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

ORDER M-430

Appeal M-9400314

Town of Hanover

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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Town of Hanover (the Town) received a request for copies of Phases I and II of an environmental audit (the audits). The audits were prepared as a condition of an agreement of purchase and sale entered into between the Town and the owner of certain property (the vendor).

The Town subsequently decided not to purchase the property. The vendor and the Town then signed a mutual release in which, among other things, the Town delivered to the vendor all of its copies of environmental reports or audits, including the requested records.

The Town had originally denied access to the audits in their entirety, relying on the following exemptions contained in the Act:

- third party information - section 10(1)
- valuable government information - section 11(a)
- economic and other interests - section 11(c)

The requester appealed this decision to the Commissioner's office.

A Notice of Inquiry was provided to the appellant, the Town and two affected persons, including the vendor. Representations were received from the appellant, the Town and counsel for the vendor. In its representations, the Town stated that it no longer has an interest in the matter and would not be making any representations regarding the application of the exemptions or any other issues.

In his representations, counsel for the vendor claimed that the following additional exemptions should apply to the audits:

- solicitor-client privilege - section 12
- invasion of privacy - section 14(1)
- economic and other interests - sections 11(d) and (e)
- proposed plans or projects of an institution - section 11(g)

He also maintained that the discretionary exemptions originally claimed by the Town, sections 11(a) and (c), should still apply to the audits.

DISCUSSION:

PRELIMINARY MATTERS

CUSTODY AND CONTROL OF THE RECORDS

The Town forwarded a copy of the audits to the Commissioner's office on June 1, 1994.

However, when the Notice of Inquiry was sent to the parties to the appeal on August 16, 1994, he Town no longer had physical possession of the audits. Pursuant to the mutual release entered into between the Town and the vendor, dated June 29, 1994, the Town had agreed to, and did, forward all environmental audits, soil tests, etc. to the vendor. The Notice of Inquiry thus requested the parties to submit representations on the issue of whether the audits could be said to be "in the custody or under the control" of the Town for the purposes of section 4(1) of the Act.

The Notice of Inquiry posed a number of questions which had been set out by former Commissioner Sidney B. Linden in Order 120 as providing some assistance in determining whether records are in the custody or under the control of an institution for the purposes of the Act. Counsel for the vendor maintains that, according to these criteria, the audits are not currently in the custody or under the control of the Town. Thus, he states that the audits are not in the "public domain" and the Act has no application.

Section 4(1) of the Act states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or part falls within one of the exemptions under sections 6 to 15.

This section does not state at what point in time the institution must have custody or control over the records in order for the Act to apply. However, it is my opinion that it would defeat the purposes of the legislation if one were to accept the position of counsel for the vendor. I cannot agree that because the Town does not **currently** have custody of or control over the audits, the Act does not apply. This conclusion would frustrate the ongoing efforts of the appellant to obtain a copy of the audits.

In my view, the current status of the audits vis a vis custody or control is not germane to this appeal. It is clear that as of the date the request was made and the subsequent appeal filed, the Town had both custody and control over the audits. As I have indicated, the Town provided the Commissioner's office with a copy of the audits in response to the Confirmation of Appeal dated May 20, 1994. It was only after this date and pursuant to the terms of the mutual release, that the Town was obliged to and did forward the remaining copies of the audits in its possession to the vendor.

Accordingly, I conclude that at the relevant time, the Town had custody and control over the audits. Thus the provisions of the Act apply.

LATE FILING OF THE APPEAL

In his submissions, counsel for the vendor maintained that the appeal was "out of time" in that it was filed beyond the 30-day period prescribed in section 39(2) of the Act. The decision of the Town denying access to the audits was dated March 4, 1994. The letter of appeal was received by the Commissioner's office on May 18, 1994.

When the Town was notified of the appeal, the Town itself raised the issue of the timing of the appeal. I note that, in its decision letter, the Town did not advise the requester that, should he wish to appeal its decision, he should file an appeal with the Commissioner's office within 30 days as required by section 39(2).

Pursuant to section 22(1)(b) of the Act, there are certain legislative requirements which an institution must include in its decision letter refusing access to a record. One such requirement is set out in section 22(1)(b)(iv) which states:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> (b) where there is such a record,
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In my view, in order that notification of the right to appeal be meaningful, it must include a reference to the 30-day appeal period established by section 39(2). This requirement is set out in the June 1992 IPC Practices publication of the Commissioner's office entitled "Drafting a Letter Refusing Access to a Record". This document was sent to all provincial and municipal institutions at the time of its publication, and it remains in effect to this day.

