

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3153-I

Appeal MA14-31-2

Corporation of the City of Clarence-Rockland

January 26, 2015

Summary: The appellant sought access to a specific report submitted to the city's Administration Committee on a given date. The city denied access to the report pursuant to the discretionary exemption at section 7(1) (advice or recommendations) of the *Act*. The appellant appealed the city's decision. This order finds that section 7(1) does not apply to the majority of the information contained in the report and orders the city to disclose those portions to the appellant. This order also finds that although section 7(1) applies to the remainder of the record, in the absence of representations from the city, its decision to exercise its discretion to withhold the remaining portions of the record is not upheld. The city is ordered to provide representations on its exercise of discretion and the adjudicator remains seized of this appeal in order to deal with any outstanding issues that might arise from this interim order.

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

OVERVIEW:

[1] The Corporation of the City of Clarence-Rockland (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

A copy of the report submitted to the November 20th, 2013 Administration Committee meeting comparing costs of placing the advertisements for

community events in the *Vision*, Rockland's municipal paper, versus the [city's] *Focus* pamphlet.

[2] The city denied access to the responsive record pursuant to section 7(1) (advice or recommendations) of the *Act*.

[3] The requester, now the appellant, appealed the city's decision.

[4] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. During my inquiry, I sent the parties a Notice of Inquiry setting out the facts and issues on appeal. The city chose not to submit representations. As the appellant provided representations which raised issues to which I believed the city should have an opportunity to reply, I shared them with the city in accordance with this office's sharing criteria set out in *Practice Direction 7*. The city chose not to submit a reply.

[5] In this order, I must determine whether the record at issue is exempt from disclosure pursuant to the discretionary exemption at section 7(1) of the *Act*. In the decision that follows, I find that section 7(1) does not apply to the majority of the information contained in the record and order that the city disclose those portions to the appellant. With respect to the information for which I find that section 7(1) applies, in the absence of representations from the city I do not uphold its exercise of discretion to withhold that portion of the record. Accordingly, I order the city to provide representations on its exercise of discretion and remain seized of this appeal.

RECORDS:

[6] The record at issue is a 7-page report dated November 4, 2013.

ISSUES:

- A. Does the discretionary exemption at section 7(1) apply to the record?
- B. Did the city exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 7(1) apply to the record?

[7] 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.

[8] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹

Representations

[9] As previously stated, despite the fact that section 7(1) is a discretionary exemption, the city has chosen not to submit representations to explain its reasoning for applying this exemption to the record at issue.

[10] In his representations, the appellant submits that he attended the meeting of the Administration Committee during the budgeting process in November of 2013 when the report at issue was presented. He submits that he was denied access to the report at the time and was told he would receive a copy at a later date. He further submits that despite making multiple requests for the report, several of them made in a public forum at Council meetings, access to the record continues to be denied. He argues that this reflects a less than open and transparent municipal government. In his representations, the appellant raises a number of arguments to support his position that the record at issue should be generally available to the public, and not exempt under the *Act*. Specifically, the appellant makes the following arguments in his submissions:

- Not releasing the report contravenes the city's own Accountability and Transparency Policy (bylaw #1012-62, Policy # CON 2010-02):

The appellant submits under the heading "Purpose", the bylaw states that the *Municipal Act* requires that all municipalities:

...adopt and maintain a policy with respect to the manner in which the municipality will try to ensure that it is accountable to the public for its actions, and the manner in

¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

which the municipality will try to ensure that its actions are transparent to the public.”

He submits that under the heading “Policy”, the bylaw states:

Council hereby acknowledges that it is responsible to provide good government within its jurisdiction in an accountable and transparent manner based on the following principles:

- Decision making will be open and transparent,
- Municipal operations will be conducted in an ethical and accountable manner....

Finally, the appellant submits that under the heading “Financial Matters”, the bylaw states:

The city will be open, accountable and transparent to its constituents and in its financial dealings as required under the [Municipal Act. Some examples of how the city provides such accountability and transparency are as follows:

-Open budget process with public meetings....

