

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3159

Appeal MA13-579

County of Brant

February 6, 2015

Summary: The appellant sought access to an RFP Evaluation Sheet. The county denied access pursuant to the mandatory third party information exemption in section 10(1) and the discretionary advice or recommendations exemption in section 7(1). This order finds that the record is exempt under section 7(1) and also upholds the county's search for records as reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1) and 17.

OVERVIEW:

[1] The County of Brant (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following:

- 1) List of all drivers registered with a vulnerable sector police check as of [date] for [named company].
- 2) Copies of vehicle safeties, Ontario Licence plate #'s and registration of all owners for each vehicle for [named company].

- 3) Copy of insurance coverage for each of the registered vehicles being used for county contract (provide dates rec'd. this [named company] info).
- 4) RFP [Request for Proposals] Points for each category for [two named companies] for subsidized transportation.
- 5) Copy of completed contract signed by [named individual, named company] with – attachments.

[2] The county issued a decision granting partial access to the records. Access was denied to the requested driver information pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*. Access was also denied to the raw scores relating to the RFP evaluation process pursuant to the mandatory third party information exemption in section 10(1) and the discretionary exemptions in sections 7(1) (advice or recommendations) and 11 (economic and other interests) of the *Act*.

[3] The requester (now the appellant) appealed the decision of the county to deny access to the withheld portions of the two records.

[4] During mediation, the appellant explained that she expected to receive the following documents:

1. The liability insurance for a [named company] for \$5,000,000;
2. The taxi cab insurance for each vehicle of a [named company];
3. Confirmation that each of a [named company]'s drivers had completed a police reference check, prior to [date];
4. Confirmation that each driver of a [named company] completed the 5 levels of AODA training prior to [date];
5. The vehicle safety check records for each of a [named company]'s cabs and the dates they were conducted;
6. The vehicle registrations for each of a [named company]'s cabs and the dates they were registered.
7. The entire RFP evaluations.

[5] The appellant was not satisfied with the county's responses to these inquiries. She indicated that she did not believe that a reasonable search was conducted by the county and believed that the county should have the following records on file:

- Vehicle insurance of 5,000,000 per vehicle, for the named company;
- Safety standards certificates and the dates the certificates were issued for each vehicle for the named company;

- A list of the vehicles involved in the subsidized transportation program of the named company and when the vehicles were put to work for this program;
- A list of the drivers working for the subsidized transportation program of the named company and when they started working for this program.

[6] The appellant sought access to the records that had been withheld, namely the RFP Evaluation Sheet and the drivers' list of the named company.

[7] No further mediation was possible. Accordingly, this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought clarification from the appellant as to the information at issue. The appellant indicated that she was not interested in the information in the drivers' list; therefore, this record and section 14(1) are no longer at issue.

[8] I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the county and the named company (the affected party) seeking their representations regarding sections 7(1), 10(1) and 11. I also sought the representations of four third party companies listed in the RFP Evaluation Sheet with respect to the possible application of the mandatory exemption in section 10(1). I received representations from the county, the affected party, and two third party companies. In its representations, the county withdrew its reliance on sections 10(1) and 11 of the *Act*.

[9] The representations of the county and the two third party companies were sent to the appellant, along with a Notice of Inquiry. In response, the appellant provided representations. The representations of the affected party were withheld from the appellant due to confidentiality concerns.

[10] I then provided a copy of the appellant's representations to the county and sought and received reply representations from it. In its reply representations, the county relied on its initial representations.

[11] In this order, I find that the record is exempt under section 7(1). I also uphold the county's search for responsive records as reasonable.

RECORDS:

[12] The one record at issue in this appeal is the RFP Evaluation Sheet for the county's Subsidized Transportation Program. The record contains the individual raw scores relating to the RFP evaluation process for the six proponents in the RFP process.

[13] The appellant has received a copy of the Proposal Evaluation Report which contains the names of the six proponents and their final scores, as well as how the grading of the proposal was broken down by the county. Remaining at issue in the record is, therefore, the individual scores for each category for each proponent and the comments made by the evaluators on the individual scores.

