



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-485

Appeal M-9400508

City of Toronto



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The City of Toronto (the City) received a request for the following information:

1. What were the general and specific grants or allocations made by the City to the East Toronto Village Coalition and/or its constituent associations (the Coalition) in fiscal years 1991, 1992, 1993 and 1994? What portion was for salaries and wages and what portion was for general operating expenditures such as office rental, equipment and supplies? Were budgets submitted, and if yes, please provide a copy for each year? Were financial and/or value-for-money audits conducted; if so, please provide copies?
2. What were the dollar values of the City staff professional services provided to the Coalition in each of the above fiscal years?
3. What were these City staff professional services, and which departments or agencies provided them?
4. Were tenders called for legal and environmental consulting work before awarding a contract to [a named law firm]? Please provide copies of the tender documents, the bids/proposals received, the evaluation and the final contract.
5. What is the total of payments to date, by fiscal year (fees plus disbursements), made to and through [a named law firm], since award of the contract?

The City located a large number of records which were responsive to these questions and granted access in full to some of them, access in part to others and denied access to the majority of them in their entirety. For those records to which access was denied either in whole or in part, the City claimed the following exemptions under the Act:

- advice or recommendations - section 7(1)
- third party information - section 10(1)
- economic and other interests - section 11(c), (d), (e) & (f)
- solicitor-client privilege - section 12
- invasion of privacy - section 14.

The requester appealed the City's decision to deny access to records responsive to Parts 4 and 5 of his request and claimed that records exist in response to Parts 2 and 3.

As a result of mediation, the records remaining at issue in this appeal consist of 202 pages (192 pages in full and 10 pages in part). The records comprise a number of letters, memoranda, proposal bid documents, notes and various other internal documents. They are described in greater detail in Appendix "A" to this order. I have maintained the numbering scheme used by the City in its correspondence with the appellant.

A Notice of Inquiry was sent to the appellant, the City and three affected parties. Representations were received from the City and one of the affected parties only.

In its representations, the City did not make submissions with respect to sections 11(e) and (f) of the Act. I will not, therefore, consider the application of these two discretionary exemptions to the records at issue in this appeal. In addition, the City has withdrawn all exemption claims regarding page 1114 of the record and agrees to disclose the portion of this page which is responsive to the request. Accordingly, page 1114 should be disclosed to the appellant in accordance with the highlighted copy which I have provided to the City's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions should **not** be disclosed. Finally, I note that the City has included pages 177, 178, 179 and 1402 in its representations as part of the records at issue. In my view, these four pages fall outside the narrowed scope of the request and are not at issue in this appeal.

DISCUSSION:

THIRD PARTY INFORMATION

The City submits that section 10(1) of the Act applies to exempt from disclosure those pages which are described in Appendix "A" to this order.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) of the Act, the parties resisting disclosure, in this case the City and one of the affected parties, must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in sections 10(1)(a), (b) or (c) will occur.

Failure to establish the requirements of any part of this test will render the section 10(1) exemption claim invalid.

Part One of the Test

With the exception of pages 919, 924, 951, 980, 989, 991, 1003, 1124 and 1222, all of the pages for which this exemption has been claimed contain detailed information about the bid proposals submitted by
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the two successful law firms. In my view, this information qualifies as either commercial or financial information and, accordingly, part one of the test has been satisfied.

With respect to the remaining pages, I find that they do not contain any of the types of information required to meet the first part of the test. Section 10 of the Act does not, therefore, apply to exempt these pages from disclosure.

Part Two of the Test

The second part of the test has two elements. First, the City and the affected party must establish that the information was **supplied** to the City and second, that it was supplied **in confidence**, either implicitly or explicitly.

All of these pages were correspondence or attachments to correspondence addressed to the City. The information contained in them originated with the law firms and consist of their bid proposals. Accordingly, I am satisfied that they were supplied to the City.

I must now determine whether this information was supplied to the City in confidence, either implicitly or explicitly. The City states that it treated each of the proposals and communications received during the tender process confidentially. Throughout the process, only members of the Review Committee and the Selection Committee were privy to the documents. Neither the details of the proposals nor the names of the other candidates were made public. The affected party (one of the successful law firms) confirms this statement in its representations and adds that the sole purpose of the proposal bid was to enable the City to select the firm of its choice to perform environmental legal services. It argues that there was never any intention on its part that the information would be made public.