Accordingly, I have concluded that the Town's decision letter was inadequate in that it failed to advise the requester of both his right to appeal and the time during which he must exercise that right. The notice of refusal thus fails to meet the mandatory requirements of section 22(1)(b).

Notwithstanding the fact that the Town raised the issue of the timing of the appeal, mediation of the appeal was then undertaken and the Town participated in this process without specific objection to the jurisdiction of the Commissioner's office. The matter of timing was raised in the Notice of Inquiry sent to the parties as the position of the Town on this issue was not entirely clear. Counsel for the vendor has responded to the issue as I have indicated. As I have noted, the Town has submitted no representations.

In my view, the decision to proceed to address the substantive matters raised by an appeal, despite the fact that it was filed beyond the 30 days, lies with the head of the institution. In this case, the institution followed this course and proceeded to mediate in good faith.

Because the requester was not advised by the Town of his right to appeal or the timing of a potential appeal, a strict adherence to the 30-day period would now prejudice his rights.

I also agree with the principle expressed by former Commissioner Sidney B. Linden in Order P-155 that the Act should be interpreted liberally in favour of access to the process unless someone can show prejudice resulting from the delay.

Counsel for the vendor does not submit that his client has been or is prejudiced by the timing of the filing of the appeal. Rather, he states that section 39(2) of the Act is a mandatory statutorily imposed appeal period which can be amended only by statute or regulation. Be that as it may, an appellant cannot be required to adhere to a prescribed time limit when a decision refusing access is deficient in failing to advise him of the time limit. Based on my discussion above, I do not accept the position of vendor's counsel on this issue.

Accordingly, I am of the view that I have the jurisdiction to consider the merits of this appeal despite the fact that it was filed some 45 days late.

ACCESS TO DOCUMENTATION

Counsel for the vendor maintains that he is "precluded from making full submissions" because certain documentation has not been made available to him. Prior to submitting his representations, counsel had contacted this office for copies of the request which initiated the appeal, correspondence which had been exchanged between the parties to the appeal and the orders referred to in the Notice of Inquiry.

At that time, the Supervisor of the Appeals Officer responsible for the appeal advised counsel in writing of the wording of section 55(1) of the provincial Freedom of Information and Protection of Privacy Act (the provincial Act) which states:

> The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this **or any other Act**. [emphasis added]

The reference to "any other Act" includes appeals, such as this, filed under the municipal freedom of information legislation.

This provision prohibits the Commissioner, or anyone working on his behalf, from providing copies of documentation related to the appeal to counsel.

In the same correspondence, counsel was also advised that he might make a request to the Town for access to the documentation it might have.

Following a careful review of counsel's position, I find that pursuant to section 55(1) of the provincial Act, the Commissioner's office is precluded from providing the relevant documentation to the vendor.

As he was previously advised, counsel for the vendor is not precluded from applying to the Town, under the Act, for information pertaining to this appeal which is in the custody or control of the Town. If such a request were submitted, the Town would then be required to process the request pursuant to sections 19 and 22 of the Act.

As far as counsel's request for copies of orders is concerned, the Commissioner's office has no statutory obligation to provide copies of its publicly available orders to the parties to an appeal, nor does it have any duty to do so flowing from the principles of procedural fairness. Counsel was advised that copies of orders referred to in the Notice of Inquiry were available at the Ontario Government Bookstore.

RIGHTS OF PROPERTY OWNERSHIP

Counsel for the vendor also states that his client's rights in the property, which can be traced in a direct line to the Crown patent, include the covenant that the ownership will not be disturbed. On this basis, he submits that disclosing the records would breach this covenant.

In order for me to determine whether access to a record should be denied, I must be provided with evidence that an exemption contained in the Act is applicable in the circumstances. Counsel has not provided me with any indication as to which of the exemptions in the Act may relate to the covenant. Nor has counsel submitted any evidence as to how his client's position as a successor in title to the original Crown patentee has any bearing on the application of the Act to the requested records.

I have, therefore, concluded that the vendor has not established a claim for exemption by virtue of the nature of his title to the property, and that his claims for exemption are to be treated in the same manner as those of any other third party.

DISCRETIONARY EXEMPTIONS

As I have previously indicated, the Town initially claimed that the audit was exempt pursuant to sections 11(a) and (c) of the Act but submitted no representations in support of this position. Counsel for the vendor has made representations in support of the application of sections 11(a), (c), (d), (e) and (g) of the Act.

Counsel also submits that section 12 of the Act applies to the records. The Town has at no time exercised its discretion to refuse access to the records on the basis of the section 12 exemption. Nor has it made any representations regarding the application of this exemption to the records.

I will first consider the **new** discretionary exemptions claimed by counsel for the vendor, namely sections 11(d), (e) and (g) and 12.