- Not releasing the report contravenes the city’s own Municipal Freedom of Information Policy (bylaw #1012-63, Policy # ADM 12-02):

The appellant submits that this policy was specifically passed to make it easier for citizens to access routine items such as agendas, minutes and report. He submits that this policy states under section “1.0 Policy Statement”:

The City of Clarence-Rockland is committed to ensure its compliance with regard to the intent and requirements of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* and other privacy legislation by **implementing practices that will facilitate open access to public records**, while protecting the privacy of personal information which is within the custody or the municipality. [Emphasis added in the appellant’s representations]

The appellant further submits that the section of the policy entitled “5.3.5 Routine Disclosure” states:

There are a number of records and types of information which are available via Routine Disclosure, meaning that a

formal access request **is not necessarily required in order to obtain or view the information.** Access to City information will, wherever possible, be made available to the public via the City website, orally, or through public inspection at the Municipal Offices. The following are examples of such records where routine disclosure may be permitted:

...

- Reports

[Emphasis added in the appellant's representations]

The appellant argues that the report at issue falls within the types of documents that should be made available to the public through routine disclosure.

- The report should be disclosed as it falls under a number of the exceptions to the section 7(1) exemption, listed in sections 7(2) and (3). Specifically, he submits that the following exceptions might have some relevance in the circumstances of current appeal:

7(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:

(a) factual material;

(b) a statistical survey;

(c) a report by a valuator;

...

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

...

(i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic.

Analysis and findings

Section 7(1)

[11] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[12] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.²

[13] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual and background material.³

[14] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁴

[15] Having reviewed the report at issue I find that the great majority of it does not constitute either "advice" or "recommendations" within the meaning of the exemption at section 7(1) of the *Act*. With the exception of two options that are presented on page two, under the third section of the report which is entitled, in part, "recommendation", the remainder of the information in the report is best characterized as factual or background information. In my view, its disclosure would not reveal, either directly or indirectly, any aspect of the deliberative process or the advice and/or recommendations of a public servant. I also find that its disclosure would not permit a party to accurately infer the advice or recommendations given. Accordingly, I find that the majority of the report is not exempt under section 7(1) of the *Act* and I will order it disclosed.

² Ibid at paras. 26 and 47.

³ Order PO-3315.

⁴ Orders PO-2084, PO-2028, 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.

[16] The options set forth under the third section on page two of the report, however, present specific recommendations of the author(s) of the report. They amount to two suggested courses of action to ultimately be accepted or rejected by a decision maker. Although they are presented under the title "recommendation", I find that because they present "options" to be considered by the decision maker(s) or alternative courses of action to be accepted or rejected in relation to a decision that is to be made, they qualify as "advice" and clearly fall within the exemption at section 7(1) of the *Act*.

[17] Although I have found that the exemption at section 7(1) of the *Act* applies to the two options listed under section 3 on page two of the report, sections 7(2) and (3) of the *Act* outline a number of exceptions to that exemption. Accordingly, I will go on to consider whether any of the exceptions in those sections apply to the portion of the report that I have found exempt under section 7(1).

Sections 7(2) and (3): exceptions to the exemption

[18] 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 portions of section 7(2) raised by the appellant as potentially relevant in the circumstances of this appeal read:

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

- (a) factual material;
- (b) a statistical survey;
- (c) a report by a valuator;
- ...
- (e) a report or study on the performance or efficiency of an institution;
- ...
- (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;
- ...

[19] The exceptions in section 7(2) can be divided into two categories: objective information, and specific types of records that could contain advice or recommendations.⁵ The first four paragraphs in section 7(2), paragraphs (a) to (d), are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature.

[20] The remaining exceptions in section 7(2), paragraphs (e) to (k), will not always contain advice or recommendations but when they do, section 7(2) ensures that they are not protected from disclosure by section 7(1).

[21] I have found above that the only information contained in the report that may be subject to one of the exceptions in section 7(2) constitutes advice. Therefore, it is clear that the exception at section 7(2)(a) does not apply. Additionally, given the substance of the record as a whole, it is clear that the exceptions at section 7(2)(b) and (c) are also not applicable. The appellant suggests that sections 7(2)(e) and (i) might be applicable. I agree that they warrant consideration.

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

[22] 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.⁶

[23] 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.⁷

[24] The subject matter of the report at issue relates to the impact of increased publicity costs for community activities resulting from a resolution that was passed by council. In my view, this type of report cannot accurately be characterized as a "report or study of the efficiency" of the city. Accordingly, I find that the exception at section 7(2)(e) does not apply to the report at issue.

