede that the records contain the appellant's "personal opinions and views."

On my own review of the records, I find that they contain information pertaining to the appellant that qualifies as his personal information within the meaning of paragraphs (e) (personal opinions or views), (g) (view or opinion about him), and (h) (name, with other personal information) of the definition in section 2(1) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ SOLICITOR-CLIENT PRIVILEGE

In view of my findings above, the City's exemption claim for the records at issue in this appeal falls under section 38(a), read in conjunction with section 12. Section 12 of the *Act* states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches. Branch 1 arises from the common law. Branch 2 is a statutory privilege. The onus is on the City to establish that at least one branch applies. In this appeal, the City claims that branch 2 of section 12 applies. Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Representations

The City asserts that branch 2 of section 12 applies to exempt both records at issue. The City submits that the records were held in the files of the City solicitor who was responsible for drafting the By-law and for providing legal advice to the program area involved. According to the City, the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation."

However, the City also submits that "the records are subject to statutory solicitor-client communication privilege" because they are "direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice" [P-1551]. The rest of the City's representations outline case law that expands more specifically upon the principles of branch 1 and the common law solicitor-client privilege exemption.

The City submits:

> Record 1 … is a confidential email from a City solicitor to her client in Parks in which she provides her legal opinion in response to the client's request for advice

> on the proper interpretation of By-law 854 and the claim that cross bows are bows and arrows.
>
> Record 2 … is a part of a briefing note that contains information that was provided to the solicitor so that she could prepare her legal opinion. Paragraph 2 of page 3 clearly refers to the solicitor. If these pages were to be disclosed, they could reveal information that was either created by the solicitor or was maintained by her as part of her working papers on a number of issues relating to the By-law and cross bows.

The City concludes its submissions by stating that solicitor-client privilege applies to the records at issue because they constitute confidential communications created by the City's solicitor for the purpose of providing legal advice or were compiled and maintained by her for that purpose.

The appellant submits that the City's claim of solicitor-client privilege "stretches the boundaries of that concept." According to the appellant,

> While [the individual lawyer] may be a member of the City's legal staff, the opinion of whether or not crossbows are bows and arrows is hardly the type of detailed legal advice prepared "in contemplation of or for use in litigation."

For the most part, however, the appellant's representations do not directly address the City's arguments in support of the claim to solicitor-client privilege over the records. Rather, as I understand the appellant's representations, the circumstances surrounding the inclusion of crossbows in the By-law are such that fairness dictates that access should be granted. The appellant submits that:

> As a resident taxpayer of the City of Toronto, it is reasonable that I be entitled to the opinion that I (among others) paid [the named City legal counsel] to prepare, if the City is not compromised.

Further, the appellant submits:

> The City is in no way legally compromised by [the lawyer's] opinion about bows and arrows. If crossbows are bows and arrows, the previously existing parks use can be reinstated without costs. If crossbows are not bows and arrows, permits are apparently required but reasonable criteria can be determined by the City.

The appellant also submitted supplementary comments and a *Toronto Star* article published earlier this year regarding the claim of solicitor-client privilege in another appeal with this office.

Analysis and Findings

The appellant has argued that disclosure of the information at issue would not "compromise" the City's interests. However, my determination of whether a record is exempt under section 12 of the *Act* does not turn on the presence or absence of "compromise" to the party resisting

disclosure. Rather, to support the application of the section 12 exemption, the City must provide sufficient evidence to establish that the record was "prepared by or for counsel employed or retained by an institution for use in giving legal advice." To establish what appears to be the City's alternate position, solicitor-client communication privilege, the City is required to provide evidence that the record constitutes "direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice" [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

Based on the City's representations, and my review of the records at issue in this appeal, I will uphold the City's section 12 exemption claim, in part.

Record 1 is an e-mail memo written by a solicitor employed by the City, and I am satisfied that the record itself constitutes the City solicitor's legal opinion and advice as to whether or not crossbows are "bows and arrows" for the purpose of the By-law. Accordingly, and subject to my findings on the City's exercise of discretion, below, I find that Record 1 is exempt under section 38(a), together with section 12.