As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. This result would occur, for example, where release of a record would seriously jeopardize the rights of a third party (Orders P-257 and M-10).

In my view, however, this appeal does not represent the kind of situation where a discretionary exemption not originally raised by an institution should be considered. Accordingly, I am not prepared to apply sections 11(d), (e), (g) or 12 to the records at issue in this appeal.

I will now consider the situation with regard to sections 11(a) and (c).

The scheme of the Act clearly contemplates that section 10 is designed to protect the interests of third parties, while harm to the competitive or financial position of an institution is addressed by the exemption in section 11 (Orders P-218, P-219 and P-356).

The Town, through its lack of representations in support of the section 11 exemption, is no longer relying on that exemption. It has clearly indicated that it no longer has an interest in this appeal.

Accordingly, the vendor's interest is to be determined on the application of section 10(1) of the Act and I need not consider the application of sections 11(a) and (c).

Counsel for the vendor also claims that section 14(1) applies to the records. As this is a mandatory exemption, I will consider its application in this order.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined to mean recorded information about an **identifiable individual**.

The vendor is a company incorporated under the Ontario Business Corporations Act. Its counsel claims that it has the rights, powers and privileges of a natural person by the operation of Section 15 of that Act. Counsel appears to be implying from this that the vendor is an "identifiable individual" under the Act and thus should be accorded personal privacy rights.

As section 14 of the Act applies only to personal information as defined under section 2(1), I must be satisfied that the records for which the section 14 exemption is sought contain recorded information about an identifiable individual. In this instance, I must determine whether the vendor is an identifiable individual for the purposes of the Act.

In Order 16, former Commissioner Sidney B. Linden stated that:

> "Individual" is defined in Black's Law Dictionary, (fifth edition), as follows:
>
> > As a noun, this denotes a single person as distinguished from a group or class, and also, very commonly a private or natural person as distinguished from a partnership, corporation, or association; but it is said that this

> restrictive signification is not necessarily inherent in the word, and that it may, in proper cases, include artificial persons.
>
> The use of the term "individual" in the Act makes it clear that the protection provided with respect to the privacy of personal information relates only to natural persons. Had the legislature intended "identifiable individual" to include a sole proprietorship, partnership, unincorporated associations or corporation, it could and would have used the appropriate language to make this clear. The types of information enumerated under subsection 2(1) of the Act as "personal information" when read in their entirety, lend further support to my conclusion that the term "personal information" relates only to natural persons.

I agree with the interpretation of former Commissioner Linden, and for that reason I have concluded that the vendor, identified only through its corporate designation during the course of this appeal, is not an "identifiable individual" under the Act. Accordingly, section 14 of the Act has no application in the circumstances of this appeal.

THIRD PARTY INFORMATION

Counsel for the vendor claims that sections 10(1)(a) and (c) of the Act apply to exempt the audits from disclosure. For the record to qualify for exemption under these provisions, the party resisting disclosure, in this case the vendor, 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 sections 10(1)(a), (b) or (c) will occur.

Failure to establish the requirements of any part of this test will render the section 10(1) exemption claim invalid.

Part One

The audits contain detailed information about the vendor's property, particularly about the condition of the soil. In my opinion all of the information contained in these records qualifies as technical information and, accordingly, part one of the test has been satisfied.

Part Two

The second part of the test has two elements. First, the vendor must establish that the information was **supplied** to the Town and second, that it was supplied **in confidence**, either implicitly or explicitly.

The receipt of a satisfactory environmental audit was a condition of the Town completing the agreement to purchase the vendor's property. To satisfy itself of this condition, the Town invited a consulting company to submit a proposal to conduct the audit. The proposal was accepted by the Town and the audit was undertaken. The Town paid for the services of the consultant.

Counsel for the vendor submits that the audits were "supplied" by his client to the Town in that the vendor permitted the consultants to enter onto its property and conduct the necessary tests, surveys, etc. Counsel admits, however, that his client was not involved in the audit in any way. Rather the consultants were advised that they could do what was necessary to complete their report. In the audits, the consultants describe their sources of information and the vendor is not included in this list.

Based on the above-described facts, I find that the information contained in the audits was not "supplied"by the vendor to the Town. The Town itself arranged for the consultants to provide it with the necessary information and paid for their services.

Accordingly, I find that part two of the test has not been met. Based on this finding, it is not necessary for me to consider the third part of the test. The records do not qualify for exemption under section 10(1) of the Act.

ORDER:

1. I order the Town to disclose to the appellant the copy of the records which is being sent to the Town's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Town to disclose the records within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Town to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: December 8, 1994
Anita Fineberg
Inquiry Officer