ISSUES:

- A. Does the discretionary advice or recommendations exemption at section 7(1) apply to the RFP Evaluation Sheet?
- B. Did the institution exercise its discretion under sections 7(1)? If so, should this office uphold the exercise of discretion?
- C. Did the institution conduct a reasonable search for records?

DISCUSSION:

- A.** Does the discretionary advice or recommendations exemption at section 7(1) apply to the RFP Evaluation Sheet?

[14] 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.

[15] 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

[16] "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.

[17] "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

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

decision maker even if they do not include a specific recommendation on which option to take.²

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

[19] 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.³

[20] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁴

[21] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 7(1).⁵

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

- factual or background information⁶
- a supervisor's direction to staff on how to conduct an investigation⁷
- information prepared for public dissemination⁸

[23] The county states that the raw scores in the record do not in and of themselves determine the successful proponent in an RFP evaluation process, as the scores are entered into a council-approved matrix to determine a final weighted score that is assigned to each RFP submission. This information is included in a report to the appropriate committee and/or council, along with a recommendation to award the RFP.

² See above at paras. 26 and 47.

³ Order P-1054.

⁴ See footnote 1 above at para. 51.

⁵ See footnote 1 above at paras. 50-51.

⁶ Order PO-3315.

⁷ 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.).

⁸ Order PO-2677.

The county states that the committee and/or council then have a number of choices, as follows:

- request further information about the submissions or proponents;
- accept staff's recommendation to award the contract;
- award the work to one of the other proponents;
- direct staff to cancel the RFP and re-issue it; or,
- direct staff to engage in other purchasing methods for the work to be contracted.

[24] The county states that the committee and/or council do not typically participate in the evaluation process or receive the raw scores. Accordingly this information does not form part of the public record. The publicly available report, which includes the final weighted scores, has been provided to the appellant.

[25] The appellant states that the county's scoring method was known to the proponents and that the proponents had knowledge of the scoring categories and the weight assigned to each category. The appellant also states that the scoring was factual and statistical, and that the record qualifies as a report by a valuator. The appellant submits that the record contains objective factual, not opinion, information that comes within the exceptions to section 7(1) in sections 7(2)(a), (b), (c), (i) and (j).

Analysis/Findings

[26] Based on my review of the information at issue in the record, I agree with the county that it contains advice or recommendations. In particular, the record contains evaluative analysis of specific information in the RFPs, as well as a recommendation as to which proponent should win the bid. I find that section 7(1) applies to the record.

[27] I have considered the appellant's claim that the mandatory exceptions to section 7(1) in sections 7(2)(a), (b), (c), (i) and (j) apply. These paragraphs of sections 7(2) state:

- (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;

- (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;
- (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

[28] 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.⁹ The paragraphs (a) to (c) of section 7(2) 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.

[29] Paragraphs (i) and (j) of section 7(2) 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).

[30] The word "report" appears in several parts of section 7(2). 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.¹⁰

[31] I find that the record does not fall within the exceptions noted by the appellant in section 7(2), nor does it fall within the other mandatory exceptions in section 7(2).

[32] With respect to section 7(2)(a), factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.¹¹ Where the factual information is inextricably intertwined with the advice or recommendations, section 7(2)(a) may not apply.¹² The record in this appeal contains brief comments containing advice and recommendations and does not contain a coherent body of fact separate and distinct from the advice or recommendations given.

[33] The record is neither a statistical survey nor is it a report by a valuator as contemplated by sections 7(2)(b) and (c). In addition, I find that the record is not a report, as it is not a formal statement or account of the results of the collation and

⁹ See footnote 1 above at para. 30.

¹⁰ 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.).

¹¹ Order 24.

¹² Order PO-2097.

consideration of information within the meaning of sections 7(2)(c), (i) and (j). Instead, the record is a document with brief comments about certain categories from the submissions of the proponents.

