

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3041-F

Appeal MA12-577

Municipality of the Township of Tiny

April 28, 2014

Summary: The township received a request for an identified report (including appendices), and denied access to the records on the basis of the exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice and recommendations) and 10(1) (third party information). Interim Order MO-2966-I determined that the records remaining at issue did not qualify for exemption under section 6(1)(b), and that the portions of one record which contained specific, detailed information about six named Parks and Recreation Associations did not qualify for exemption under section 7(1). Decisions regarding access to the remaining portions of the records were reserved.

This final order determines that the records do not qualify for exemption under section 10(1). It also finds that portions of the records qualify for exemption under section 7(1), but that other portions do not qualify for exemption, and ought to be disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1) and 10(1).

Orders and Investigation Reports Considered: Order 94.

OVERVIEW:

[1] This order disposes of the issues still to be resolved from my interim decision in Order MO-2966-I.

[2] The Municipality of the Township of Tiny (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a particular numbered report entitled "Review – Parks and Recreation Associations 'Memorandum of Understanding'."

[3] As particularized in Interim Order MO-2966-I, the township denied access to the report and the appellant, who represents one of the Parks and Recreation Associations identified in the report, appealed the township's decision. After mediation, the only records remaining at issue were a 15-page report (Record 1) and Appendix 8 to the report (Record 2). The township denied access to these two records on the basis of the exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice and recommendations) and 10(1) (third party information) of the *Act*.

[4] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. After receiving representations on the issues from the township, I decided to issue Interim Order MO-2966-I in this appeal.

Interim Order MO-2966-I

[5] In Interim Order MO-2966-I, I found that the two records did not qualify for exemption under section 6(1)(b) of the *Act*. I also decided that certain portions of the report that contain detailed, specific information about six named associations did not qualify for exemption under section 7(1) of the *Act*. As a result, I ordered the township to disclose to the appellant the information that related to it.

[6] I also reserved my decision on access to the remaining portions of the records for a number of reasons. I summarized these reasons in Interim Order MO-2966-I as follows:

[37] In this Interim Order, I have found that the records do not qualify for exemption under section 6(1)(b), and that the portions of Record 1 relating to specific information about the six named associations do not qualify for exemption under section 7(1).

[38] The township takes the position that the portions of Record 1 relating to the six named associations qualify for exemption under the mandatory exemption in section 10(1). However, because of the concurrent claim that the discretionary exemptions in sections 6(1)(b) and 7(1) apply to Record 1, the named associations were not provided with the opportunity to provide representations on the possible application of section 10(1) to Record 1, nor would they have been able to provide informed representations on those portions relating to them, as access to Record 1 was denied under these other exemptions.

[39] As noted above, the appellant represents one of the six associations referenced in Record 1. Section 10(1) cannot apply to deny a third party access to the information that relates to it. As a result of the findings in this order, I order the township to disclose to the appellant those portions of Record 1 which relate to it.

[40] Furthermore, in the interest of expediting this appeal, I will be sending a Notice of Inquiry to the other five associations, inviting them to address the possible application of the mandatory exemption in section 10(1) to the information which I have found does not qualify for exemption under section 7(1). Because of my findings in this order, the township is no longer constrained from describing the relevant portions of Record 1 to the affected parties, thus allowing the affected parties to submit informed representations on the possible application of section 10(1) to the actual information in Record 1 relating to them.

[41] I reserve my decision on the application of section 10(1) until the affected parties and, if necessary, the appellant, have had the opportunity to address this issue. I also reserve my decision on the possible application of section 7(1) to the remaining portions of Record 1 and to Record 2.

Further processing of this appeal

[7] As a result of Interim Order MO-2966-I, I sent a Notice of Inquiry to the other five associations, inviting them to address the possible application of the mandatory exemption in section 10(1) to the information in Record 1 relating to them. Four of the five associations responded by indicating that they consented to the release of the information relating to them. The fifth association indicated that it would not be providing representations in this appeal. In these circumstances, I decided that it was not necessary to invite the appellant to provide representations on the possible application of the section 10(1) exemption.

[8] The township also relied on the exemption in section 7(1) to deny access to the two records remaining at issue. The township provided brief representations on the application of the section 7(1) exemption to those records.

[9] Accordingly, I sent a Notice of Inquiry, along with the portion of the township's representations relating to section 7(1), to the appellant, who was invited to address the possible application of the exemption in section 7(1). I received representations from the appellant in response.

[10] In this final order, I find that the records do not qualify for exemption under section 10(1). I also find that portions of the records qualify for exemption under

section 7(1), but that other portions do not qualify for exemption, and ought to be disclosed.

