



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

ORDER MO-2626

Appeal MA09-403

Township of Scugog



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NATURE OF THE APPEAL:

The Township of Scugog (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to two letters the Township received from its auditor concerning its 2008 financial statements. One letter was referred to as the “Councillor Letter” and the other as the “Management Letter”.

The Township granted partial access to the responsive records, denying access to the withheld portions pursuant to the discretionary exemptions in sections 7(1) (advice or recommendations) and 11(f) (economic or other interests) of the *Act*.

The requester (now the appellant) appealed the Township’s decision.

During the mediation stage of the appeal process, the Township agreed to disclose the withheld portions of one of the records and, subsequently, issued a revised decision letter. In the revised decision letter, the Township disclosed the “Councillor Letter” in its entirety to the appellant. The Township also confirmed that it continued to deny access to the withheld portions of the “Management Letter” pursuant to sections 7(1) and 11(f).

The appellant advised the mediator that he wished to pursue access to the withheld portions of the “Management Letter”.

As the parties were unable to resolve the appeal during mediation, the matter was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. The Township provided representations in response to a Notice of Inquiry which were shared with the appellant. The appellant also provided representations. The appeal file was subsequently transferred to me to issue a decision.

RECORD:

The record at issue is a 13 page table, attached to the “Management Letter” that was addressed to the Township’s Chief Administrative Officer (CAO), dated September 10, 2009. The Township’s representations provided a general description of the information contained under each of the five columns in the table, as follows:

| Department | Heading/Title | Weakness/Issue description | Effect | Suggestions for Improvement |
|---|--|--|---|--|
| Identifies the relevant Township department in respect of which the particular advice or recommendation relates | Identifies either the area in the Township department in respect of which the particular advice or recommendation relates or provides a nominal description of the issue | Identifies the Consultant’s opinion or advice on a weakness or issue | Identifies the Consultants opinion or advice on what the effect of the weakness or issue may be on the Township | Identifies the Consultant’s opinion or advice for addressing the weakness or issue on a go-forward basis |

DISCUSSION:

ADVICE AND RECOMMENDATIONS

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.)].

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].

“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 [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *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].

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 (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (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)*, (cited above); 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 in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

Sections 7(2) and (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. The appellant argues that the exceptions at sections 7(2)(a) and (e) apply in the circumstances of this appeal. Sections 7(2)(a) and (e) state:

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

- (a) factual material;
- (e) a report or study on the performance or efficiency of an institution;

Representations of the parties

The Township argues that the withheld table contains information which identifies weaknesses and other issues of an accounting/auditing nature and recommends a course of action to the Township.

The Township advises that the specific advice it received from its consultant relates to:

- the existence of a weakness or other issue;
- the identification of the responsible department and, in some cases the responsible area within a department;
- the effect of the weakness or other issue; and
- the consultant's advice and recommendations for addressing the identified weakness or other issue.

The Township argues that the withheld information cannot be severed, as the disclosure of information from any column in any row would permit one to accurately infer the consultant's advice or recommendations contained in the balance of the columns. The Township also submits that each column contains advice or recommendations which require its decision makers to make discrete decisions to accept or reject the identification of the issue and/or the recommended course of action. Specifically, the Township states that its decision makers must make decisions as to:

- whether the weakness or other issue exists and that there is a policy rationale for addressing same;
- whether or not the correct department and area within the department has been identified and whether that department or area, or some other department, should be responsive to the weakness or other issue;
- the merits of the purported effect and whether there is a policy rationale for addressing same; and
- whether or not to implement the recommendations for resolving the weakness of other issue on a go-forward basis by policy.

The Township concludes:

The Consultant's Advice and Recommendations contains sensitive information with respect to financial transactions of the Township, assesses the potential for mischief, from both internal and external sources, and describes the potential consequences of allowing the identified weaknesses or other issues to go unchecked. Therefore, permitting this information to become public would put the Township in jeopardy and it would be less likely to engage expert services in the future to assess these types of matters.

...

The disclosure of the advice and recommendations of its retained professionals would put unfair pressure on the decision-makers, who may feel compelled to follow that advice or those recommendations, even if, in the opinion of the decision-maker, following the advice or recommendation is not in the best interest of the Township or is otherwise contrary to a policy or policies of the Township.

Accordingly, in order for the Township's decision-makers to carry-out their mandate, which includes making decisions in the best-interests of the Township, they must be free to seek advice, and to freely deliberate on that advice, without worry that such advice may thereafter become public.

The appellant did not address the Township's evidence that the record contains advice and recommendations. Instead, the appellant's main argument is that the records should be disclosed as they involve the spending of taxpayer monies. The appellant also provided representations in support of his position that the exceptions at section 7(2)(a) and (e) apply to the information at issue which I will refer to below, in greater detail.

