



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

ORDER M-151

Appeal M-9200166

City of Kingston



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The City of Kingston (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for records relating to the planning of the "Freedom of the City" exercise and display of military equipment and activities by the 2nd Regiment, Royal Canadian Horse Artillery on July 5, 6, and 7, 1991, in City Park, Kingston.

The City granted partial access to the records in its "Freedom of the City" file. Access was, however, denied to two records in their entirety pursuant to section 9(1) of the Act. The requester appealed the decision to deny access.

Mediation was not successful, and notice that an inquiry was being conducted to review the City's decision was sent to the appellant, the City and to the Canadian Forces Base at Kingston on behalf of the federal Department of National Defence (DND). Representations were received from all parties.

In his representations, the appellant contends that the contents of the records, which he did not receive, directly affect the public, and should, therefore, be open to view. This argument implicitly raises the issue of whether section 16 of the Act is relevant in the circumstances of this appeal.

ISSUES:

The issues in this appeal are:

- A: Whether the mandatory exemption provided by section 9 of the Act applies to the records.
- B: Whether section 16 of the Act is relevant to the disposition of this appeal.

ISSUE A: Whether the mandatory exemption provided by section 9 of the Act applies to the records.

Section 9(1) of the Act states, in part, that:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

- (a) the Government of Canada;
- (b) the Government of Ontario or the government of a

province or territory in Canada;

...

- (d) an agency of a government referred to in clause (a), (b) or (c);

In Order M-128, Inquiry Officer Asfaw Seife set out the following test to determine whether section 9(1) is applicable to the records in an appeal:

In my view, in order to deny access to a record under section 9(1), [the institution] must demonstrate that disclosure of the record could reasonably be expected to reveal information which [the institution] received from one of the governments, agencies or organizations listed in the section, **and** that this information was received by [the institution] in confidence.

I agree with the approach outlined in Order M-128 and adopt it for the purposes of this appeal. I would note that each element of the test must be met in order to support the application of the section.

The two records which the City did not disclose to the appellant are:

- (1) A covering memorandum dated January 18, 1991, along with nine pages of preliminary instructions regarding the military displays and related activities for the "Freedom of the City" celebration.
- (2) A covering letter dated May 10, 1991, along with 46 pages of Operations Instructions. (These instructions relate to such items as parade routes, the marching team, the canoeing contingent, a weapons security plan and an approach for dealing with the media).

All of these materials were prepared by staff of the DND. According to the representations received from the City, these materials were presented to City officials during two co-ordinating conferences held in January and June 1991, prior to the occurrence of the "Freedom of the City" event. During these sessions, copies of the records were also distributed to representatives of the City's Police Department and to members of the public who were part of the "Kingfest Committee".

Based on this chronology of events, it is clear that City officials **received** the records in question from

employees of the Government of Canada. In addition, the subsequent disclosure of these records could reasonably be expected to reveal information contained in the records. I must now determine whether the records in question were received **in confidence**, which is the final element of the section 9(1) test.

After receiving the access request from the appellant, the City sought the consent of the DND to disclose the records in question. The City has provided a copy of the response to this invitation which states that the records were given to the City "in confidence". The letter goes on to state, however, that:

[The] Information ... is not classified but is privy to our organization and ... should not be divulged to people requesting access to information to your organization.

In its representations, the DND repeated that it would not consent to the release of the documentation.

The City of Kingston, for its part, addresses the issue of confidentiality in the following fashion:

...[A]t the time we received the two records were they distributed with the expectation of confidentiality? The answer is no. According to [the City employees] there was not an explicit expectation that the records were supplied in confidence. However, several times during the two meetings there were security matters discussed where there was an implied expectation of confidentiality.

The appellant's position, on the other hand, is that "... the issue of confidentiality must be made clear when the documents are first exchanged, not retrospectively".

Section 42 of the Act provides that the burden of proof that a record, or part of a record, falls within one of the specified exemptions in the Act lies with the head of the institution (Order M-5).

After reviewing the records and the representations provided, I am not satisfied that the records were received by the City in confidence from a Department of the Government of Canada. I have arrived at this conclusion for two reasons. First, based on the evidence before me, the DND made no effort to restrict the persons who obtained access to the records during the two meetings which I referred to earlier in this order. Second, neither the City nor the DND have provided me with representations on the conditions under which the records were received or otherwise supported their assertions that the materials were provided in confidence.

Because I have not been provided with sufficient evidence to establish that the records were received in confidence, each element of the section 9(1) test has not been met. Consequently, I find that the City cannot rely on this provision of the Act to withhold the two records in question.

Since I have found that the records do not qualify for exemption under section 9(1) of the Act, it is not necessary for me to consider the application of section 16 of the Act to the facts of this case.

ORDER:

1. I order the City to disclose the records to the appellant in their entirety within 35 days following the date of this order and **not** earlier than the 30th day following the date of this order.
2. In order to verify compliance with the provisions of this order, I order the City to provide me with a copy of the pages of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____

Irwin Glasberg
Assistant Commissioner

_____ June 23, 1993