



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

ORDER M-941

Appeal M_9600379

The Corporation of the Town of Oakville



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NATURE OF THE APPEAL:

The Corporation of the Town of Oakville (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to two reports: “Department of Public Works Operational Review” dated October, 1990 and “Management of Change Recommendations for the Construction Inspection Unit” dated June, 1994. The Town granted access to the 1994 report but denied access to the 1990 report.

The Town claimed that the 1990 report fell within the parameters of section 52(3)3 of the Act and therefore, outside the scope of the Act. The Town indicated that even if section 52(3) did not apply, the record was exempt from disclosure under section 6(1)(b) (closed meeting) of the Act.

The requester, a former employee of the Town, appealed the decision to deny access.

During mediation and within the timeline established by the Commissioner’s office for the raising of additional discretionary exemptions, the Town issued a supplementary decision letter, indicating that sections 7(1) (advice or recommendations) and 11(f) (economic and other interests) of the Act, also applied to the record.

The record at issue is a report of an operational review of the Town’s Department of Public Works, prepared by consultants retained by the Town for this purpose. The report, dated October 1990, identifies and addresses issues in the following areas: operational and strategic planning, communications, department structure and staffing, operating changes in each section, overall management direction and financial implication.

This office provided a Notice of Inquiry to the appellant and the Town. Representations were received from both parties.

DISCUSSION:

JURISDICTION

The first issue in this appeal is whether the report falls within the scope of sections 52(3) and (4) of the Act. These sections read:

- (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
- (4) This Act applies to the following records:
1. An agreement between an institution and a trade union.
 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 52(4) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction

The Town submits that section 52(3)3 applies to exclude the record from the Act.

In Order P-1242, former Assistant Commissioner Tom Mitchinson found that in order to fall within the scope of paragraph 3 of section 65(6) of the provincial Act, which is the equivalent of section 52(3)3 of the Act, the institution, in this case, the Town, must establish that:

1. the record was collected, prepared, maintained or used by the Town or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communication; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Town has an interest.

I agree with this analysis and will apply it in the present appeal.

Requirements 1 and 2

The Town states that the report was prepared on its behalf, by consultants retained to conduct an operational review of its Public Works department. The Town submits that the consultants were retained “to provide advice in the form of a report with regard to the Town’s Department of Public Works in the areas of short term and long term strategic operational planning, the structure and staffing levels of the operational units and the efficiency and effectiveness of the operation.” The Town also states that the report was prepared to assist the council in its discussions related to the Public Works department and has provided evidence that the report was presented to the council.

Having reviewed the report, I find that it was clearly prepared on behalf of the Town by the consultants. I am also satisfied that the preparation and use of the report was directly connected to the council meetings, discussions or communications and it can properly be characterized as being “in relation to” them (Order P-1242). Therefore, Requirement 2 has also been established.

Requirement 3

I must now determine whether the communications and meetings were about employment or labour related matters.

The Town submits that the report relates to the “short term and the long term planning for the Department... and focused on the staffing levels and staff functions” and therefore, was directly related to labour relations and employment related matters in which the Town has an interest.

I have carefully reviewed the record. While the report includes suggestions for the elimination of certain positions and the creation of others, in my view, it is primarily an organizational review of the department and contains summaries of management’s areas of concerns, employees’ concerns, department goals, and a summary of a survey conducted of the local residents on the efficiency of the service delivery mechanisms of the department. In my view, the report’s is more appropriately characterized as relating to the “efficiency and effectiveness of the operation” than to labour-relations or employment-related matters. I find, therefore, that the third requirement has not been met and section 52(3)3 does not apply.

Accordingly, I conclude that the report is subject to the Act and as a consequence, it falls under the jurisdiction of the Commissioner’s office. Accordingly, I will proceed to consider whether any of the claimed exemptions apply.

CLOSED MEETING

In order for the Town to apply section 6(1)(b) of the Act, it must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**
2. that a statute authorizes the holding of this meeting in the absence of the public; **and**
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

The Town has provided copies of minutes of various meetings as evidence that meetings of the council and its committees of the whole took place. I am satisfied that such meetings took place and the first part of the section 6(1)(b) requirement has been met.

The excerpts from the minutes of the various meetings, provided by the Town, make it clear that the meetings were held in the absence of the public.

With respect to the second requirement, the Town submits that the in-camera meetings were authorized by section 55(1) of the Municipal Act. This section, as it then read, provided:

The meetings, except meetings of a committee including a committee of the whole, of every council and of every local board as defined by the Municipal Affairs Act, except police services boards and school boards, shall be open to the public, and no person shall be excluded therefrom except for improper conduct.

The Town also refers to subsection 95(1) of By-law 1986-261, being its procedural by-law and passed pursuant to section 102 of the Municipal Act, which, at the time of the meetings, provided as follows:

Any committee meeting or any part thereof may be held in camera if the committee so decides by a vote of the majority of the members present to consider a personnel matter, a property matter or a matter involving litigation underway or perceived as a possible result.

In my view, the record does not relate to a property matter, a personnel matter or a matter involving litigation or possible litigation. As I have indicated previously, the record is a report on an organizational review of the public works department. I find that the information in the record does not fall within any of the categories listed in subsection 95(1) of By-law 1986-261. Accordingly, as the Town has not shown that a statute authorized holding meetings relevant to this record in the absence of the public, I find that the section 6(1)(b) exemption does not apply to the record.