Section 7(2)(i): report of a committee within an institution established for the purpose of preparing a report.

⁵ See footnote 1 above at para. 30.

⁶ 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.).

⁷ Orders M-941 and P-658.

[25] From the title page of the report, it appears to have been prepared by a public servant. The final page of the report is signed by three different public servants. The appellant submits that the report was presented to the city's Administration Committee in November, 2013.

[26] For the exception at section 7(2)(i) to apply, the report must have been prepared by a committee established for the purpose of preparing a report on a particular topic. On the face of the record, it appears that it has not been prepared by a committee but rather by public servants in one or more departments who describe the impact of the resolution passed by Council on the publication of announcements relating to community activities. Even if those individuals could be said to form part of a committee, there is no evidence before me that such committee was established for the purpose of preparing a report specifically on the impact of the resolution. In the absence of evidence to support a conclusion that the report was prepared by a committee established for the purpose of preparing a report on the topic that it addresses, I find that the exception at section 7(2)(i) has not been established.

Conclusion

[27] I have found that the majority of the information contained in the report does not qualify for exemption pursuant to section 7(1) as it does not consist of either "advice" or "recommendations." As no other exemptions have been claimed for this information I will order that the city disclose it to the appellant.

[28] I have found that the exemption at section 7(1) applies to a portion of the report that reveals advice provided by a public servant. That portion is found on section 3 on page two of the report. Having considered the exceptions to this exemption at sections 7(2), I find that none of them apply. For that information, I will next determine whether the city properly exercised its discretion to withhold it.

B. Did the city exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

[29] 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, this office may determine whether the institution failed to do so.

[30] In addition, this office 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.

[31] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁸ This office may not, however, substitute its own discretion for that of the institution.⁹

Relevant considerations

[32] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁰

- 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
 - 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

⁸ Order MO-1573.

⁹ Section 43(2).

¹⁰ Orders P-344 and MO-1573.

- the age of the information
- the historic practice of the institution with respect to similar information.

Analysis and finding

[33] In Issue D of the Notice of Inquiry sent to the city at the outset of the adjudication stage, I requested that the city provide me with representations on its exercise of discretion with respect to the information that it withheld pursuant to the application of the discretionary exemption at section 7(1) of the *Act*. I have already noted that the city declined to submit representations.

[34] As the city did not provide me with any evidence respecting its exercise of discretion, I am unable to determine whether it exercised its discretion properly in choosing not to disclose the information which I have found to be exempt under the discretionary exemption at section 7(1).

[35] With discretionary exemptions, the city must turn its mind to whether or not it will disclose information and must articulate this to the appellant and this office, explaining the factors applied in exercising its discretion so that this office is assured that it considered relevant factors and did not consider unfair or irrelevant factors.

[36] As the city has provided no evidence to support its application of the discretionary section 7(1) exemption, I will order it to exercise its discretion and provide this office with written representations on how it did so.

ORDER:

1. I order the city to disclose to the appellant the portions of the record to which section 7(1) of the *Act* has been found not to apply by **February 26, 2015**. For the sake of clarity I have enclosed a copy of the record which has been highlighted to indicate the information that *should not* be disclosed.
2. I order the city to exercise its discretion to apply section 7(1) of the *Act* to withhold the remaining portions of the record in accordance with the discussion of that issue above and to provide representations to me detailing the result of its exercise of discretion, in writing, by **February 26, 2015**. If the city continues to withhold all or part of the information that remains at issue, I order it to provide in its representations, an explanation of the basis for exercising its discretion to do so.

3. If the city decides, after exercising its discretion, to disclose additional information to the appellant, it must issue a new access decision in accordance with sections 19, 20, 21, and 22 of the *Act*, treating the date of its decision to disclose the information as the date of the request.
4. I may share the city's representations on its exercise of discretion with the appellant unless they meet the confidentiality criteria identified in *Practice Direction Number 7*. If the city believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions it seeks to withhold.
5. I remain seized of this appeal pending the final determination of the city's exercise of discretion or any related issues that may arise.

Original Signed by: _____
Catherine Corban
Adjudicator

January 26, 2015