In the absence of any evidence to the contrary, based on my review of the records and the representations of the parties, I am satisfied that the pages which I have found to contain financial or commercial information were supplied in confidence. Part two of the section 10(1)(a) test has, accordingly, been met.

Part Three of the Test

To satisfy part three of the test, detailed and convincing evidence must be adduced which describes a set of facts and circumstances which would lead to a reasonable expectation that the harms described in section 10(1)(a) would occur if the information was disclosed.

Both the City and the affected party submit that these pages contain details regarding the business practices of the law firms such as billing practices, legal expertise and strategies. They submit that disclosure of this information would significantly interfere with their competitive position in the field and with any future contract bid submissions for legal services with other potential clients. In my view, I have been provided with sufficient evidence to substantiate a clear and direct linkage between the disclosure of these pages and a reasonable expectation of prejudice to the competitive position of the law firms as contemplated by

section 10(1)(a).

Accordingly, I find that all three parts of the test have been met in respect of pages 4-8, 160-176, 202-207, 845-847, 925-927, 981-984, 994-997, 1000-1002, 1004-1005, 1006-1010, 1038-1039, 1054, 1055, 1059, 1126-1127, 1140, 1356-1401 and 1436-1466, and these pages qualify for exemption under section 10(1)(a). It is, therefore, not necessary for me to consider any other exemptions which have been claimed for these pages.

SOLICITOR-CLIENT PRIVILEGE

The City submits that section 12 applies to exempt from disclosure those pages which are listed in Appendix "A" to this order.

Section 12 of the Act consists of two branches, which provide the City 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).

For a record to qualify for exemption under the first branch of solicitor-client privilege, the following four criteria must be satisfied:

1. there must be a written or oral communication;
2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal adviser; and
4. the communication must be directly related to seeking, formulating or giving legal advice.

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 City indicates that it is relying on both branches of the exemption.

In my view, pages 902, 923-924, 928-932, 936, 951, 1115, 1192-1194, 1197-1202, 1203-1204, 1211-1212, 1218-1219, 1223, 1224, 1226-1228, 1237 and 1238 in their entirety are subject to the common law solicitor-client privilege (Branch 1). They all involve confidential communications between City staff and their counsel, and are directly related to the seeking, formulating or giving of legal advice.

Pages 919, 920 and 1222 are written communications from one of the successful law firms to the City. Pages 919 and 920 were sent prior to the existence of a solicitor-client relationship between the City and the law firm. Page 1222 was written following the termination of the law firm's retainer by the City. Accordingly, I find that these are not communications between a solicitor and client and do not, therefore, satisfy the requirements of Branch 1. I also find that Branch 2 does not apply as the documents were not "prepared by or for counsel employed or retained by an institution". Accordingly, pages 919, 920 and 1222 do not qualify for exemption under section 12.

Pages 980, 989-991, 1003 and 1124 are handwritten notes made by members of the Selection Committee during the selection process. The City submits that these pages meet the requirements of Branch 2 as they represent notes made by members of the Selection Committee during the evaluation of the proposals received and that the Committee's recommendation would be made to the City Solicitor. I have carefully reviewed these pages and the City's representations. Regardless of the fact that the notes may have been created to document the Committee's findings for the City Solicitor, I find that the dominant purpose for the creation of these notes was not for use in giving legal advice, or in contemplation of litigation, or for use in litigation. The requirements for Branch 2 have not, accordingly, been satisfied with regard to these pages.

In summary, I have found that section 12 of the Act applies to exempt from disclosure pages 902, 923-924, 928-932, 936, 951, 1115, 1192-1194, 1197-1202, 1203-1204, 1211-1212, 1218-1219, 1223, 1224, 1226-1228, 1237 and 1238. The exemption does not apply to pages 919, 920, 980, 989-991, 1003, 1124 and 1222. As I have disposed of all the exemptions claimed in respect of page 920, it should be disclosed to the appellant.

ADVICE TO GOVERNMENT

The pages which the City claims are exempt from disclosure pursuant to section 7(1) of the Act are described in Appendix "A" to this order. The City has not provided me with any representations on the application of this exemption to pages 1026A, 1027, 1030, 1031, 1077 and 1089. Accordingly, I will not be considering these pages in my discussion of this exemption.