On my review of Record 2, however, and contrary to the City's submissions, I am not satisfied that this record, in its entirety, was prepared by or for the aforementioned City solicitor for the purpose of obtaining legal advice, or in contemplation of, or use in, litigation for the purposes of branch 2 of section 12. With specific reference to the content of the briefing note, I reject the City's submission that it contains information that was provided to the solicitor so that she could prepare her legal opinion. The date of the briefing note (as it appears on the footer) is December 7, 2007, while the City solicitor's legal opinion (Record 1) is dated October 30, 2007. Moreover, the briefing note was prepared by the North York District Parks Manager to provide City staff with background information and options regarding the use and management of the archery range at E.T. Seton Park. While I accept that the City's solicitor may have been consulted at some point by the individual responsible for the briefing note's preparation, this record is, in my view, primarily factual and informative in nature and does not contain legal advice. The one exception to this conclusion relates to the short paragraph on page 3 of the briefing note that specifically refers to the City solicitor and summarizes her legal opinion. In the instance of this short paragraph, I am satisfied that its disclosure would reveal the City solicitor's legal advice and I will uphold the City's claim of section 12 to withhold that one portion of Record 2. However, I find that there is insufficient evidence to support a finding that the remainder of Record 2 was prepared by or for counsel to obtain legal advice, or in contemplation of, or use in, litigation.

Moreover, and with reference to the City's alternate position under branch 1 of section 12, the mere fact that Record 2 may now be found "in the files of a solicitor in the City's Legal Department," does not mean that it is subject to solicitor-client communication privilege. It is well-established that confidentiality is an essential component of the privilege. In this appeal, the City has not tendered evidence of Record 2's confidentiality, either explicit or implicit, and the record itself bears no outward markings of such confidentiality [see *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

In addition, I am not satisfied by the City's evidence that Record 2 forms part of the City's solicitor's "working papers." For the most part, the record does not directly relate to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27]. With regard to whether a record may be considered to be the working papers of legal counsel, I adopt the following reasoning of Adjudicator Steven Faughnan in Order MO-2231:

> It is only where a record contains or would reveal the contents of a communication between the solicitor and client that it would so qualify. For example, where a record reveals the thought processes of the lawyer in formulating legal advice, such as the lawyer's notes of his or her research or comments on or legal impressions concerning the subject matter of the advice, it would qualify under the working papers component of solicitor-client communication privilege.

In my view, only the paragraph on page 3 of Record 2 contains any content of a communication between the City solicitor and her client, and I have already upheld the exemption of this portion of the record under the City's claim of branch 2 of section 12.

In summary, I find that I have not been provided with sufficient evidence to support a finding that Record 2 is exempt under either branch of section 12, with the exception of the paragraph on page 3 previously identified.

In addition, I find that the appellant's own personal information, where it very briefly appears in one part of Record 1, is so intertwined with the information that I have found to be solicitor-client privileged that it cannot reasonably be disclosed without revealing the privileged information. Accordingly, I find that it should be withheld under section 12.

Subject to my review of the City's exercise of discretion under section 38(a), below, I find that Record 1 and part of Record 2 are exempt under section 12.

ADVICE TO GOVERNMENT

The City also claims that Record 2 is exempt under section 7(1) and that none of the exceptions to the exemption found in section 7(2) apply.

Section 7(1) states:

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

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. Furthermore, advice or recommendations may be revealed in two ways: either 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 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 [2005] 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 [2005] S.C.C.A. No. 563].

Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681]. Sections 7(2) and 7(3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7.

