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

INTERIM ORDER MO-1765-I

Appeal MA-030085-1

City of Hamilton

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NATURE OF THE APPEAL:

The City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

1. All letters and emails and other correspondence between the City of Hamilton (and the former Regional Municipality of Hamilton-Wentworth) and [a named consulting company] since June 1, 1998 regarding the potential air, noise, health and thermal dynamic impacts of the north-south section of the proposed Red Hill Creek Expressway in Hamilton, Ontario including draft reports prepared by [the named consulting company].

2. All letters and emails and other correspondence between the legal counsel of the City of Hamilton (and the former Regional Municipality of Hamilton-Wentworth) and [the named consulting company] since June 1, 1998 regarding the potential air, noise, health and thermal dynamic impacts of the north-south section of the proposed Red Hill Creek Expressway in Hamilton, Ontario including draft reports prepared by [the named consulting company].

The City located a number of records that it initially considered responsive to the request and granted access to some of them, in whole or in part. Access to other records, or parts of records, was denied on the basis that they contained information which was exempt under the following exemptions in the *Act*:

- relations with other governments – section 9; and
- solicitor-client privilege – section 12

The City also indicated that, although certain responsive records (comprising documents generated internally by the consultants and various sub-consultants) were in its possession, it did not maintain custody or control over these documents. It took the position, therefore, that these records are not subject to the *Act*.

The requester, now the appellant, appealed the City's decision.

During the mediation stage of the appeal, the City provided an Index of Records to the appellant in which it indicated that it also intended to claim the application of the discretionary exemptions in sections 7(1) (advice or recommendations) and 11 (economic and other interests) and the mandatory exemption in section 10(1) (third party information) to some of the records. On September 16, 2003, the City also stated that it had identified an additional 120 pages of records beyond those originally located and provided a fee of $78.40 to the appellant representing the cost of preparing the records for disclosure and photocopying charges.

The appellant paid the requested fee and access to some 337 pages of records was granted. In a further decision dated October 16, 2003, the City indicated that it also wished to rely on the mandatory exemption in section 14(1) (invasion of privacy) for portions of Record K50.

The appellant stated that she wished to proceed with her appeal of the City's decision to apply exemptions to the responsive records. She also advised that she is of the view that additional responsive records ought to exist beyond those identified by the City and that the records identified as "n/a" by the City are, in fact, within its custody or under its control and are subject to the *Act*. In addition, the appellant disputes the ability of the City to claim the application of the discretionary exemptions in sections 7(1) and 11 to the records as this claim was made past the deadline set in the Confirmation of Appeal sent to the City by the Commissioner's office on April 14, 2003.

Further mediation was not possible and the appeal was moved into the inquiry stage of the process. I decided to seek the representations of the City initially. The City provided its representations which were shared, in their entirety, with the appellant, along with a copy of the Notice of Inquiry. In its representations, the City withdrew its reliance on section 7(1) for Record E1-7 and sections 9 and 11 for Record B8-2. The City also indicated that Records B4-8, C-1.5, G-21 and I-14.1 are within its custody or control. As it has not claimed the application of any exemptions to these records, and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant. I did not receive any response to the Notice of Inquiry from the appellant.

DISCUSSION:

CUSTODY OR CONTROL/RESPONSIVENESS OF RECORDS

The City takes the position that a number of the records that it originally identified as being responsive to the request are not, in fact, within its custody or control and are not, accordingly, subject to the *Act*. It argues that:

> In conducting a search for responsive records the Red Hill Valley Project Group contacted the consultant requesting that they provide records responsive to the request for 'all letters and emails and other correspondence **between** [the City's emphasis] the City of Hamilton . . . and [the consultant] since June 1, 1998 to [the date of the request].
>
> Instead of simply providing only responsive records, the consultants provided **all** [the City's emphasis] of their records relating to the Red Hill project not solely the records **between** [the City's emphasis] themselves and the City of Hamilton.
>
> In my review of the records with staff from the Red Hill Valley Project Group, records which did not meet the criteria of 'letters and emails and other correspondence between the City of Hamilton' and the consultants were identified in the record index which the City prepared as 'n/a', meaning not in the custody or control of the City. In hindsight, since the records did not meet the criteria of the request, the records should have been identified as 'non-responsive' and not included in the record index, rather than included in the record index and identified as 'n/a'.