In its representations, the Township addressed the issue of whether any of the exceptions under section 7(2) could apply to the withheld information. With respect to the exception at section 7(2)(a)(factual material), the Township argues that the record does not contain any factual or background information. In support of its position, the Township argues that any factual or background information is wholly and exclusively contained in the cover letter to the Township's CAO, which was disclosed to the appellant. However, elsewhere in its representations, the Township states that "any factual information contained in the Consultant's Advice and Recommendations is included because":

- (a) the advice or recommendation requires the factual material to relate to the reader; or
- (b) the factual material is compromised of [the] Consultant's expert opinion as to the existence of the fact.

The appellant appears to take issue with the Township's representations that the withheld charts do not contain any factual or background information. However, the appellant did not provide any representations suggesting that the withheld portions of the record contain factual material. Instead, the appellant argues that he could not "find any factual information" in the cover letter. The issue before me is not whether the cover letter contains factual or background information. The issue I am to decide is whether the withheld information in the record contains any factual material.

In support of its position that the exception at section 7(2)(e)(report or study on the performance or efficiency of an institution) does not apply, the Township states:

[t]he Consultant's Advice and Recommendations contains precise direction on how to address the issues identifie[d] by the Consultant that are capable of being put into immediate operation if accepted by the Township.

The appellant's representations point out that the Township itself provided evidence that "the record advises of weaknesses in the financial systems of the Township and has included "suggestions for improvement"."

Decision and Analysis

Section 7(1)

I have carefully reviewed the record and am satisfied that three of the five headings contain the advice and recommendations of the Township's consultant and thereby qualify for exemption

under 7(1), subject to my discussion of the application of the exceptions in sections 7(2)(a) and 7(2)(e).

I find that the information under the heading “Suggestions for Improvement” contains a suggested course of action that will ultimately be accepted or rejected by the Township. I also find that disclosure of the identification of issues under the headings “Weakness/Issue description” and “Effect” would permit one to identify issues within the Township financial systems and as a result could lead one to accurately infer the advice or recommendations the Township received from its consultant about these issues.

However, I do not accept the Township’s evidence that the mere identification of a department or sub-department within the Township could lead one to accurately infer the advice or recommendations the Township received. Nor am I satisfied that disclosure of the information contained under the heading “Heading/Title” which the Township advises provides a “nominal description of the issue” could lead one to accurately infer the advice or recommendations at issue. In my view, this information is too general to lead one to accurately infer the advice or recommendations at issue. Accordingly, I find that the exemption at section 7(1) does not apply to the information contained under the headings “Department” and “Heading/Title”.

I will go on to consider whether any of the two exceptions claimed by the appellant apply to the information I found exempt under section 7(1).

Exception in section 7(2)(a) and (e)

Section 7(2)(a): factual material

Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record [Order 24]. Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply [Order PO-2097].

Having regard to the record and the representations of the parties, I find that the exception at section 7(2)(a) does not apply to the withheld information. The information contained in the table does not contain a coherent body of facts separate and distinct from the advice and recommendations provided by the consultant to the Township. In my view, any factual information contained in the record is inextricably intertwined with the advice and recommendations the Township received from its consultant.

Section 7(2)(e): performance or efficiency report

This office has defined “report” as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-2681, Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

Section 7(2)(e) is not restricted to reports or studies concerning institutions as a whole, but may also apply to reports or studies concerning one or more discrete program areas within an institution.[Orders M-941, P-658].

I have carefully reviewed the representations of the parties along with the record itself and find that the exception at section 7(2)(e) does not apply. In making my decision, I also reviewed the cover letter which accompanied the record at issue. As previously noted, the cover letter is addressed to the Township's CAO from its consultant. The letter states that the purpose of the audit was to "obtain reasonable assurance whether the financial statements are free of any material misstatement." It appears that during the course of its annual audit of the Township's financial statements, the consultant identified some matters which it thought would be of interest to management. The consultant went on to identify these matters in a chart, which is the record at issue. The cover letter also indicates that the objective of the audit was not to identify things of this nature and that "an audit would not usually identify all such matters."

Though the Township maintains that section 7(2)(e) does not apply to the record, it described the record as an "operational review" in its representations in support of its position that section 11(f) applies. In making this argument the Township argues that its consultant reviewed its financial practices with a view to recommending changes.

