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

FINAL ORDER PO-1915-F

Appeal PA-990408-1

Ministry of the Attorney General

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Attorney General (the Ministry) for access to information concerning proposed amendments to the *Criminal Code* regarding hate laws.

The Ministry identified responsive records and advised the appellant by letter that it was granting partial access to these records. The Ministry enclosed records with this letter, portions of which were severed. The Ministry stated that it was denying access to the remaining records (approximately 2,502 pages) pursuant to sections 13, 15, 19 and 21 of the *Act*. The Ministry further stated:

> The exempt material consists of briefing materials, reports of various working groups and background material for working groups.
>
> Access to part of the records (where indicated on the enclosed documents) is denied pursuant to subsection 15(1)(b) of the *Act* as described above.
>
> In addition, some portions of the responsive records have been marked as not responsive (N/R) as they do not pertain to your request.

The appellant appealed the Ministry's decision to this office.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the Ministry, which provided representations in response. I then sent the Notice of Inquiry, together with a copy of the Ministry's representations, to the appellant. The appellant did not provide representations in response.

In my Interim Order PO-1891-I, I upheld, in part, the Ministry's decision to deny access to the records at issue. However, with respect to a certain group of records, I stated:

> . . . [S]ome of the records for which section 15 was claimed consist of materials either sent to or received from the City of Toronto and/or the former Municipality of Metropolitan Toronto (the City). In my view, while they may fall within the scope of section 15(a) or (b) for other reasons, this exemption does not apply solely on the basis of the reasons articulated by the Ministry respecting relations between Ontario and the governments of Canada and other provinces and territories. In the circumstances, I have decided not to make a specific finding on the applicability of section 15 to these records, but will seek further representations from the City and the Ministry on this issue from the perspective of relations between the City and Ontario. These records are:
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> > Records 1276-1278, 1286-1290, 1291-1294, 1295-1304, 1381, 1382-1391, 1392-1394, 1395-1470, 1858-1863

I then sent a Supplementary Notice of Inquiry to the City and the Ministry seeking representations on these specific records. Both the City and the Ministry provided

representations in response. I then sent these representations to the appellant, together with the Supplementary Notice of Inquiry, but I received no representations in response.
In its representations, the City indicated that it had no objection to the disclosure of all of the records remaining at issue, with the exception of Records 1382-1391, which comprise a document entitled, "Toronto Mayor's Committee on Community and Race Relations Legal Sub-Committee: Notes for Discussion with the Ontario Solicitor and Attorney Generals and Minister of Citizenship on November 16, 1993."

The Ministry adopts the position of the City in this regard. On this basis, I will order the Ministry to disclose the remaining records to the appellant, and only Records 1382-1391 are still at issue.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

Introduction

Sections 15(a) and (b) read:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) prejudice the conduct of intergovernmental relations by the Government of Ontario or an institution;
>
> (b) reveal information received in confidence from another government or its agencies by an institution;
>
> . . . . .
>
> and shall not disclose any such record without the prior approval of the Executive Council.

The words "could reasonably be expected to" appear in the preamble of section 15, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In Order 69, former Commissioner Sidney Linden held that a municipality is not a government for the purposes of section 15 of the *Act*. In this order, the former Commissioner states:

In my view, for an exemption under either subsection 15(a) or (b) to apply, I must first determine if a municipality is a government for the purposes of section 15 of this *Act*. An examination of the meaning of the word "municipality" in the context of the *Act* itself is a necessary starting point to making this determination.

In subsection 2(1) of the *Act*, the definition of "institution" encompasses a municipality. In subsection 15(b), the pertinent phrase used is "another government". If a municipality is an institution for the purposes of the *Act*, it would be contrary to the wording of the *Act* to extend the meaning of "another government" to include "municipality" without specific statutory direction. A plain reading of subsection 15(b), taking into consideration the context of the *Act*, leads me to the conclusion that "another government" means the federal government, another provincial government, or a foreign government.

The institution relies on several court decisions as authority for the proposition that a municipality is a government. Specific reference is made in the institution's submissions to *McCutcheon v. Toronto* (1983), 147 D.L.R. (3d) 193 (Ont. H.C.) and *McKinney v. University of Guelph* (1987), 46 D.L.R. (4th) 193(Ont. C.A.).

In my view, reliance on these decisions to determine the meaning of the word "government" in the context of this *Act* is problematic. I have an obligation to rely on the *Act*'s written expression in ascertaining legislative intent in the first instance. As Pierre A. Cote points out in The Interpretation of Legislation in Canada (1984 Les Editions Yvon Blais Inc., at p. 443), "there is a danger in taking the meaning given by one judge to a word in a specific context, and transposing it to another enactment for which a different context may suggest a different meaning for the same word."

With this in mind, I note that the legal authorities relied upon by the institution deal with entirely different statutory contexts. In *McCutcheon v. Toronto* and *McKinney v. University of Guelph*, the courts' comments with respect to the status of a "municipality" were made in the context of the application of the *Canadian Charter of Rights and Freedoms*.