Representations

The City submits that the briefing note "contains a suggested course of action that was ultimately accepted or rejected by the recipient of the advice or recommendation." The City's representations do not directly identify the recipient of the briefing note nor is this apparent from the copy of the record submitted during this appeal. However, the appellant's request identifies the recipient of the briefing note as the Chair of the City's Parks and Environment Committee. According to the City,

> Some pages set out specific recommendations, for example, page [4] outlines the recommendations of an expert that were used by staff to make their own recommendations… [and] page [7] sets out option 4 for which all concur is "the best choice".
>
> Some pages identify other options, the disclosure of which would provide the rationale and basis for the staff's subsequent final advice or recommendation… If this information were to be disclosed, it could reasonably allow a knowledgeable individual to subsequently determine from what was rejected what the specific advice/recommendation that was ultimately accepted.

Referring to Order P-363, the City states that "[g]overnment must have the benefit of staff advice which is candid, direct, and to the point" and submits that disclosure would have a "chilling effect" on full and frank exchange of ideas within the City, leading to inhibition of policy and decision-making.

The appellant reiterates the position previously articulated regarding section 12 that he is entitled to receive a copy of the "report about a city park that I (among others) paid [the author] to prepare, if the City is not compromised in any way." Further, the appellant takes the position that

> … the City is in no way compromised by the provision of this report which I understand explores the various options to restore parks use, including By-law revision and/or criteria for permit. This type of report does not contain "advice or recommendations" such as termination of an employee or the other types of extreme personnel advice that 7(1) was designed to protect.

The appellant's representations do not otherwise address section 7 of the *Act*.

Analysis and Findings

The City claims that Record 2 is exempt in its entirety under section 7(1). Accordingly, I must determine whether it reveals, either directly or by inference, a course of action that will ultimately be accepted or rejected by the person or decision-maker being advised.

The rationale for what was to be the section 7(1) exemption was canvassed in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), as follows:

> Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public. We are in general agreement with both of these propositions [page 288].

As previously noted, Record 2 is a briefing note prepared by the North York District Parks Manager for the City's Parks and Environment Committee regarding the use and management of the archery range at E.T. Seton Park. The record was disclosed in part by the City. Remaining at issue are pages 2 to 7, which contain the following four sections: "Issue", "Considerations", "Departments/Agencies Involved" and "Options to Consider, and Pros and Cons for each [Options]".

Based on my review of the record, I find that much of it consists of background, factual and evaluative information, which does not qualify as advice or recommendations for the purposes of

section 7(1). In my view, the sections titled "Issue" and "Departments/Agencies Involved" consist of "mere information." I find that they do not qualify for exemption under section 7(1) since their disclosure would not reveal advice or recommendations, or a recommended course of action, nor would their disclosure permit inferences about the recommended course of action.

In introducing the four options that are presented in the final section of the briefing note ("Options to Consider, and Pros and Cons for each") the "Considerations" section also contains factual and background material, including a review of the input received from an individual who had previously been consulted on the issue of archery range use. This factual and background information describing the options laid out in the final section is considerably intertwined, in my view, with the observations, opinions, analysis, and views of the individual who authored the record, and other City staff members consulted.

In considering the possible application of section 7(1) to the "Considerations" and "Options" sections, I referred to Order PO-2400. In that order, Adjudicator John Swaigen reviewed how past orders of this office have addressed the question of whether "options" constitute advice or recommendations [Orders PO-2355, PO-2028, P-1631, P-1037, P-1034 and P-529]. Adjudicator Swaigen stated the following:

> In Order PO-2355, Adjudicator Bernard Morrow used the approach set out by Assistant Commissioner Mitchinson [in Order PO-2028] to analyze whether comments made by staff of the Ministry of the Environment about a proposal by a company to expand its licensed lime quarry constituted advice or recommendations. …
>
> Adjudicator Morrow found that the information in the internal Ministry document was not advice or recommendations because:
>
> > [T]he author of the options has not set out a suggested course of action to the decision-maker. What the author has done is provide the decision-maker with a list of four "alternative" options with modest discussions of the benefits of implementing one option over another and the implications or consequences of choosing to do so or not. However, the author does not expressly identify a preferred option and one cannot be inferred from the information. I cannot discern from the options a suggested course of action. Therefore, I conclude that the information at issue in record 1 should be characterized as "mere information" since none of the information at issue actually advises the decision maker on a suggested course of action.
>
> With regard to [a] draft letter to the Ministry of Natural Resources …, Adjudicator Morrow stated:

