



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

ORDER M-92

Appeal M-9200303

Town of Ajax



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Town of Ajax (the "Town") received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of a report prepared by the Director of Transit on the feasibility of the Town assuming the service of public transportation within the Town.

The Town identified a report and certain internal memoranda as responsive to the request, and granted access to a portion of the report. The Town denied access to the internal memoranda pursuant to sections 7(1), 11(e) and (f) of the Act, and to portions of section 5 of the report pursuant to sections 11(c), (d), (e) and (f) of the Act.

The requester appealed the denial of access based upon the referenced exemptions, and indicated that he was only interested in the portions of section 5 of the report which were not disclosed to him.

Mediation of the appeal was not possible, and notice that an inquiry was being conducted to review the Town's decision was sent to the Town and the appellant. Written representations were received from the Town. The appellant indicated that he had no additional submissions to make.

The record in issue in this appeal consists of severed portions of section 5 of the report entitled "Contract Review and Analysis", which was prepared by the Director of Transit. Access was denied to portions of section 5 as follows:

Section severed	Exemption relied on
Section 5.1	Section 11(e),(f)
Section 5.2 Paragraph 2	Section 11(e),(f)
Section 5.3 Paragraph 2	Section 11(e),(f)
Section 5.4 Paragraph 1	Section 11(e),(f)
Section 5.4 Paragraphs A, B, C, and D	Section 11(c),(e)
Section 5.4 Last Paragraph	Section 11(c),(d),(e)

During the course of processing this appeal, the Town identified that it was prepared to release to the appellant the last paragraph of section 5.4. This portion of the record and section 11(d) are, therefore, no longer at issue.

ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 11(f) of the Act applies.
- B. Whether the discretionary exemption provided by section 11(e) of the Act applies.
- C. Whether the discretionary exemption provided by section 11(c) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 11(f) of the Act applies.

Section 11(f) of the Act reads as follows:

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 a record satisfies each element of a three-part test:

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.

[Orders M-77, P-229]

In previous orders, the word "plan" has been defined as "a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Orders M-77, P-229). I adopt the above test, as well as the definition of "plan".

The record in this appeal originated as a report prepared by the Director of Transit for discussion at an in-camera meeting of the Executive and Development Committee of the Town. The report includes a review of transit systems operated by municipalities throughout Ontario (section 2); a review of the transit services currently provided to the Town, including a review of possible options available to the Town (sections 3 and 4); a section entitled "The Municipality Operating its own Transit System" (section 5); and two appendices which consist of the internal memoranda referenced above (sections 6 and 7). The only portions of the report in issue in this appeal are the portions of section 5 which were not provided to the appellant.

In its representations, the Town indicates that Town Council passed a resolution which read as follows: "That the Town of Ajax undertake the necessary action to operate its own Transit System effective January 1, 1993, as per the report of T.N. Barnett dated June 17, 1992" and, therefore, adopted the report as its plan.

The record is a review and analysis of the transit contract in effect in the Town, including observations and recommendations for change. The record does not contain the sort of detailed methods, schemes or designs that are characteristic of a plan. It appears to be a document which provides advice for developing a plan or plans to resolve the issues, but is not, in my view, a plan itself.

In my view, the record does not consist of or contain a plan or plans and, therefore, the first requirement of the test for exemption under section 11(f) has not been satisfied. Accordingly, I find that the exemption found in section 11(f) of the Act does not apply to section 5.1, section 5.2 (paragraph 2), section 5.3 (paragraph 2), and section 5.4 (paragraph 1).

ISSUE B: Whether the discretionary exemption provided by section 11(e) of the Act applies.

The Town submits that all of the severed portions of the record qualify for exemption under section 11(e) of the Act. Section 11(e) of the Act reads as follows:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

Section 11(e) of the Act is similar to section 18(1)(e) of the provincial Freedom of Information and Protection of Privacy Act (the provincial Act). Accordingly, orders issued under section 18(1)(e) of the provincial Act are useful in interpreting section 11(e) of the Act. In my view, for a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; **and**
3. the negotiations must be carried on currently, or will be carried on in the future; **and**
4. the negotiations must be conducted by or on behalf of an institution.