Section 7(1) states that:

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 a number of 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 records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The City submits that pages 919, 921, 922, 980, 989-991, 1003, 1076, 1088 and 1124 contain advice or recommendations. In my view, none of this information has been drafted in such a way as to reflect "advice" or "recommendations" and is not developed into any action plan or formalized manner of proceeding. Accordingly, I find that these pages do not qualify for exemption under section 7(1).

As I have dealt with the application of all of the exemptions claimed for pages 919, 980, 989-991, 1003 and 1124, they should be disclosed to the appellant.

ECONOMIC AND OTHER INTERESTS

The City submits that pages 1026A, 1027, 1030, 1031, 1076, 1077, 1088 and 1089 are exempt from disclosure under sections 11(c) and (d) of the Act. Sections 11(c) and (d) state that:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

In order to qualify for exemption under sections 11(c) and (d) of the Act, the City must successfully demonstrate a reasonable expectation of harm to its economic interests, competitive position or its financial interests should the information contained in the records be disclosed. Further, the evidence to support such an expectation must be "detailed and convincing" (Orders 87, M-27 and M-37).

These pages consist of the interview questions prepared by the City and used by the Selection Committee in the selection process. The City submits that these documents reveal the methodology used by the Selection Committee to assess the firms' familiarity with environmental law. It further submits that the disclosure of these pages to the public would result in an unfair competitive advantage being given to potential bidders in a future selection process. The City submits that this would interfere with the City's efforts to select the best competitor.

In my view, the evidence provided by the City is not sufficiently detailed and convincing to demonstrate a reasonable expectation of harm. The City fails to make the necessary connection between the disclosure of the information contained in the pages themselves and any specific "use" or "misuse" of it that could reasonably be expected to prejudice or harm the City's financial or economic interests or its competitive position. Accordingly, I find that pages 1026A, 1027, 1030, 1031, 1076, 1077, 1088 and 1089 do not qualify for exemption under section 11(c) or (d) of the Act. As I have now discussed the application of all of the exemptions claimed for these pages, they should be disclosed to the appellant.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined to mean recorded information about an identifiable individual. The City claims that the remaining pages at issue, pages 921, 922, 937 and 1222 contain personal information. In addition, in its decision letter the City also claimed that portions of pages 913, 978, 1033, 1035, 1037, 1065, 1073, 1180-1181 and 1187-1188 contain personal information. The City did not make representations on the application of section 14 to this latter group of records.

The City also indicated that it would agree to disclose page 978 "with the names of the individuals to whom it was directed severed, as these names are not at issue in this appeal." I do not agree that the names contained on page 978 are outside the scope of this appeal, as narrowed by the appellant. Accordingly, I will include this page in my discussion of this exemption.

I have considered the submissions of the City, and carefully examined the above-noted pages. It is my view that only the information contained in page 937 is the personal information of an identifiable individual within the meaning of section 2(1) of the Act. It should be noted that this information does not relate to the appellant. All of the information contained in the remaining pages concerns identifiable individuals but relates to those individuals in their professional or employment capacities. This information does not, therefore, satisfy the definition of personal information contained in section 2(1) of the Act.

As I have found that the information contained in pages 913, 921, 922, 978, 1033, 1035, 1037, 1065, 1073, 1180-1181, 1187-1188 and 1222 does not constitute "personal information", section 14 cannot apply and this information should be disclosed to the appellant.

Section 14(1) of the Act prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in certain circumstances listed under the section.

In my view, the only exception to the section 14(1) mandatory exemption which has potential application to page 937 is section 14(1)(f), which reads as follows:

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.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 14(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

With respect to page 937, the City claims that disclosure would constitute an unjustified invasion of the individual's personal privacy named therein as it contains, in part, the employment history of the named individual (section 14(3)(d)) and the information was submitted in confidence to the City by the named individual (section 14(2)(h)).

Having found that page 937 contains information which qualifies as personal information, and in the absence of any submissions weighing in favour of finding that disclosure of this page would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 14(1)(f) does not apply, and page 937 is properly exempt from disclosure under section 14 of the Act.

REASONABLENESS OF SEARCH

The remaining issue in this appeal is whether the City conducted a reasonable search for records which are responsive to Parts 2 and 3 of the appellant's request. This part of the request concerned the dollar value of City professional staff time by the Coalition and the home department of any staff person who provided professional services to it.