> In my view, much of the information in this record is clearly best described as "mere" information", including factual, background and contextual, analytical and/or evaluative information.
>
> …
>
> With regard to the four options in Record 2, I find that my analysis of the four options in Record 1 applies. As with Record 1, the options in Record 2 do not suggest a course of action to the decision-maker. The author of Record 2 has presented four alternative options for discussion purposes. While the options present well-articulated alternative approaches, and provide commentary on the consequences of undertaking each option, a preferred option is not expressly identified and cannot be inferred. I am not able to extract from the options a suggested course of action. Therefore, I conclude that the four options are not exempt under section 13(1) [the provincial equivalent of section 7(1)].

I agree with the Assistant Commissioner that whether information is labeled "options", "conclusions", "findings", "analysis" or is described by some other term is not determinative of whether it is advice or recommendations. Rather, for the purposes of the section 13(1) analysis, what is important is whether the information actually "advises" the decision-maker on a suggested course of action, or allows one to accurately infer such advice, and determining this requires a careful review of the content of the information and an assessment of the content in light of the context.

As Adjudicator Morrow's comments suggest, **a moderate degree of discussion, assessment, comparison or evaluation of options or alternatives does not necessarily constitute "advice". There is a fine line between description and prescription.** Whether discussion of options crosses that line and becomes a blueprint or road map directing the decision-maker to a preferred option may depend to some extent on matters such as whether the number of options identified is large or small, the tone of the language used to describe and discuss each of them, the strength of the views expressed, and whether the discussion is balanced or skewed [emphasis added to original].

I adopt the reasoning articulated by Adjudicators Morrow and Swaigen in Orders PO-2355 and PO-2400.

Viewed in this context, I find, with one exception, that the discussion contained in the "Considerations" section of Record 2 contains discussions and a comparison of alternate solutions for the use and management of the E.T. Seton Park archery range that is descriptive in tone, and does not contain advice or recommendations for the purposes of section 7(1). The exception to this finding relates to two paragraphs found on page 5 of Record 2 which, if disclosed, would permit accurate inferences to be drawn about the Parks Manager's suggested

course of action. I find that these two paragraphs qualify for exemption under section 7(1).

Furthermore, I am satisfied that the "Options" section of Record 2 contains information that qualifies as advice and recommendations for the purpose of section 7(1) since it advises the decision-maker about the four options and identifies the preferred course of action among the four options presented. I find, therefore, that disclosure of the Options section of Record 2 would reveal the advice or recommendations prepared by a City employee for the City's Parks and Environment Committee, and that it is exempt.

As previously mentioned, there are mandatory exceptions to the section 7(1) exemption. In this appeal, however, neither the City nor the appellant has argued that any of the exceptions in sections 7(2) or 7(3) apply. In my view, section 7(3) has no possible application in the circumstances of this appeal.

I note that some parts of the "Options" section of Record 2 to which section 7(1) applies contain information which may be disclosed pursuant to the provisions of section 7(2), such as "factual material" (section 7(2)(a)). However, I find that any information that should be disclosed under section 7(2) is so intertwined with the advice or recommendations that it is not possible to disclose the non-exempt information without also disclosing exempt information [MO-1494]. I also find that the appellant's own personal information, where it appears in parts of Record 2 to which section 7(1) applies, is similarly intertwined with the advice or recommendations contained therein that its disclosure to him could reveal the advice or recommendations of a public servant, and it should be withheld under section 7(1).

Accordingly, I find that the part of the "Considerations" section that I will identify on the copy of the record sent to the City with this order, and the entire "Options" section, are exempt under section 7(1), subject to my review of the City's exercise of discretion under section 38(a), below.