ECONOMIC AND OTHER INTERESTS

The Town submits that section 11(f) applies to the information contained in the record. This section states:

A head may refuse to disclose a record that contains:

plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public.

In order to qualify for exemption under section 11(f) of the Act, the Town must establish that the record satisfies each element of the following:

1. the record must contain a plan or plans, **and**
2. the plan or plans must relate to:
 - (i) the management of personnel or
 - (ii) the administration of an institution, **and**
3. the plan or plans must not yet have been put into operation or made public.

In Order P-348, Commissioner Tom Wright made the following finding under section 18(f) of the provincial Act, which is equivalent to section 11(f) of the Act:

The eighth edition of The Concise Oxford Dictionary defines “plan” as “a formulated and especially detailed method by which a thing is to be done; a design or scheme”. In my view, the record cannot properly be considered a “plan”. It contains certain recommendations which, if adopted and implemented by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan. Therefore, in my view, the record does not qualify for exemption under either section 18(1)(f)...

The Town submits that the record contains plans and recommendations for the management and administration of the public works department. The Town states that the plans were never made public and were never put into operation. In its representations, the Town also states that “[a]lthough the Council directed that a report be prepared regarding the implementation of the recommendations within the report, the recommendations contained in the report were never adopted by Council and were never implemented”.

In my view, the record does not contain the sort of detailed methods, schemes or designs which are characteristic of a plan. It is evident from my review of the record that the Town did not intend it to be used as a plan but rather as a basis for discussion towards the development of a plan. Accordingly, I find that the first requirement of section 11(f) has not been met and the exemption does not apply to the record.

ADVICE OR RECOMMENDATIONS

Section 7(1) of the Act reads as follows:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

It has been established in previous orders that advice and recommendations for the purpose of section 7(1) must contain more than mere information. To qualify as “advice” or “recommendations” the information contained in the record must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 7(1) of the Act.

The Town submits that the record would reveal the advice and recommendations of a consultant retained by the institution. The Town states that the information in the record relates to a suggested course of action which would ultimately be accepted or rejected by its recipient during the deliberative process. The Town states further that disclosure of the information in the record would inhibit the free flow of advice and recommendations within the Town’s deliberative process of decision-making and policy-making.

Based on the representations of the Town, it would appear that the record is a preliminary step in the review exercise. Therefore, in my opinion, it would be quite removed from the deliberative process of decision-making and policy-making which has yet to take place.

In my view, disclosure of such a report prepared by consultants retained by the Town would not inhibit the free flow of advice and recommendations within the Town’s deliberative process of decision-making and policy-making.

I find that only certain portions of the record contain advice or recommendations pursuant to section 7(1) of the Act. The remaining portions contain factual information, analyses, opinion and survey responses, the disclosure of which would not reveal the advice and recommendations nor would it permit the drawing of accurate inferences about the substance of the recommendations.

I must now consider whether any of the mandatory exceptions contained in section 7(2) of the Act apply to those parts of the record that I have found to be exempt under section 7(1).

Section 7(2)(e) provides that an institution **shall not** refuse to disclose a record which contains “a report or study on the performance or efficiency of an institution”. This section is unusual in the context of the Act in that it constitutes a mandatory exception to the application of an exemption for discrete types of documents, namely reports on institutional performance. Even if the report or study contains advice or recommendations for the purpose of section 7(1), the Town must still disclose the **entire** document if the record falls within this category.

As indicated previously, the record is an operational review of the public works department relating to the efficiency and effectiveness of the department. The record is clearly a report which includes factual information, survey results, analyses and recommendations. In my view,

the primary focus of the report is to find ways in which to increase the productivity of the public works department or in other words, to improve its performance or efficiency. I find that the record falls squarely within the exception provided by section 7(2)(e).

In reaching this decision, I am mindful of the differences between the wording of the exception in section 7(2)(e) of the Act and the concordant section, section 13(2)(f) of the provincial Act. The latter section prohibits a head from refusing to disclose “a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy”.

Previous orders of the Commissioner have adopted a broad interpretation of this section in order to not restrict access to those reports or studies which focus on one or more discrete program areas within an institution, rather than the institution as a whole. This interpretation is consistent with the general principle of providing requesters with a general right of access to government information and accords with the plain meaning of this exception. If the interpretation of section 7(2)(e) of the Act was limited to performance or efficiency reports of an institution as a whole, the exception would be rendered virtually meaningless and result in an anomalous distinction between the scope of access provided under the municipal as opposed to the provincial legislation. This distinction would be nonsensical given that the purposes and principles of both access schemes are the same (Orders P-658 and M-700).

I agree with this approach and adopt it for the purposes of this appeal. Therefore, I find that the exception in section 7(2)(e) should apply to an operational review of a department or section of an institution, such as the record at issue in this appeal. Accordingly, I find that the section 7(2)(e) exception applies and the report, in its entirety, should be disclosed to the appellant.

ORDER:

1. I order the Town to disclose the record, in its entirety, to the appellant by sending him a copy not later than **June 6, 1997**.
2. In order to verify compliance with this order, I reserve the right to require the Town to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ May 22, 1997