

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2811-F

Appeal MA11-202

City of Dryden

November 9, 2012

Summary: The appellant made a request for various records relating to a sewage treatment plant construction project in the City of Dryden. The city issued a decision granting access in part to some records and denying access to other records, claiming the application of the exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1) (third party information), 11(a) (valuable government information), 11(c) and (d) (economic and other interests), 12 (solicitor client privilege) and 14 (personal privacy) of the *Act*. During the inquiry of the appeal, the city raised a new discretionary exemption with respect to some of the records. In Order MO-2787-I, the adjudicator allowed the late raising of a new discretionary exemption, upheld the city's decision in part, but found that the city did not exercise its discretion, as is required. The city was ordered to release some records in whole or in part, and was ordered to exercise its discretion. In this final order, the city's exercise of discretion is upheld.

OVERVIEW:

[1] This is my final order in this appeal, which addresses the exercise of discretion by the City of Dryden (the city). This final order disposes of the sole remaining issue raised as a result of an access decision made by the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) following a 15-part request for access to records relating to the construction of a sewage treatment project in the city.

[2] The city located responsive records and issued a decision letter, granting access, in part, to some records and denying access, in full, to other records. The city claimed the application of the exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1) (third party information), 11(a) (valuable government information), 11(c) and (d) (economic and other interests), 12 (solicitor client privilege) and 14 (personal privacy) of the *Act*.

[3] During the mediation of the appeal, the appellant's representative clarified that the appellant was seeking access to the following records that were withheld in full or in part: 2.11, 4.5, 4.6, 4.7, 4.8, 6.1, 7.3, 7.5, 7.9, 7.10, 7.11, 7.12, 7.13, 7.14, 9.2, 13.1, 14.1 and 15.7, but that it was not seeking access to those portions of the records that were withheld pursuant to section 14 of the *Act*.

[4] On, September 7, 2012, I issued Order MO-2787-I, upholding the city's decision in part, but also finding that the city did not exercise its discretion, as required. I ordered the city to disclose some records in whole or in part, and ordered it to exercise its discretion.

[5] In that order, I commented on the manner in which the city exercised its discretion as follows:

The city did not provide any representations on whether it properly exercised its discretion under sections 7(1) and 12 of the *Act*.

As stated above, an institution must exercise its discretion. Unfortunately, I am unable to determine whether the city exercised its discretion properly, as I have not been provided with any evidence from the city on this issue even though it was given an opportunity to provide representations on this issue, as set out in the Notice of Inquiry.

The exemptions listed above are discretionary and, as such, the city must turn its mind to whether or not to disclose information and must articulate this to the appellant and this office, explaining the factors used in exercising its discretion, so that this office can be sure the city considered relevant factors and did not consider unfair or irrelevant factors.

[6] Accordingly, I included Order Provision 4, which contained the following term relating to the exercise of discretion:

I order the city to exercise its discretion under sections 7 and 12 in accordance with the analysis set out above and to advise the appellant and this office of the result of this exercise of discretion, in writing. If the city continues to withhold all or part of the records, I also order it to provide the appellant with an explanation of the basis for exercising its

discretion to do so and to provide a copy of that explanation to me. The city is required to send the results of its exercise, and its explanation to the appellant, with the copy to this office no later than **October 15, 2012**. If the appellant wishes to respond to the city's exercise of discretion, and/or its explanation for exercising its discretion to withhold information, it must do so within **21 days** of the date of the city's correspondence by providing me with written representations.

[7] In turn, the city sent a letter to the appellant and to this office, setting out its explanation of the basis for exercising its discretion. The appellant did not respond to the city's explanation regarding its exercise of discretion.

DISCUSSION:

Did the institution exercise its discretion under sections 7(1) and 12? If so, should this office uphold the exercise of discretion?

[8] The sections 7 and 12 exemptions are discretionary. Therefore, once it is determined that a record qualifies for exemption under this section, the city must exercise its discretion in deciding whether or not to disclose it.

[9] Under section 7, the exercise of discretion involves a weighing of the appellant's right of access against ensuring 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, and preserving the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.

[10] Under section 12, the exercise of discretion involves a weighing of the appellant's right of access against the privilege protecting solicitor-client communication made for the purpose of obtaining or giving legal advice.

[11] 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.

[12] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹

- the purposes of the *Act*, including the principles that information should be available to the public, individuals should have a right of access to their own personal information, exemptions from the right of access should be limited and specific and the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- the relationship between the requester and any affected persons;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information; and
- the historic practice of the institution with respect to similar information.

[13] The city submits that it carefully reviewed all of the records to which the exemption in section 7 applies and has decided not to disclose them. In exercising its discretion, the city states that it considered the importance of receiving candid advice and recommendations from its employees, consultants and officers. The city submits that it is in the public's interest that the city continues to receive confidential advice and recommendations from these sources. The city further submits that disclosure of the records that are exempt under section 7 would create a "real and significant risk" that the city's employees, consultants and officers would not provide candid advice or recommendations in the future, as they would be afraid that such advice would become public.

¹ Orders P-344, MO-1573.

[14] With respect to the records found exempt under section 12, the city submits that it considered the importance of the solicitor-client relationship, the actual communications contained in the records, and the public's interest in transparent and fair municipal public procurement processes.

[15] As noted above, the appellant did not provide further representations on the police's exercise of discretion.

[16] Taking into account all the circumstances present in this appeal, I am satisfied that the city has appropriately exercised its discretion under sections 7 and 12 of the *Act*, taking into account relevant considerations and not taking into account irrelevant ones.

ORDER:

I uphold the city's exercise of discretion to apply the exemptions in sections 7 and 12 to the withheld information that I did not order disclosed in Order MO-2787-I.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ November 9, 2012