The interpretation that a municipality is not a "government" for purposes of the *Freedom of Information and Protection of Privacy Act, 1987* is supported by the legislative history of section 15. Section 15 of the *Act* had its genesis in the recommendations contained in the Report of the Williams Commission - *Public Government for Private People* (The Report of the Commission on Freedom of Information and Individual Privacy/1980 - Queen's Printer of Ontario). It is clear from a review of the Commission's discussion leading to the recommendation of a provision very similar to the present section 15 that the intent of such a provision was to exempt sensitive information that may be generated by "international relations or the relations of the province of Ontario with the governments of other jurisdictions". (See pages 304 to 307, Volume 2, *The Report of the Commission on Freedom of Information and Individual Privacy/1980*).

> In the clause-by-clause review of Bill 34 by the Standing Committee on the Legislative Assembly, the comments of the Attorney General with respect to the purpose of the section 15 exemption were unequivocal. The Attorney General stated that the purpose of the exemption was "to protect intergovernmental relations between the provinces or with the feds or with international organizations". The Attorney General explicitly stated that a municipality was not intended to be a "government" for the purposes of section 15. (March 23, 1987, Comments made after second reading of the Bill.)
>
> Finally, if a municipality was considered to be a government for the purposes of section 15 of the *Act*, a letter from a local library board, for example, could be placed on the same footing, and qualify for the same exemption as a document received from the government of another nation. This would greatly expand the number of records that could be withheld from the public indefinitely, not just for the duration of a period of negotiations. In my view, this result would be contrary to the spirit and right of access to information as set forth in the *Act*. Clear statutory direction would be necessary to justify such a position, and as I have indicated, I see no such direction in the *Act*.
>
> In view of the above, I am not able to accept the institution's position that a municipality is a government for the purposes of the *Freedom of Information and Protection of Privacy Act, 1987*. Accordingly, I find that the exemptions claimed under section 15, do not apply.

The City makes extensive submissions on why I should decline to follow Order 69, and find that sections 15(a) and (b) can extend to relations between municipalities and the Government of Ontario. In the circumstances, I have decided not to make a definitive ruling on this point because, for the reasons set out below, the City has failed to establish that disclosure could reasonably be expected to prejudice the conduct of relations between it and the province as required under section 15(a), or that disclosure could reasonably be expected to reveal information the Ministry received in confidence from the City.

The City submits:

> . . . The records were created specifically for a private meeting with the Ontario Solicitor and Attorney Generals and the Minister of Citizenship. These records provide the legal context as well as the former City's views and position on issues to be discussed at the meeting, including recommended reforms and objectives for training. Given the sensitivity of the issues, the information contained in these records was specifically provided by the former City to the three provincial ministers in confidence.
>
> The City submits, therefore, that section 15(b) of the [*Act*] applies to withhold the records from disclosure.

The Ministry relies on its earlier submissions regarding the application of section 15(a) and/or (b) to these records. However, these submissions do not specifically address the relationship between the City and the Ministry.

In my view, neither the City nor the Ministry has established that disclosure of the records at issue could reasonably be expected to prejudice the conduct of intergovernmental relations under section 15(a) of the *Act*. While the records touch on the same subject matter as the records I found exempt in Order PO-1891-I, that is, proposed amendments to the hate crime provisions of the *Criminal Code*, this alone is not sufficient. My decision in the earlier order was based largely on the specific context of the confidential federal, provincial, and territorial government discussions. In my reasons, I stated:

> Based on the approach taken to section 15(a) in similar circumstances in these earlier orders, as well as the representations of the Ministry and the records themselves, I am satisfied that disclosure of the vast majority of the records at issue under section 15 could reasonably be expected to prejudice the conduct of intergovernmental relations by the Government of Ontario. In my view, the Ministry has provided detailed and convincing evidence to establish a reasonable expectation of probable harm, under section 15(a), to the conduct of relations between the Government of Ontario and the federal government and the other provinces and territories participating in discussions concerning amendments to the hate crime provisions of the *Criminal Code*. I am satisfied that disclosure of these records could reasonably be expected to inhibit any further co-operative ventures among the federal, provincial and territorial governments with respect to these and other issues requiring national cooperation and consultation.

Unlike in Order PO-1891-I, the records at issue here were not created in the context of a co-operative venture between the City and the Ministry respecting legislative amendments. Clearly, the City does not play a comparable role to that of the provincial, territorial and federal governments in regards to the administration of justice and the *Criminal Code*, as discussed in these records, and it is not alone sufficient that the record may have found its way into the Ministry's hate crime amendment files.

In addition, under section 15(b), the Ministry and the City have not provided me with the necessary detailed and convincing evidence to establish that disclosure of these records would reveal information the Ministry received "in confidence" from the City, either expressly or by implication. I accept that the records address sensitive criminal justice and race relations issues. However, this does not mean that the City's *position* on these issues is necessarily sensitive, and I see nothing in the records to suggest that the information contained in them is inherently confidential.

ORDER:

1. I do not uphold the Ministry's decision to withhold Records 1276-1278, 1286-1290, 1291-1294, 1295-1304, 1381, 1382-1391, 1392-1394, 1395-1470, 1858-1863 from the appellant.

2. I order the Ministry to disclose Records 1276-1278, 1286-1290, 1291-1294, 1295-1304, 1381, 1382-1391, 1392-1394, 1395-1470, 1858-1863 to the appellant no later than **July 26, 2001**, but not earlier than **July 20, 2001**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant in accordance with provision 2.

Original Signed By: June 22, 2001
David Goodis
Senior Adjudicator