. . .

> The City will maintain that the remaining records for which n/a was applied are not responsive to the request and that even though the City may have copies of the records, mere possession of a record does not constitute custody or control in all circumstances (Order 120).

The City goes on to address a number of questions posed in the Notice of Inquiry respecting the considerations used by the Commissioner's office in determining whether an institution has the requisite degree of custody or control over records.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

It has been well-established in previous decisions of the Commissioner's office that in order to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880]. In my view, the appellant's request clearly indicated that she was seeking access only to "all letters and emails and other correspondence between the City of Hamilton (and the former Regional Municipality of Hamilton-Wentworth) and [the consultants] since June 1, 1998. . ." I find that the scope of the request is clear - the appellant sought access to communications between the City and its consultants. In my view, the request does not extend to include communications between the consultants and various other participants in the environmental review which forms the subject matter of these particular records.

I have carefully examined the contents of the records that the City has claimed are not responsive to the request and agree that these records reflect only communications between the consultants and other engineering firms, legal counsel and sub-contractors. As the appellant's request included only records involving communications between the City and the consultants, I agree

with the position adopted by the City and find that these records, identified as "n/a" in the Index of records provided to the appellant by the City, are not responsive to the request. Having found that these records are not responsive to the request, it is not necessary for me to determine whether they fall within the City's custody or control.

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the City will be upheld. If I am not satisfied, further searches may be ordered.

Where a requester provides sufficient detail about the records which he/she is seeking and the City indicates that further records do 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 further records do 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.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the City's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

During the mediation stage of the appeal, the appellant indicated her belief that additional records responsive to the second part of her request should exist. The records sought relate to communications between the City's legal counsel and the consultants during the applicable period.

The City's Freedom of Information Co-ordinator submits that, following receipt of the appellant's request, she forwarded a request to the program areas most likely to have responsive records, the Public Works Department's Red Hill Valley Project Group and the Legal Services and Corporate Counsel Division. The Acting City Solicitor responded to this inquiry from the Co-ordinator by advising that any responsive records would be in the custody or control of the Red Hill Valley Project Group and that neither Legal Services nor the Corporate Counsel Division had any such records in its record-holdings. The City did not, however, provide any indication as to the nature and extent of the searches undertaken by its Legal Services and Corporate Counsel Division or whether any such searches were even done.

During mediation, the appellant questioned whether all of the responsive records had been properly identified by the City as it appeared that a number of attachments to email communications were not included in the records at issue. The City provided an explanation as to the location in the records of various attachments referred to in the email correspondence. It indicates that the attachments are included in the responsive records though they are often

unconnected and are in no particular order in relation to the messages they were originally part of.

After reviewing the representations of the City, I find that it has not provided the kind of detailed and convincing evidence required to establish that its search for records relating to the second part of the appellant's request was reasonable. I have not been provided with sufficient information as to the nature and extent of any searches undertaken; nor have I been given sufficient indication as to who undertook these searches or the locations where such searches were made. As a result, I will order the City to conduct additional searches of its Legal Services and Corporate Counsel Division for records responsive to the second part of the request and to provide the appellant with a decision letter with respect to access to any records which are found, using the date of this order as the date of the request. At a minimum, these searches should be conducted by knowledgeable staff who are familiar with the record-holdings of these City Departments and should identify where the searches were conducted and the result, if any, of these efforts.

LATE RAISING OF DISCRETIONARY EXEMPTIONS

The City raised the possible application of the discretionary exemption in section 7(1) to Record E1-5 in its decision letter to the appellant on June 9, 2003. In the Confirmation of Appeal sent to the City by the Commissioner's office on April 14, 2003, the City was advised that it would be permitted to raise additional discretionary exemptions beyond those originally claimed in its decision letter only until May 21, 2003.

The City indicates that it initially advised the Mediator assigned to the file that it intended to apply section 7(1) to several records, including Record E1-5 on April 29, 2003 when it forwarded a copy of the Index of Records to her. The City provided a copy of the Index identifying the application of section 7(1) to Record E1-5 to the appellant on May 21, 2003. The City takes the position that in preparing and forwarding a copy of its Index of Records to both the Mediator and the appellant within the prescribed time, it demonstrated its intention to relay on the application of the section 7(1) exemption within the required timeframe. In addition, the City submits that no real prejudice will occur to the appellant should it be allowed to rely on this exemption for Record E1-5.

