



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

ORDER M-862

Appeal M_9600232

City of Toronto



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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the City of Toronto (the City). The request was for access to the most recent or final version of a real estate appraisal report prepared for the City by an independent appraiser in 1995. The appraisal report relates to the potential market value of approximately 14 acres of land on the west end of the Greenwood Raceway property which the City purchased from a named corporation.

The City denied access to the report based on the following discretionary exemptions:

- economic and other interests - sections 11(c), (d) and (e)

The appellant appealed the City's decision to deny access. Thirty-four days after the date this office sent a confirmation of the appeal to the City, the City notified the appellant that it was also relying on the following discretionary exemptions:

- valuable government information - section 11(a)
- proposed plans, policies or projects of an institution - section 11(g)

The appellant appealed the City's decision to deny access to the report. A Notice of Inquiry was sent to the City and the appellant. Subsequently, the City notified this office that it believes the mandatory exemptions found in sections 10(1)(a) and (c) of the Act apply to the record. A supplemental Notice of Inquiry was sent to the City, the appellant and the independent appraiser. Representations were received from the City and the appellant. The City did not submit representations with respect to the application of section 10 of the Act.

DISCUSSION:

VALUABLE GOVERNMENT INFORMATION

Section 11(a) of the Act states:

A head may refuse to disclose a record that contains,

trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value.

In order to qualify for exemption under section 11(a), the City must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to ... an institution; **and**
3. has monetary value or potential monetary value.

The City submits that the record contains financial and commercial information provided by the outside appraiser. Based on my review of the record, I am satisfied that it contains commercial information.

The City's position is that since the report was paid for by the City, it belongs to the City within the meaning of section 11(a). I do not agree. In my view, the fact that the City has paid for a document does not necessarily mean that the information contained therein "belongs" to the City within the meaning of the exemption.

The City submits that the appraisal report has monetary value, as evidenced by the fact that the City paid the author to provide it. The City also argues that disclosure of this report would allow the requester to obtain at no cost a report which the City has paid for.

The purpose of section 11(a) is to permit the City to refuse to disclose a record which contains information where disclosure would deprive it of the monetary value of the information (Order P_219). In this case, the City has no intention of publishing or disseminating the requested information in a way that would result in some form of monetary payment to it. I am not satisfied that the information itself has monetary value. In fact, the contingent or limiting conditions in the document specifically state that the City has no right of publication, and all copyright is reserved to the author.

The City submits that the record's potential monetary value rests with its use in determining land values for negotiations/offers to purchase lands within the Greenwood Site, as all land transfers with the owner of the Greenwood Site have not been completed. The City states that negotiations with the Municipality of Metropolitan Toronto for lands in the immediate vicinity are ongoing. In my view, these concerns are more properly directed to the exemptions in sections 11(c) and (d).

I am not satisfied that the information contained in the appraisal report belongs to the City or that it has monetary value or potential monetary value. Accordingly, I find that section 11(a) does not apply.

PROPOSED PLANS, POLICIES OR PROJECTS OF AN INSTITUTION

Section 11(g) reads:

A head may refuse to disclose a record that contains,

information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

In order to qualify for exemption under this section, the City must establish that a record:

1. contains information including proposed plans, policies or projects; **and**
2. that the disclosure of the information could reasonably be expected to result in:
 - (i) premature disclosure of a pending policy decision, or
 - (ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied (Order P-229).

The City has not identified a pending policy decision which might be prematurely disclosed if the records were disclosed at this time, and I find this aspect of the exemption has not been established.

With regard to the expectation of undue financial benefit or loss to a person, the City simply states that disclosure would negatively affect the City's position in negotiations with the Municipality of Metropolitan Toronto for lands in the immediate vicinity. In my view, these concerns are more properly directed to the exemptions in sections 11(c) and (d). Accordingly, I find that section 11(g) does not apply.

ECONOMIC AND OTHER INTERESTS

Sections 11(c), (d) and (e) read:

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;
- (e) 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(c)

In Order P-1190, former Assistant Commissioner Tom Mitchinson stated:

In my view, the purpose of section 11(c) is to protect the ability of institutions to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or

private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

I agree.