RECORDS:

[11] The records at issue consist of a 15-page report (Record 1 - the Report, contained on pages 1-15) and a 1 page memo (Record 2 - Appendix 8, contained on page 53) as described in the index provided by the township.

[12] As a result of my findings in Interim Order MO-2966-I, only portions of Record 1 remain at issue, and all of Record 2 remains at issue.

ISSUES:

- A. Does the mandatory exemption at section 10(1) apply to the records?
- B. Does the discretionary exemption at section 7(1) apply to the records?

DISCUSSION:

A. Does the mandatory exemption at section 10(1) apply to the records?

[13] The township takes the position that the records qualify for exemption under section 10(1), and provides brief representations in support of its position. As identified above, four of the five associations ("the associations" or "the affected parties") indicated that they consented to the release of the information relating to them. The fifth association did not provide representations on the application of section 10(1) to the records.

[14] Section 10(1) states in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[15] Furthermore, section 10(2) states:

A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

[16] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²

[17] For section 10(1) to apply, the institution and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[18] In the circumstances, I will begin by reviewing the application of the third part of the three-part test.

Part 3: harms

[19] To meet this part of the test, the party resisting disclosure must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.³

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

² Orders PO-1805, PO-2018, PO-2184, and MO-1706.

³ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[20] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.⁴

[21] The township's representations on section 10(1) are brief, and state:

Section 10 applies as the staff report contains financial information about other organizations including sources of revenues associated with fundraising efforts, programming and annual capital budget development.

[22] Four of the affected parties consented to the disclosure of the information relating to them, and the fifth affected party did not provide any representations on the application of the section 10(1) exemption.

[23] As set out above, to meet part three of the test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm."

[24] The only evidence provided by the parties on the application of the test in section 10(1) is the brief portion of the township's representations set out above. Although its representations identify the nature of the information relating to the affected parties contained in Record 1, the township does not provide evidence to establish any of the harms set out in section 10(1)(a), (b) and/or (c).

[25] On my review of the township's representations and the records themselves, I am not satisfied that the harms set out in section 10(1)(a), (b) or (c) have been established. Although I agree with the township's characterization of the nature of the information in the records, there is insufficient evidence on the face of the records to support a finding that the harms in section 10(1)(a), (b) and/or (c) would result from disclosure of the information.

[26] As result, in the absence of sufficient evidence to support a finding that the harms in sections 10(1)(a), (b) and/or (c) are established, I find that the records do not qualify for exemption under this section.

B. Does the discretionary exemption at section 7(1) apply to the records?

[27] In Interim Order MO-2966-I, I found that certain portions of Record 1, which contained detailed, specific information about the six named associations, do not

⁴ Order PO-2020.

contain "advice or recommendations," and that they do not qualify for exemption under section 7(1). I reserved my decision on the possible application of section 7(1) to the remaining portions of Record 1 and to Record 2. I will now review those portions of the records to determine whether they qualify for exemption under section 7(1).

[28] 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.

[29] 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.⁵

[30] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information.⁶

[31] "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.⁷

[32] 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.⁸

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

⁵ 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.).

⁶ Order PO-2681.

⁷ 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.

⁸ 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).

- 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.⁹

[34] The township provided brief representations in support of its position that section 7(1) applies to the two records. The appellant's representations do not directly address the section 7(1) claim, and focus more on the reasons why the records ought to be disclosed.

Record 1

[35] In support of its application of the exemption in section 7(1) to the remaining portions of Record 1, the township submits that this record qualifies for exemption under that section because the record "contains advice and recommendations by an employee of the municipality on how to move onward with respect to the subject matter." As noted above, in Interim Order MO-2966-I, I found that the portions of Record 1 which contained detailed, specific information about the six named associations do not contain "advice or recommendations" and do not qualify for exemption under section 7(1).

[36] Record 1 is a 15-page report, and is divided into six main headings. In reviewing the application of section 7(1) to the remaining portions of Record 1, I will review the information contained under each of these headings.

[37] The first heading is entitled "Recommendations" and contains the brief, specific recommendations of the author(s) of the report. I find that because it contains the specific recommendations of the author(s) of the report, this section of Record 1 clearly qualifies for exemption under section 7(1) of the *Act*.

[38] The second heading is entitled "Background" and contains a review of the background to the information contained in the report. I find that the information under this heading is simply factual or background information, and is not advice or recommendations for the purpose of section 7(1). I also find that disclosure would not allow a party to accurately infer the advice or recommendations given. As a result, this

⁹ 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).

portion of Record 1 does not qualify for exemption under section 7(1), and I will order that it be disclosed.