Where a requester provides sufficient details about the records to which he or she seeks access and the City indicates that no further responsive records can be located, it is my responsibility to ensure that the City has made a reasonable search to identify any records which are responsive to the request. In my view, the Act does not require the City to prove with absolute certainty that further requested records do not exist. However, in order to properly discharge its obligations under the Act, the City must provide me with sufficient evidence which shows that it has made a **reasonable** effort to identify and locate records responsive to the request.

The representations of the City include the sworn affidavit of the Policy Planner from the City's Department of Planning and Development who was the sole staff member assigned to provide professional services to the East Toronto Village Coalition. He states that he conducted a search of his overtime records for the period during which he attended meetings of the Coalition. This search revealed that he attended seven evening meetings for a total of 20 hours in 1991 and 10 evening meetings for a total of 34 hours in 1992.

Having carefully reviewed the circumstances of this appeal and the affidavit provided, I am satisfied that the City has taken all reasonable steps to locate records responsive to Parts 2 and 3 of the appellant's request.

ORDER:

1. I uphold the decision of the City not to disclose Pages 4-8, 160-176, 202-207, 845-847, 902, 923-924, 925-927, 981-984, 994-997, 1000-1002, 1004-1005, 1006-1010, 1038-1039, 1054, 1055, 1059, 1126-1127, 1140, 928-932, 936, 937, 951, 1115, 1192-1194, 1197-1202, 1203-1204, 1211-1212, 1218-1219, 1223, 1224, 1226-1228, 1237, 1238, 1356-1401 and 1436-1466 as well as those portions of pages 922, 980, 989, 990, 991, 1114, 1124, 1037, 1186 and 1191 which I have highlighted on the copy of these pages provided to the City's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the City to disclose to the appellant Pages 913, 919, 920, 921, 978, 1003, 1026A, 1027, 1030, 1031, 1033, 1035, 1065, 1073, 1076, 1077, 1088, 1089, 1180, 1181 and 1222 in their entirety and pages 922, 980, 989, 990, 991, 1114, 1124, 1037, 1186 and 1191 in accordance with the highlighted copy of these pages provided to the City's Freedom of Information and Privacy Co-ordinator with a copy of this order within thirty-five (35) days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order. The highlighted portions are **not** to be disclosed.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ March 10, 1995

APPENDIX "A"

INDEX OF RECORDS			
PAGENUMBER	DESCRIPTION	DISPOSITION	EXEMPTIONS CLAIMED
4-8, 160-176, 202-207 & 845-847	Proposal bid from a named law firm	Not Disclosed	10(1)(a), (b), (c), 12, 14(2)(h), 14(3)(d)
902	Internal memorandum dated October 6, 1993	Not Disclosed	7(1), 11(c), (d), (e), (f), 12
913	FAX cover sheet dated September 13, 1993	Disclosed	14(2)(h), 14(3)(d)
919	Letter dated May 6, 1994	Disclosed	7(1), 10(1)(a), (b), (c), 12,
920	Letter dated May 6, 1994	Disclosed	10(1)(a), (b), (c), 12,
921	Handwritten note	Disclosed	7(1), 10(1)(a), (b), (c), 12, 14(2)(h), 14(3)(d)
922	Handwritten note	Disclosed in part	7(1), 10(1)(a), (b), (c), 12
923-924	Internal memorandum dated May 3, 1994	Not Disclosed	7(1), 10(1)(a), (b), 12, 14(2)(f), (h), 14(3)(d)
925-927	Letter dated April 21, 1994	Not Disclosed	7(1), 10(1)(a), (b), (c), 12, 14(2)(h), 14(3)(d)
928-932	One-page letter dated April 21, 1994	Not Disclosed	7(1), 10(1)(a), (b), (c), 12, 14(2)(h), 14(3)(d)
936	Internal memorandum dated April 15, 1994	Not Disclosed	7(1), 10(a), (b), (c), 12, 14(2)(h), 14(3)(d)
937	Letter dated April 15, 1994	Not Disclosed	10(1)(a), (b), (c), 14(2)(h), 14(3)(d)
951	Internal memorandum dated April 8, 1994	Not Disclosed	7(1), 10(1)(a), (b), (c), 12, 14(2)(f), (h), 14(3)(d)
978	FAX cover sheet dated December 10, 1993	Disclosed	10(1)(a), (b), (c), 12, 14(2)(h), 14(3)(d)
980	Handwritten list	Disclosed in part	7(1), 10(1)(a), (b), (c), 12
981-984	Interview questions and answers	Not Disclosed	7(1), 10(1)(a), (b), (c), 11(c), (d), (e), (f), 12