[34] I find that the record forms part of a dialogue with the county, rather than a report to it, and contains the observations, suggestions and advice of county staff who reviewed the submissions.¹³ As stated by the county, its staff reviews the RFP submissions received and, based on their professional opinions of the information as presented, assigns scores to the various elements of the submissions. The scores are entered into a council-approved matrix to determine a final weighted score that is assigned to each RFP submission. The raw scores do not in and of themselves determine the successful proponent in an RFP evaluation process. The final total scores for each proponent have been disclosed to the appellant.

[35] Therefore, subject to my review of the county's exercise of discretion, I find that the record is exempt under section 7(1).

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

[36] 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.

[37] 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.

[38] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁴ This office may not, however, substitute its own discretion for that of the institution.¹⁵

¹³ Interim Order PO-3326-I.

¹⁴ Order MO-1573.

¹⁵ Section 43(2).

[39] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁶

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

[40] The county states that the record represents the collective professional opinion of a small selected group of municipal staff, with expertise in a particular area, who are known to the appellant. It submits that disclosure of the evaluation scores can subject this group to undue public scrutiny and consequently interfere with staff's continued

¹⁶ Orders P-344 and MO-1573.

ability to provide advice to committee and council in the free and frank manner contemplated by section 7(1) of the *Act*.

[41] The county further states that the publicly available report, including the final weighted scores, has been provided to the appellant and there is very little advantage in terms of further public accountability that can be gained by making the raw RFP scores public.

[42] The appellant states that the county erred in exercising its discretion because it failed to take into account the relevant considerations of the public's need for accountability in the expenditure of funds and the transparency that should have been provided in a fully scored evaluation sheet. She states that the proponents expected the four category scores to be available since they made up the sum of the total which was used to obtain a successful vendor. The appellant further states that no special matrix is needed for the sum of points to equal a factual number and form part of the public record, therefore, either the county took into account irrelevant factors or exercised its discretion in bad faith.

Analysis/Findings

[43] Based on my review of the record and the representations received from the county and the appellant, I find that the county exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[44] I find that the county took into account the purpose of section 7(1), which 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.¹⁷

[45] I also find that the county took into account that information should be available to the public, as well as whether disclosure will increase public confidence in the operation of the institution and the significance of the information to the appellant.

[46] In my view, the county's representations reveal that it considered the appellant's position and circumstances, balanced against the free flow of advice and recommendations, in denying access to the record under section 7(1).

[47] Therefore, I am upholding the county's exercise of discretion and find that the record is exempt under section 7(1) of *MFIPPA*. As the record is exempt under section

¹⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

7(1), it is not necessary for me to consider whether the record is also exempt under the third party information exemption in section 10(1).

C. Did the institution conduct a reasonable search for records?

[48] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹⁸ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[49] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.¹⁹ To be responsive, a record must be "reasonably related" to the request.²⁰

[50] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.²¹

[51] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.²²

[52] 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.²³

[53] In this appeal, the appellant did not indicate in her representations what additional information should have been located by the county. She merely states that she believes that information for the successful proponent, the affected party, should have been released because the affected party was now contracted to do work and all public safety information would have been mutually generated for the contract to be implemented. The appellant states that she submitted a separate request for copies of the proposals and did receive them from the county.

¹⁸ Orders P-85, P-221 and PO-1954-I.

¹⁹ Orders P-624 and PO-2559.

²⁰ Order PO-2554.

²¹ Orders M-909, PO-2469 and PO-2592.

²² Order MO-2185.

²³ Order MO-2246.

[54] Based on my review of the appellant's representations, it appears to me that she is satisfied with the records that have been located by the county and is merely pursuing access to the RFP Evaluation Sheet. As such, I find that the appellant has not provided a reasonable basis for me to conclude that additional responsive records exist. Accordingly, I am upholding the county's search for responsive records.

ORDER:

I uphold the county's decision and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ February 6, 2015