EXERCISE OF DISCRETION

Section 38(a) is discretionary, and permits 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 takes into account irrelevant considerations or 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]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Representations

In the City's initial representations, the City submits that it exercised its discretion in good faith and in consideration of relevant factors. The City notes that it specifically considered the wording of the section 7(1) and 12 exemptions and concluded that it had provided all of the information that it could while still protecting the City's interests from the harm that would result

from disclosure. The City also took the position at that point that the information at issue was not personal information and so the principle that individuals should have the right to access their own personal information did not apply. The City also asserts that the requester did not have a sympathetic or compelling need to receive the information and that disclosure of the information would not increase public confidence in the City.

The appellant's representations suggest that there is a sympathetic and compelling reason for the disclosure of the information at issue. The appellant submits that he:

> … has been attempting to secure information that may cause the City to review its previous interpretations and decisions regarding crossbow use at the archery range. It is frustrating … that the City continues to resist and resist hard the release [of] this material.
>
> … The appellant disagrees, in the strongest possible terms, with the City's statement that "the requester has not provided neither sympathetic nor compelling reasons as why the information at issue should be disclosed."
>
> The appellant has shown that a long existing 37 year history parks use of all four types of bows by individuals has been terminated at the Toronto archery range without any reason beyond an apparent series of mistakes by the City. …
>
> The appellant also takes strong exception to the City's comments to one of the purposes of the Act; "whether disclosure of the information will increase public confidence."
>
> While the City states "there is no evidence that the disclosure would increase public confidence in the City", the appellant believes otherwise. When reasonable people make mistakes, they correct them, they don't endlessly attempt to justify or conceal them. Respect for the City and its processes will increase with the requested releases. There are no stronger reasons for the Adjudicator to rule for the appellant than the City's previously noted two responses on exercise of discretion.

In representations provided in reply, the City states that it considered the additional factors raised by the appellant in his submissions, and then expressed disagreement with the appellant's position about the City's response to the request and the suggestion that crossbow use in the park had been "terminated". The City submits:

> Notwithstanding that the City does not agree with the appellant's views that there has been a "mistake", the City has considered his comments. The City, however, remains of the view that the disclosure of the records at issue would not increase public confidence in the City.

> … The City does not believe that the "factors" raised by the appellant for disclosure of the records at issue outweigh the purposes of the exemptions that have been applied.

In the City's supplementary representations regarding the exercise of discretion under section 38(a), the City indicated that it would agree to disclose "the portions of the records at issue that contain the appellant's personal opinions and views." The City submits, however, that even though the records may contain the appellant's personal information, the information remaining at issue is still subject to the exemptions in sections 7(1) and 12. The City maintains, therefore, that all of the factors cited in its initial representations on the exercise of discretion remain relevant.

Analysis and Findings

It should be noted that I am only reviewing the City's exercise of discretion under section 38(a) in relation to those records, or portions of records, to which either section 7(1) or section 12 applies.

In the circumstances, I find that the City exercised its discretion to deny access under section 38(a) within generally accepted parameters. In saying this, I recognize the importance of this issue to the appellant, and the sincerity of his concerns about it. I have considered the fact that the appellant will receive some information through operation of this order. While I appreciate that the information disclosed through this order may not resolve all of the appellant's concerns about the use of the archery range at E.T. Seton Park, this is not determinative of the issue of exercise of discretion. As long as the City exercises its discretion considering relevant factors, this office may not intervene. With overall regard for the circumstances, I do not find anything improper in the City's exercise of discretion, and I will uphold it.
Consequently, I find that the information withheld pursuant to sections 7(1) and 12, as identified above, is exempt under section 38(a) of the *Act*.

ORDER:

1. I uphold the City's search for records.

2. I order the City to disclose to the appellant the information that I have **not** highlighted on the copy of Record 2 provided to the City with this order by sending a copy to the appellant by **July 28, 2009**.

3. I uphold the City's decision not to disclose Record 1, and the information in Record 2 that I have highlighted.

4. To verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original Signed by: June 22, 2009
Daphne Loukidelis
Adjudicator