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989-990	Handwritten notes	Disclosed in part	7(1), 10(1)(a), (b), (c)
991	"Schedule of Interviews"	Disclosed in part	7(1), 10(1)(a), (b), (c)
994-997	Interview questions and answers	Not Disclosed	7(1), 10(1)(a), (b), (c), 11(c), (d), (e), (f), 12
1000-1002	Interview questions and answers	Not Disclosed	7(1), 10(1)(a), (b), (c), 11(c), (d), (e), (f), 12
1003	Handwritten notes	Disclosed	7(1), 10(1)(a), (b), (c), 12
1004-1005	Interview questions and answers	Not Disclosed	7(1), 10(1)(a), (b), (c), 11(c), (d), (e), (f), 12
1006-1010	Duplicate of pages 4-8	Not Disclosed	
1026A-1027 & 1030-1031	Interview questions	Disclosed	7(1), 10(1)(a), (b), (c), 11(c), (d), (e), (f), 12
1033	Letter dated December 2, 1993	Disclosed	14(2)(h), 14(3)(d)
1035	Letter dated December 2, 1993	Disclosed	14(2)(h), 14(3)(d)
1037	Schedule of Interviews dated November 30, 1993 and December 1, 1993	Disclosed in part	14(2)(h), 14(3)(d)
1038-1039 & 1054	Interview questions and answers	Not Disclosed	7(1), 10(1)(a), (b), (c), 11(c), (d), (e), (f), 12
1055 & 1059	Proposal call selection criteria chart	Not Disclosed	7(1), 10(1)(a), (b), (c), 12
1065	Letter dated November 25, 1993	Disclosed	14(2)(h), 14(3)(d)
1073	Letter dated November 25, 1993	Disclosed	14(2)(h), 14(3)(d)
1076-1077 & 1088- 1089	Interview questions	Disclosed	7(1), 10(1)(a), (b), (c), 11(c), (d), (e), (f), 12
1114	"Confidential Mail Register"	Disclosed in part	10(1)(a), (b), (c), 12
1115	Internal memorandum dated November 24, 1993	Not Disclosed	7(1), 12
1124	Handwritten notes	Disclosed in part	7(1), 12
1126-1127	Part of proposal bid from a named law firm	Not Disclosed	10(1)(a), (b), (c), 12

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1140	Part of proposal bid from a named law firm	Not Disclosed	10(1)(a), (b), (c), 12
1180	Letter dated October 19, 1993	Disclosed	14(2)(h), 14(3)(d)
1181	Letter dated October 19, 1993	Disclosed	14(2)(h), 14(3)(d)
1186 & 1191	Mailing lists	Disclosed in part	14(2)(h), 14(3)(d)
1192-1194	Draft "Proposal Call"	Not Disclosed	7(1), 12
1197-1198	Draft letter dated October 14, 1993	Not Disclosed	7(1), 12
1199	Draft letter dated October 15, 1993	Not Disclosed	7(1), 12
1200	Draft letter dated October 15, 1993	Not Disclosed	7(1), 12
1201-1202	Draft letter dated October 7, 1993	Not Disclosed	7(1), 12
1203-1204	Internal memorandum dated October 6, 1993 (page 1203 is duplicate of page 902)	Not Disclosed	7(1), 11(c), (d), (e), (f), 12
1211-1212	Duplicate of pages 1203-1204	Not Disclosed	
1218-1219	Internal memorandum dated October 6, 1993	Not Disclosed	11(c), (d), (e), (f), 12
1222	Letter dated October 8, 1993	Disclosed	10(a), (b), (c), 12
1223	Letter dated September 30, 1993	Not Disclosed	10(a), (b), (c), 12
1224	Internal memorandum dated September 28, 1993	Not Disclosed	12
1226-1228	Draft "Proposal Call"	Not disclosed	7(1), 12
1237-1238	Internal memorandums dated September 20, 1993 and September 23, 1993	Not Disclosed	7(1), 12
1356-1401	Proposal from a named law firm	Not Disclosed	10(a), (b), (c), 12, 14(2)(h), 14(3)(d)
1436-1466	Proposal from a named law firm	Not Disclosed	10(1)(a), (b), (c), 12