In my view, the City has not established the requirements for exemption under section 11(c). I am not satisfied that this record, which relates to the acquisition of land, is related to the City's economic interests or competitive position as contemplated by section 11(c). I find that the City has not provided sufficient evidence to establish a reasonable expectation that disclosure of the record would prejudice the City's interests in these areas, and section 11(c) does not apply.

Section 11(d)

To establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests. The City points out that its negotiations with the named corporation involved not only the acquisition of the 14 acres of the land, but also the staged transfer of lands for public highways, a school and parkland. The City submits that although the agreement to acquire the land has been fully executed and registered on title in the Registry Office, certain land transfers have yet to take place. The City asserts that disclosure of the record, specifically the land value conclusions, could result in the remaining land transfers being affected, but does not provide an explanation of how or why the land transfers could be affected, or what impact that would have on the City's financial interests.

The City also refers to its ongoing negotiations with the Municipality of Metropolitan Toronto respecting lands adjoining the Greenwood Site. The City asserts that if the Municipality knew the values on which the City is basing its negotiating position, it would give the Municipality an unfair negotiating position.

The appellant submits that the price the City paid for the land is publicly known, and it is publicly known that the record at issue valued the land higher than the price paid. The appellant also submits that the value of the purchased lands would be quite different from the value of the rest of the site, as the purchased site is comprised of landfill on former peat bog, is closest to one of the largest sewage treatment and pumping facilities in North America and is farthest away from the adjacent desirable residential neighbourhood.

Because the City does not explain in sufficient detail how or why disclosure of the records would be injurious to its financial interests, I am not convinced that such a harm could reasonably be expected to occur. Accordingly, I find that section 11(d) does not apply to exempt the records from disclosure.

Section 11(e)

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 any 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 M_92]

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the Act. Sections 11(c), (d) and (g) all take into consideration the **consequences** which would result to an institution if a record was released. They may be contrasted with sections 11(a) and (e) which are concerned with the **type** of the record, rather than the consequences of disclosure.

As stated above, the first part of the section 11(e) test requires that the record contain positions, plans, procedures, criteria or instructions. As such, the first part of the test relates to the form of the record and not to its intended use.

The City may very well intend to use the information in the record in its upcoming negotiations with the Municipality of Metropolitan Toronto. The City also argues that disclosure of the information in the record could cause land transfers negotiated with the previous owner not to occur in a timely manner. However, neither of these arguments has any bearing on whether the record itself contains information which can be characterized as a position, plan, procedure, criteria or instruction.

Previous orders of the Commissioner's office have defined "plan" as "... a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Order P_229). In my opinion, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre_determined courses of action or ways of proceeding. In my opinion, the record at issue does not disclose any intended course of action on the part of the City. It is not sufficient for the City to merely state that because the record formed or will form the basis for negotiations, it represents the "positions, plans, procedures, criteria or instructions" of the City. It is evident from a review of the record, that it does not represent a plan, position, criteria or instruction to be applied by the City in its negotiations, but rather contains the background information which would have been used by the City during the acquisition process.

The City has not provided me with sufficient evidence to conclude that this record contains a position, plan, procedure, criteria or instruction. Accordingly, the first part of the section 11(e) test has not been satisfied. Therefore, I find that the record does not qualify for exemption pursuant to section 11(e) of the Act.

THIRD PARTY INFORMATION

Section 10(1) requires that evidence sufficient to substantiate a reasonable expectation of the specified types of harm be provided by the City or the affected party, in this case the independent appraiser. Neither of these parties provided representations on the application of section 10(1) of the Act to the record, and I find that there is not sufficient evidence on the face of the record to substantiate a reasonable expectation of any of the types of harm listed in section 10(1). Accordingly, I find that section 10(1) does not apply.

PUBLIC INTEREST IN DISCLOSURE

In light of my finding that the exemptions claimed by the City do not apply, it is not necessary for me to address the appellant's submissions regarding the application of section 16 of the Act.

ORDER:

1. I order the City to disclose the record to the appellant by sending him a copy by **December 27, 1996**, but not earlier than **December 23, 1996**.
2. 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 1.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ November 20, 1996