[39] The third heading is entitled "Analysis" and contains a lengthy review of each of the categories of items identified in the Memorandum of Understanding being reviewed. This section contains the bulk of the report, and also contains the portions of the report which contain the factual or background information about the six associations, which I found do not qualify for exemption under section 7(1).¹⁰ The other parts of this section contain what I consider to be the observations or opinions of staff relating to each of the categorized items. On my review of this information, I find that it does not contain "advice or recommendations" for the purpose of section 7(1). Furthermore, although I accept that small parts of this section contain the views, opinions or observations of the author(s) of the report, I find that this information does not constitute "advice or recommendations" or that any advice or recommendations contained in other portions of the report could be accurately inferred from disclosure. As a result, this portion of Record 1 does not qualify for exemption under section 7(1), and I will order that it be disclosed.

[40] The fourth and fifth headings relate to two general topics, and are brief in nature. The information under these headings is simply factual, and does not constitute advice or recommendations for the purpose of section 7(1). I will order that this information be disclosed.

[41] The sixth and last heading is entitled "Conclusion." Portions of this section contain the recommendations of the author(s) of the Report. The other portions of this section review and summarize information, and I find that disclosure of this information would reveal the advice of staff and/or would allow accurate inferences to be drawn regarding the recommendations of staff. As a result, I am satisfied that this section qualifies for exemption under section 7(1). I acknowledge that some portions of this section reflect information contained in the other parts of Record 1 which I have found do not qualify for exemption. However, because this information is now contained in the "Conclusion" section of Record 1, in that context I find that disclosure would reveal the advice or recommendations of the author(s), as opposed to simply identifying views, observations and opinions of the author(s).

[42] In summary, I find that the sections of Record 1 entitled "Recommendations" (part of page 1) and "Conclusions" (parts of pages 14-15) qualify for exemption under section 7(1). The remaining portions of Record 1 do not qualify for exemption, and I will order that they be disclosed.

Record 2

¹⁰ See Interim Order MO-2966-I.

[43] With respect to the application of the exemption in section 7(1) to Record 2 (Appendix 8 - a 1 page memo), the township submits that this record qualifies for exemption under that section because it is a memorandum "authored by an employee of [the township's insurance company] which provided advice and recommendation on liability issues."

[44] On my review of the information contained in Record 2, I find that the bulk of this brief one-page record is primarily devoted to general information and broad analysis. Arguably, parts of it could be characterized as "advice or recommendations", but it is so general in nature that I am not satisfied that it is the sort of information that is intended to be captured by the section 7(1) exemption. As stated by former Commissioner Sidney B. Linden in Order 94 (in relation to the provincial equivalent):

...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision making and policy making.

In this case, it can be inferred that the author of the memo is "recommending" that the noted questions be considered in the course of the investigation but in my view this is not the kind of recommendation to be exempted pursuant to subsection 13(1) of the Act. The disclosure of this type of information could not reasonably be expected to inhibit the free flow of information to policy makers and decision makers within the government.

[45] Applying this approach to Record 2, I am not convinced that disclosure of most of the information in the record would prohibit the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making. In the circumstances before me, having regard to the content of Record 2 and the nature of the information contained in it, I find that the section 7(1) exemption does not apply to much of the information – in particular – the views of the author of the memo.

[46] However, I note that two sentences in Record 2 refer to the recommendations contained in Record 1. In my view, disclosure of these two sentences, in this context, would permit one to accurately infer the recommendations in Record 1. Accordingly, I find that these two sentences qualify for exemption under section 7(1).

[47] I find that the remaining portions of Record 2 do not qualify for exemption under section 7(1) of the *Act*, and I will order that they be disclosed.

ORDER:

1. I find that the records do not qualify for exemption under section 10(1) of the *Act*.
2. I find that certain portions of Record 1 (portions of pages 1, 14 and 15) and two sentences in Record 2, qualify for exemption under section 7(1), and I uphold the township's decision to deny access to these portions of records. I find that the remaining portions of these records do not qualify for exemption under section 7(1).
3. I order the township to disclose to the appellant the remaining portions of Records 1 and 2 which I have found do not qualify for exemption. For greater certainty, I have attached a copy of Records 1 and 2 to the order provided to the township, with the portions that should not be disclosed to the appellant highlighted in yellow. I order the township to disclose the unhighlighted portions of Records 1 and 2 to the appellant by **May 29, 2014**.

Original signed by: _____
Frank DeVries
Adjudicator

_____ April 28, 2014