The appellant has not made any submissions with respect to this issue beyond stating that she objects to the late raising of this discretionary exemption.

In my view, in the circumstances described above, allowing the City to claim the application of the discretionary exemption in section 7(1) with respect to Record E1-5 would not compromise the integrity of the inquiry process and would not prejudice the appellant in any significant way. Accordingly, I will proceed to determine whether the discretionary exemption in section 7(1) applies to Record E1-5.

ADVICE OR RECOMMENDATIONS

In support of its contention that Record E1-5 qualifies for exemption under section 7(1), the City states that:

> Record E1-5 consists of a fax memorandum cover sheet and the attached draft minutes of a meeting prepared by [the consultant]. The author of the fax requests the comments of the fax addressee in regard to the contents of the minutes and in particular the actions that may or may not be undertaken by various personnel. The record suggests courses of action and the various scenarios which may result from the actions.

Section 7(1) states:

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

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028]

In my view, Record E1-5 does not contain either advice or recommendations for the purposes of section 7(1). The minutes of the meeting simply set out the actions to be undertaken by each of the participants. It does not recommend a specific course of action to be undertaken by these individuals; rather it simply describes what work each has undertaken to perform. In my view, section 7(1) has no application to this record and I will order that it be disclosed.

SOLICITOR-CLIENT PRIVILEGE

The City has claimed the application of the solicitor-client privilege exemption in section 12 to Records C4.1, D1 to D5, D7, D8, D10, D13, F11, F12, F13, I16, J3, L2, L16 and L17 on the basis that these records represent confidential communication between a solicitor and his client or that they form part of the "continuum of communications" between counsel and client.

General principles

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. The City must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

The City takes the position that the records contain confidential solicitor-client communications, thereby qualifying for exemption under that aspect of section 12.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly.

> Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

The City's representations

The City argues that Record C4.1 is a legal opinion prepared by the City's outside counsel that represents a "direct communication of a confidential nature between the City's outside counsel

and its client". The City also submits that the remaining records represent "a continuum of communications in that each of the authors are keeping counsel apprised of the project status thereby providing counsel with the opportunity to question and or provide relevant comments."

Findings

Record C4.1 is a sixteen-page legal opinion prepared by counsel retained by the City and is addressed to the former Regional Municipality's Acting Manager of Environmental Engineering. The opinion relates directly to certain legal issues surrounding the Red Hill Creek Project and includes the solicitor's legal opinion and advice. I find that Record C4.1 qualifies for exemption under section 12 as it represents a confidential communication between a solicitor and his client made for the purpose of giving professional legal advice.

Record D10 contains an email communication from the City's outside counsel to a number of recipients setting out certain procedures relating to communications. I find that Record D10 is a confidential communication between a solicitor and his clients and that the subject matter of the message relates directly to the provision of legal advice. Record D10 is therefore exempt under section 12.

Record F11 is an email communication dated July 10, 2002 from the City's Project Manager Transportation/Transit to several of the consultants retained by the City. The communication is not between a solicitor and his or her client and does not represent part of the "continuum of communications" involving a solicitor. As a result, I find that Record F11 does not qualify for exemption under the solicitor-client communication privilege component of section 12.

Record F12 is a memorandum from the consultants to the City's Project Manager Transportation/Transit dated July 11, 2002. It is marked "Solicitor and Client Privileged/Confidential Communication-For Purpose of City of Hamilton Counsel Providing Legal Advice". The City has not provided me with any evidence to demonstrate that the recipient of the memorandum is a solicitor or that the communication relates to the giving, seeking or formulating of legal advice. I note that the City's outside counsel was not copied on this communication. Accordingly, I find that the message does not form part of a "continuum of communications" in which the solicitor was involved. I find that section 12 has no application to Record F12.

Similarly, Record F13 is an email communication between a consultant and the Project Manager. The City's outside counsel was not copied on this communication. I find that Record F13 is not a confidential communication between a solicitor and client and does not fall within the ambit of the "continuum of communications". Record F13 is not, therefore, exempt from disclosure under section 12.

Record I16 is a letter from one of the City's consultants to its outside legal counsel. I find that in sending this letter, the consultant was acting on behalf of the City in the capacity of a client for the purposes of section 12. Record I16 qualifies for exemption under this section as it represents

a confidential communication between a solicitor and client relating to the seeking of legal advice.

