



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

ORDER M-897

Appeal M_9600347

The Corporation of the City of Barrie



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NATURE OF THE APPEAL:

The Corporation of the City of Barrie (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to information concerning the purchase of land by the City from a named limited company for the development of a sports field complex. In addition, the requester sought access to a list of names of all individuals involved with the limited company including its shareholders, officers and directors.

The City located a number of responsive records and provided the appellant with a decision letter in which it advised him that, upon payment of a fee of \$104, access would be granted to the majority of the records. The City indicated its intention to deny access to several of the records, in whole or in part, claiming the application of the following exemptions contained in the Act:

- closed meeting - section 6(1)(b)
- third party information - sections 10(1)(a) and (c)
- economic and other interests - sections 11(c), (d) and (e)
- solicitor-client privilege - section 12
- information published or available - section 15(a)

The requester (now the appellant) appealed the City's decision to deny access to the information contained in the records. He also appealed the fee estimate provided by the City and submits that further records responsive to his request should exist. During the mediation of the appeal, the appellant withdrew his request for access to Record 6, to which the City had applied the solicitor-client exemption. As a result, this record, and the possible application of section 12 to it, are no longer at issue in this appeal.

A Notice of Inquiry was provided to the City, the appellant and to 15 individuals whose rights may be affected by the disclosure of the information contained in the records (the affected persons). Representations were received from the appellant and from a representative of the affected persons who indicated that they "have no further objection to the City formally releasing the names or files related to our negotiations on the property in question".

PRELIMINARY ISSUE:

IS THE APPEAL FRIVOLOUS AND VEXATIOUS?

During mediation, the City submitted that the appeal was frivolous and vexatious because some of the information which the appellant had requested had been published in the local newspaper. It argued that because some of the information had been made public, and the appellant failed to collect the remaining records, his pursuit of the appeal could be characterized as being frivolous or vexatious.

The provisions of the Act which address the question of frivolous and vexatious appeals are contained in sections 4(1)(b) and 20.1 of the Act, as well as section 5.1 of Regulation 823, as amended by Regulation 22/96.

In my view, the appellant's request was not limited to the information which ultimately found its way into the newspaper articles. In addition, the appellant did not collect the remaining records because he disputed the amount of the fee estimate provided by the City. Accordingly, I find that the provisions of the Act relating to frivolous or vexatious requests have no application to the facts existing in this appeal.

DISCUSSION:

CALCULATION OF THE FEE

In its original decision letter, and in subsequent correspondence with our office, the City set out the component parts of its fee estimate as follows:

•	Photocopying - 70 pages at \$.20 per page	\$14.00
•	Search and Preparation Time - 3 hours at \$30 per hour	<u>90.00</u>
		\$104.00
		=====

It submits that a City Alderman undertook a 30 minute search to locate records held by the Sports Parks Committee relating to the request. The Alderman also spent an additional 15 minutes reviewing the documents to determine what information ought not to be disclosed. In addition, a 45 minute search of City Council's records maintained by the City Clerk's office was undertaken. The City also indicates that a further 1.75 hours were spent reviewing the records to determine whether they should be disclosed and another three hours severing and copying the documents. Finally, the City's Records and Information Manager indicates that a further two hours were spent reviewing the decision letter and communicating with the appellant by telephone. Finally, the City submits that it has expended at least eight hours in processing the appellant's request but has chosen to charge him only for three hours of the time spent.

The request and the subsequent appeal are governed by the following statutory and regulatory provisions:

Section 45(1)

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
- (d) shipping costs; and

- (e) any other costs incurred in responding to a request for access to a record.

R.R.O. 1996, Regulation 823, Section 6, as amended by Regulation 22/96

The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act:

1. For photocopies and computer printouts, 20 cents per page.
2. For floppy disks, \$10 per disk.
3. For manually searching for a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of a record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

In reviewing the City's fee estimate, my responsibility under section 45(5) of the Act is to ensure that the amount estimated by the City is reasonable in the circumstances. In this regard, the burden of establishing the reasonableness of the estimate rests with the City. In my view, it discharges this burden by providing me with information as to how the fee estimate has been calculated, and by producing sufficient evidence to support its claim.

Photocopies

I am satisfied that the charge of \$14 for the photocopying of the 70 pages of responsive records is in accordance with the Act and the Regulations.

Search Time

I find that the City may properly charge the appellant for the time spent by the Alderman and City Clerk's office searching for the responsive records. According to the information provided by the City, the time spent searching for records was 1.25 hours. I find that to be a reasonable amount of time to locate the requested information. The allowable fee for search time is, accordingly, \$37.50.

Preparation Time

The City submits that it is also entitled to charge a fee for the time it spent preparing the records for disclosure, particularly time spent determining what information is subject to an exemption under the Act, as well as the time spent manually severing the documents. Previous orders of this office have allowed a fee of two minutes per page for the preparation of records for disclosure [Orders M-782, M-811 and M-858]. As the City intends to disclose severed versions of seven pages of records, I find that it is entitled to charge for the 14 minutes taken to complete this work, for a fee of \$6.80.