[Order P-219]

The Town submits that the release of the portions of the record in issue could affect the course of anticipated negotiations between the Town and the union which represented the transit employees prior to the Town assuming the operation of the transit system. The Town submits that the severed portions of the record disclose the positions the Town is taking with respect to the rights of the union under the collective bargaining agreement which was in place until January 1, 1993. The Town also submits that the release of this information could provide the union with information which may provide it with an unfair advantage in a successor rights application which may arise from the assumption of the operation of the transit system by the Town.

In my view, the only part of the record which satisfies each part of the test for exemption under section 11(f) is Section 5.1. This section identifies the position the Town intends to take with respect to the rights of the union. I have been provided with sufficient evidence to convince me that negotiations will be carried on in the future, and I find that section 11(e) of the Act applies to this part of the record.

Section 5.2 (paragraph 2) identifies the proposed staffing requirements for the Town. This information, with the exception of some information regarding possible benefits, is contained in a portion of the record which was disclosed. Section 5.3 (paragraph 2) identifies proposed wage groups, based on positions currently available. I am not convinced that either of these sections contain "positions, plans, procedures, criteria or instructions" to be applied to any negotiations, and I am not persuaded that section 11(e) applies to them.

Section 5.4 (paragraph 1 and sections A, B, C, and D) concern the transit cost analysis. The first paragraph explains the information contained in the remaining sections. The information contained in sections A, B, C and D of section 5.4 sets out the anticipated annual operating costs of the Town operating the transit system. The total amount of the costs to operate the system has been disclosed, and sections A, B, C and D identify more specifically how the total costs are broken down. The Town has taken the position that this information will be used by staff in negotiations with parties to supply goods and services.

I am not satisfied that the information contained in the first paragraph and in sections A, B, C and D of section 5.4 meet the requirements set out in section 11(e) of the Act as set out above. I am not persuaded that these anticipated amounts were intended to be applied to negotiations, nor am I convinced that this section contains "positions, plans, procedures, criteria or instructions" to be applied to any negotiations. The information in this section is a general breakdown of the anticipated annual operating costs following the assumption of the transit system, and I am not persuaded that section 11(e) applies to it.

It is therefore my view that section 5.1 qualifies for exemption under section 11(e) of the Act, and that section 5.2 (paragraph 2), section 5.3 (paragraph 2), and section 5.4 (paragraph 1 and sections A, B, C, and D) do not qualify for exemption under section 11(e) of the Act.

ISSUE C: Whether the discretionary exemption provided by section 11(c) of the Act applies.

The Town submits that section 11(c) of the Act applies to sections A, B, C and D of section 5.4. These sections of section 5.4 contain the expected annual operating costs for the implementation of the transit proposal.

Section 11(c) of the Act reads:

A head may refuse to disclose a record that contains,

information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The expectation of harm to the Town's economic interests or competitive position, should the record be disclosed, must not be fanciful, imaginary or contrived, but based on reason, and the evidence provided by the Town in support of the exemption claimed must be detailed and convincing (Orders M-27 and M-37).

The Town submits that the release of the information contained in section 5.4 (sections A, B, C, and D) of the report would prejudice the Town's economic position in light of the involvement of staff in negotiations with parties for the supply of goods and services.

The information contained in sections A, B, C and D of section 5.4 sets out an analysis of the anticipated annual operating costs of the Town operating the transit system. The total amount of the costs to operate the system has been disclosed, and sections A, B, C and D identify more specifically how the total costs are broken down. The breakdown is also very general in nature, and I am not persuaded that the release of this information could prejudice the economic interests or the competitive position of the Town in light of the type of negotiations which the Town is referencing at this point in time.

Accordingly, in my view, disclosure of section 5.4 (sections A, B, C, and D) could not reasonably be expected to prejudice the economic interests or the competitive position of the Town, and I find that section 11(c) of the Act does not apply.

ORDER:

1. I uphold the Town's decision to deny access to section 5.1 of the record.
2. I order the Town to disclose section 5.2 (paragraph 2), section 5.3 (paragraph 2) and section 5.4 (paragraph 1 and section A, B, C and D) to the appellant within 15 days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Town to provide me with a copy of the sections of the record which are disclosed to the appellant pursuant to Provision 2 of this order, **only** upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ March 2, 1993