Record L17 is a memorandum from one of the City's consultants to another seeking her views on a draft response to certain comments received from the Ontario Ministry of the Environment. Again, this record is not a communication between a solicitor and client and does not form part of the "continuum of communications" as the City's counsel was not copied on the memorandum. In my view, Record L17 does not qualify for exemption under section 12 for these reasons.

Records D1 to D5, D7, D8, D13, J3, L2 and L16 are various email messages and memoranda passing between the consultants and the City's employees. The City argues that each of these communications form part of the "continuum of communications" between the consultants, City staff and the City's outside solicitor. In each case, the communication was copied to the solicitor, though he was not the primary recipient of any of them. In my view, the communications reflected in these records were made in confidence, either expressly or by implication and were intended to keep all of the parties to the project, including the outside solicitor, informed as to the progress being made by all concerned. As a result, I find that these communications form part of the "continuum of communications" between the City and its outside counsel and are, accordingly, exempt from disclosure under section 12. (Orders MO-1279, MO-1316, PO-2001 and PO-2084)

To summarize, I find that Records C4.1, D1 to D5, D7, D8, D10, D13, I16, J3, L2 and L16 qualify for exemption under section 12, while Records F11, F12, F13 and L17 do not.

PERSONAL INFORMATION/INVASION OF PRIVACY

The City submits that the undisclosed portion of Record K50, which consists of the names of members of the public who provided it with comments about air quality issues surrounding the Red Hill Creek Project, constitutes the personal information of these individuals. The City argues that this information is exempt from disclosure under the invasion of privacy exemption in section 14(1). The comments themselves and the City's responses to those comments were disclosed to the appellant.

The section 14(1) personal privacy exemption applies only to information which qualifies as "personal information", as defined in section 2(1) of the *Act*. "Personal information" is defined, in part, to mean recorded information about an identifiable individual, including the personal opinions or views of the individual [paragraph (e)] or the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

I find that the undisclosed information contained in Record K50 qualifies as the personal information of the individuals whose names appear there for the purposes of section 2(1). The information reflects the personal opinions or views of these individuals and the disclosure of

their names would reveal other personal information relating to them, particularly the fact that they supported or opposed the Red Hill Creek Project.

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception which may apply in the present appeal is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The City submits that the information is exempt under section 14(1) as the "[D]isclosure of the citizens' name linked to their comments would constitute a breach of their respective personal privacy."

The appellant has not made any submissions in response to the Notice of Inquiry.

I find that the exceptions listed in section 14(4) have no application and the appellant has not raised the possible application of the public interest override provision in section 16. In addition, I find that in the absence of any considerations, listed or otherwise, under section 14(2) which favour the release of the names in Record K50, the disclosure of this information would result in

an unjustified invasion of the personal privacy of these individuals under section 14(1). As a result, I find that the exemption applies to the undisclosed portions of Record K50.

THIRD PARTY INFORMATION

In the Index of Records provided to the appellant and this office by the City, it claimed the application of the mandatory exemption in section 10(1) to the last page of Record A4(1). The Notices of Inquiry sent to the City and the appellant did not address the possible application of this exemption to this information and the City did not make any submission on its application. As it appears that this remains an issue in the appeal, it will be necessary for me to solicit the representations of the appellant, the City and an affected party in order to determine whether the exemption applies to this information.

INTERIM ORDER:

1. I uphold the City's decision to deny access to Records C4.1, D1 to D5, D7, D8, D13, I16, J3, L2, L16 and the individual's names in Record K50.

2. I order the City to disclose to the appellant Records B4-8, B8-2, C1.5, E1-5, E1-7, F11, F12, F13, G21, I14 and L17 by providing her with copies by **April 5, 2004.**

3. I order the City to conduct additional searches of its Legal Services and Corporate Counsel Division for records responsive to the second part of the request and to provide the appellant with a decision letter with respect to access to any records which are found, using the date of this order as the date of the request.

4. I remain seized of this appeal in order to deal with the application of section 10(1) to the last page of Record A4.1 and any other outstanding issues.

5. In order to verify compliance with Order Provision 2, I reserve the right to require the City to provide me with copies of the records that are disclosed to the appellant.

Original Signed By: March 15, 2004
Donald Hale
Adjudicator