Time spent feeding the photocopier is included in the amount charged for photocopying and is not to be calculated as part of the preparation time. Similarly, time spent in reviewing the records, preparing the decision letter and communicating with the appellant is not recoverable under the provisions of section 45(1) of the Act and section 6 of Regulation 823.

By way of summary, I find a reasonable fee for the processing of this request may be calculated as follows:

•	for photocopying - 70 pages at \$.20 per page	= \$14.00
•	for search time - 1.25 hours at \$30 per hour	= \$37.50
•	for preparation time - .25 hours at \$30 per hour	= <u>\$ 6.80</u>
	Total	\$58.30
		=====

THIRD PARTY INFORMATION

Neither the City or the affected persons have made any submissions regarding the application of the sections 10(1)(a) and (c) exemptions to the records. Because these are mandatory exemptions, however, I am required to independently review their possible application to the records.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the City and/or the affected persons must satisfy each part of the following three-part test:

1. the records 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 records must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 10(1) will occur.

[Order M-29]

In all cases where a claim for exemption is made under section 10 of the Act, an onus rests with the institutions and/or affected persons to demonstrate the harms envisioned by these sections are

present or reasonably foreseeable. No submissions have been received from the City or the affected persons with respect to the application of section 10 to the information contained in the records. I have reviewed the records, and I find that their disclosure would reveal commercial or financial information relating to the sale of land by the company owned by the affected persons to the City.

I have not, however, been provided with any evidence to support the position that the information was supplied to the City, in confidence or otherwise. Neither have I been provided with any evidence that the disclosure of the records would give rise to a reasonable expectation that any of the harms set out in sections 10(1)(a) or (c) would occur. As parts two and three of the section 10 test have not been satisfied, I find that sections 10(1)(a) and (c) have no application to the information at issue in this appeal.

ECONOMIC OR OTHER INTERESTS

The City has claimed that the severed information contained in Records 10 and 11 is also exempt from disclosure under sections 11(c), (d) and (e) of the Act. These sections state:

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;

The City has not made any submissions on the application of this exemption to the information in Records 10 and 11 which it is refusing to disclose. I find, therefore, that sections 11(c), (d) and (e) have no application to this information.

CLOSED MEETING

The City has also claimed the application of section 6(1)(b) of the Act to the information contained in the severed portions of Records 10 and 11. This section states:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes the holding of that meeting in the absence of the public.

Record 10 is a report to the General Committee of City Council from its Sports Field Committee dated June 10, 1996. The record contains certain recommendations regarding the purchase of

land for the creation of a sports field complex on property owned by the affected persons. The report is marked confidential. I have not, however, been provided with any evidence to indicate that the Council meeting of June 10, 1996 was held in the absence of the public, or that the meeting was held in camera pursuant to any statutory authority. As such, I find that section 6(1)(b) has no application to the information contained in Record 10.

Record 11 is "Council Direction Memo" dated June 17, 1996 addressed to the City Clerk. It describes in detail a Resolution of Council regarding the purchase of certain land for the creation of a sports field complex. Again, I have not been provided with any evidence to indicate that the disclosure of this record would reveal the substance of the deliberations of a meeting of the City Council or the Sports Field Committee which was held in the absence of the public. Again, I find that section 6(1)(b) does not apply to Record 11.

INFORMATION PUBLISHED OR AVAILABLE

The City submits that the information contained in Record 15 is exempt from disclosure under section 15(a) of the Act. This section states:

A head may refuse to disclose a record if,
the record or the information contained in the record has been published or
is currently available to the public;

Record 15 consists of a short memoranda (page one) from one of the affected persons to a City official along with a list of the affected persons (page two). This list has been published on several occasions in local newspapers, copies of which are included in the appellant's submissions. I find that the information contained in page two of Record 15 is exempt under section 15(a) as the information which it contains has been published. Page one of Record 15 has not been published and is not, therefore, exempt from disclosure under section 15(a).

ADEQUACY OF SEARCH

During the mediation of the appeal, the City provided detailed information about the nature and extent of the searches which it undertook for records responsive to the appellant's request. Searches were undertaken by an Alderman of the records maintained by the Sports Field Committee. In addition, records maintained by City Council were searched by the City Clerk's office. The individuals who conducted the searches indicate that all of the records which are responsive to the appellant's request were located and that no further records exist.

Where a requester provides sufficient details about the records which he is seeking, 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 the requested record does not exist. However, 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 appellant's request.

Based on my review of the representations which I have received, as well as the records themselves, I find that the City has made a reasonable effort to identify and locate the records

which are responsive to the appellant's request and that the search which it undertook was reasonable in the circumstances of this appeal.

ORDER:

1. I find that the City's search was reasonable and dismiss that portion of the appeal.
2. I uphold the City's decision to deny access to page two of Record 15.
3. I find that a fee of \$58.30 is reasonable in the circumstances of this appeal.
4. Within fifteen (15) days following the payment of \$58.30 by the appellant, I order the City to disclose to the appellant Records 10 and 11 and page one of Record 15.
5. In order to ensure compliance with 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 4.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ February 13, 1997