



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

ORDER M-650

Appeal M_9500342

The City of Niagara Falls



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NATURE OF THE APPEAL:

The City of Niagara Falls (the City) received the following request under the Municipal Freedom of Information and Protection of Privacy Act (the Act):

- (1) ...all notes, memorandums, reports, writings or records of the City of Niagara Falls, including those made by City staff or made by others but in the possession of City staff with respect to the preparation of specifications and tender documents and the determination of what is to be included therein for contract 95-01- (General Maintenance, Pole Replacement and Installation of New Street Lighting Fixtures, for the City of Niagara Falls).
- (2) ...all notes, memorandums, reports, writing or records of every meeting, telephone conversation or recommendation of the City of Niagara Falls including City staff with respect to the above-noted contract tender after advertising for Tender and after receipt of Tenders.
- (3) Without restricting the generality of the foregoing, all memorandum and notes of [named individuals] of any meetings or telephone discussions held with each other, officials of Niagara Falls Hydro, officials of Ontario Hydro or officials of Ground Aerial Maintenance Services Limited - concerning the proposed Tender and actual Tender.

The City granted partial access to records which it identified as responsive to the request, but denied access to the remaining records pursuant to the following exemption contained in the Act:

- solicitor-client privilege - section 12

The records to which access was denied consist of four documents: (a) three pages of handwritten notes dated March 2, 1995, (b) a two-page letter dated March 6, 1995, (c) a one-page letter dated April 11, 1995 and (d) a one-page letter dated May 10, 1995.

The requester appealed the denial of access. He also believes that more records exist which respond to his request. A Notice of Inquiry was provided to the appellant and the City. Representations were received from both parties.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 12 of the Act consists of two branches, which provide a head with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and

- (2) a record which was prepared by or for counsel employed or retained by the City for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by the City; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

The appellant did not submit representations on this issue. The City makes reference only to the application of the exemption to the handwritten notes, stating that:

...[the City Solicitor's] handwritten notes were a record that was subject to Solicitor/Client privilege and were prepared by Counsel who was employed by the City and was prepared in contemplation of litigation. At the time of making the notes, the City was aware of potential litigation with respect to the awarding of the Tender for the Street Lighting Contract.

The City provided no details or additional information in support of the exemption claimed. While the handwritten notes may have been prepared by the City's counsel, I have not been provided with any information as to the circumstances surrounding their creation and it is not apparent on the face of the record. The City has not addressed the application of the exemption to the other three records. In my view, the City has provided insufficient evidence to establish that section 12 applies to exempt the records from disclosure. No other discretionary exemptions have been claimed by the City and, following my review of the records, I find that there are no mandatory exemptions which apply in this case. Accordingly, the records should be disclosed to the appellant.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the City indicates that such a record does not exist, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. The Act does not require the City to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

The City states that all pertinent records were searched, that the search consisted of a manual examination of files and that there is no electronic file system in place for records of this nature. No other information as to the nature and extent of the search undertaken by the City was provided. The City did not provide a summary of the steps taken to locate records responsive to

the appellant's request, nor did it provide this information in affidavit form, as had been requested in the Notice of Inquiry.

In his representations, the appellant indicates his reasons for believing that additional records exist which respond to the request. Specifically, the appellant indicates that he seeks access to records which may have been prepared by City staff or others which relate to the preparation of the tender itself, including the specifications for the work to be performed. The only records identified by the City as responsive were prepared after the tender call was made. In my view, the City has not adequately addressed the question of records created prior to the issuance of the tender, which forms the basis for the appellant's request.

Based on the representations provided by the parties, I am not satisfied that the City conducted a reasonable search for records responsive to the request.

ORDER:

1. I order the City to disclose the records to the appellant within fifteen (15) days of the date of this order.
2. I order the City to conduct a further search for records responsive to the appellant's request and to advise the appellant in writing of the results of this search within twenty-one (21) days of the date of this order.
3. In the event that responsive records are located in the search referred to in Provision 2, I order the City to render a decision on access to the records in accordance with the provisions of sections 19 and 22 of the Act, treating the date of this order as the date of the request, without recourse to a time extension under section 20 of the Act.
4. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records disclosed pursuant to Provision 1 and the correspondence referred to in Provisions 2 and 3.

Original signed by: _____

Donald Hale
Inquiry Officer

November 17, 1995