However, despite the Township's evidence, I am not satisfied that the consultant was retained to prepare a formal statement or account of the results of the collation and consideration of information regarding the Township's financial systems. Instead, it appears that in the course of reconciling the Township's annual financial statements, the consultant discovered problems and other issues which it brought to the Township's attention. Further, in raising these matters with the Township, the consultant acknowledged that the purpose of the audit was not to identify such matters. As a result, other problems or issues that may exist were not discovered as they were not part of the consultant's mandate. In my view, a performance or efficiency report would not include such a disclaimer as it would be expected that the consultant would conduct a thorough and complete review of the issues it was retained to investigate.

Having regard to the above, I find that none of the exceptions at section 7(2) apply to the record at issue. Accordingly, I find that the withheld information under the headings "Weakness/Issue", "Effect" and "Suggestions for Improvement" qualify for exemption under section 7(1). As I have found the information under the heading "Department" and "Heading/Title" does not qualify for exemption under section 7(1), I will go on to determine whether the exemption at section 11(f) applies to this information.

ECONOMIC AND OTHER INTERESTS

Section 11(f) states:

A head may refuse to disclose a record that contains plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

In order for section 11(f) to apply, the institution must show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
 - (i) the management of personnel, or
 - (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public [Orders PO-2071 and PO-2536]

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Orders P-348 and PO-2536].

The Township argues that the advice and recommendations its consultant provided relates to the management of Township personnel and its general administration. The Township goes on to argue that the solutions its consultant identified to address issues constitute a plan or plans that have not yet been put into operation or made public.

The appellant did not provide representations on the possible application of section 11(f) to the record.

As noted above, the only remaining information at issue is the information under the headings "Department" and "Heading/Title". In my view, the information remaining at issue cannot be described as containing information which relates to the management of personnel or the administration of the Township. In addition, disclosure of this information would not reveal a plan or plans. In my view, the information contained under the headings "Department" and "Heading/Title" is too general in nature to reveal information about any plans the Township has relating to its administration or management of personnel.

Accordingly, I find that section 11(f) does not apply to the information contained under the heading "Department" and "Heading/Title" as a result, I will order that this information be disclosed to the appellant.

EXERCISE OF DISCRETION

The section 7(1) exemption 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 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]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The Township argues that it exercised its discretion in good faith, taking into account relevant factors and not taking into account irrelevant factors.

The appellant argues that the Township failed to take into consideration whether disclosure would increase public confidence in the operation of the institution. In support of his argument, the appellant states:

It is qu[i]te obvious that any institution that is open and transparent admits to mistakes, documents and identifies problems and provides solutions will garner public confidence. The Township has identified the record to be such a document and can only increase public confidence in [its] management of taxpayers funds.

The appellant goes on to make the following arguments:

- that the withheld information contained in the charts was gathered from the consultant's 2008 audit of the Township's financial statements and that the consultant's audit report is a public document.
- that the safeguarding of taxpayer assets and any problem relating to the safeguarding of taxpayer assets should be known to taxpayers who are the owner of such assets.
- that the information relates to funds provided by taxpayers and the management of those funds.

- that section 224 of the *Municipal Act* directs Council to ensure the accountability and transparency of the operations of the municipality, including the activities of the senior management of the municipality.

Having regard to the representations of the parties, I find that the Township properly exercised its discretion in applying the exemption at section 7(1). In making my decision, I took into account the wording of the exemption and the interests it seeks to protect and the Township's evidence that disclosure of the information at issue could reasonably be expected to inhibit the free flow of advice or recommendation to the 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.)].

I also considered the appellant's evidence and, I do not share his view that disclosure would increase public confidence in the operation of the Township. In my view, the information at issue goes beyond disclosing how the Township ultimately decided to spend and safeguard taxpayer funds. It describes the actual advice and recommendations the Township received about its financial systems and its auditor's advice about how to safeguard its systems.

I am also not convinced that section 224 of the *Municipal Act*, which provides that it is the role of Council to ensure accountability and transparency of the operations of the municipality, requires the disclosure of any information the Township may take into consideration during its deliberation processes.

Given that there is no evidence that the Township exercised its discretion in bad faith or for an improper purpose, I find that the Township properly exercised its discretion taking into account relevant factors and not taking into account irrelevant considerations, in denying the appellant access to the portions of the record I found exempt under section 7(1).

ORDER:

1. I uphold the Township's decision to deny access to those portions of the records that I have highlighted on the copy of the records provided to the Township's Freedom of Information and Protection of Privacy Co-ordinator with this order. The highlighted portions of the records are properly exempt from disclosure under section 7(1).
2. I order the Township to disclose those portions of the records which are **not** highlighted by providing the appellant with copies no later than **July 4, 2011**.

3. In order to verify compliance with the terms of order provision 2, I reserve the right to require the Township to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: _____
Jennifer James
Adjudicator

_____ June 6, 2011