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

ORDER MO-1476

Appeal MA-010081-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of "records pertaining to any polling done for the Mayor's office or the CAO's office during the last twelve months by any city department, including but not exclusive to police helicopters, traffic, TTC [Toronto Transit Commission] and the Olympics".

Pursuant to section 21(1)(a) of the *Act*, the City notified the author of the responsive records before responding to the requester, providing that party an opportunity to identify any concerns regarding disclosure. After receiving the author's response, the City decided to disclose the records to the requester, and advised the author accordingly. The author (now the appellant) appealed the City's decision.

This appeal was not resolved through mediation, so it proceeded to the Adjudication stage. I sent a Notice of Inquiry to the appellant initially, inviting representations on the issues raised in the appeal. The appellant submitted representations, the non-confidential portions of which were shared with the City and the requester. Only the City submitted representations in response. I then shared these representations with the appellant, and received further representations in reply.

RECORDS:

The records at issue consist of:

- portions of a [named] report authored by the appellant that deal with issues relating to the City, specifically consisting of an executive summary, statistical tables, and a section titled "Focus on the Greater Toronto Area";

- portions of a second [named] report authored by the appellant that deal with issues relating to the City, specifically consisting of an executive summary, statistical tables, sections titled "Focus on the Greater Toronto Area" and "The Olympic Games Bid"; and

- a letter dated November 23, 2000 from the appellant to the City that summarizes the results of one of the reports.

DISCUSSION:

RESPONSIVENESS OF THE RECORD/SCOPE OF THE REQUEST

As a preliminary matter, the appellant takes the position that the records are not responsive to the request. In its initial representations, the appellant states:

> … none of the … records that the City wishes to release actually pertains to polling done "for the Mayor's office or the CAO's office". [The syndicated survey questions] are conceived and designed entirely by [the appellant's]

> researchers without instruction from any one subscriber and in this case, specifically without instruction from the City of Toronto. Moreover, the results are not made available exclusively to any one client such as the City of Toronto. The results are made available to a number of different subscribers in the public and private sectors, all of whom pay to be subscribers to the report and to enjoy access to the information provided in the report.

The appellant also identifies that the letter to the City simply summarizes the data found in the accompanying report, and therefore does not qualify as "polling data" obtained for the Mayor's office or for the CAO's office.

The City takes the position that reports were purchased by a division of the CAO's office, and states:

> … while the survey results contained in the [reports] were not made exclusively available to the City, these records are, nonetheless, polling records to which the City's CAO's Office had subscribed during the time period specified by the requester.

The City also submits that the letter constitutes a "Toronto specific memo" that was produced exclusively for the City pursuant to an agreement, and was purchased by the City for a fee.

Finally, the City states that it contacted the requester twice during the course of responding to the request, and received confirmation that he was interested in receiving access to the identified records.

In its reply representations, the appellant submits that the records are not responsive because they were not prepared exclusively for the City and, as such, by definition do not qualify as polling done for the Mayor's office or the CAO's office.

Previous orders of the Commissioner have established that in order to be responsive, a record must be "reasonably related" to the request:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records that will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness." That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness," I believe that the term describes anything that is reasonably related to the request [Order P-880; see also Order P-1051].

I agree with the above, and must therefore determine whether the records are reasonably related to the request.

Requesters are not always aware of precisely what records are held by an institution. Section 17(1) of the *Act* requires requesters to provide as much detail as possible in order to help institutions identify responsive records, and section 17(2) imposes a corresponding duty on institutions to assist requesters in clarifying requests in order to be in a position to undertake appropriate search activities. In this case, the request received by the City was quite clear. The requester was seeking access to polling results over a defined period of time and on some specific topics. He also indicated that the polls he is looking for were done for the Mayor's Office or CAO's office. In order to resolve any ambiguities, the City contacted the requester to ensure a clear understanding of the scope of the request, and then proceeded to identify the three responsive records. The City contacted the requester a second time before providing its response, and again confirmed that the records at issue in this appeal were the ones that he wanted to receive. In my view, any initial ambiguity that may have existed was resolved through the subsequent discussions between the City and the requester. I find that the three records identified by the City are clearly "reasonably related" to the request, and therefore "responsive" as the term is defined in Order P-880.

THIRD PARTY INFORMATION

The appellant takes the position that the records qualify for exemption under sections 10(1) of the *Act*. The portions of this exemption with potential application in the circumstances of this appeal are sections 10(1)(a) and (c), which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

For a record to qualify for exemption under sections 10(1)(a) or (c) each part of the following three-part test must be established:

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 Board 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 (a) or (c) of subsection 10(1) will occur.

[Orders 36, M-29 and M-37]

Because the City has decided that section 10 has no application in the circumstances of this appeal, the burden of proof rests with the appellant, and it is up to the appellant to provide evidence and representations sufficient to establish the requirements of the section 10(1) exemption claim.

Part One: Type of Information

The appellant submits that the records contain scientific information:

> Public opinion information such as that found in the [records] is information which presents, within a statistically derived margin of error, a picture of the views and/or reported behaviours of an entire population without having to investigate the views of every single individual within that population. This representative, generalisable information … is derived according to accepted, scientific methods used by social scientists all around the world.
>
> The method, which is part of an organized field of knowledge (that is well represented in social science faculties throughout Ontario and Canada), hinges largely on the importance of random probability sampling, valid questionnaire design, (which includes the observation and testing of specific hypotheses) and standard analytical models of statistical analysis, all of which are necessarily undertaken by experts in the field. Indeed, several of [the appellant's] researchers …. have been recognized as survey research "experts", qualified to testify in federal and provincial court proceedings.

The City takes the opposite position:

> … the records at issue consist of those portions of the statistical tables that show the results/responses for the City of Toronto to the issues/questions that were canvassed, and the analysis and conclusions that were drawn from these responses by the appellant.
>
> The City submits that the information in the records is simply a reporting of the views of a sample of the adult population in the City of Toronto regarding their level of satisfaction with public services and their attitudes toward local issues and problems … and the appellant's analysis and interpretation of that information.

> The City further submits that the compilation of the views of a sample of the citizens of Toronto and the analysis and interpretation thereof does not relate to the observation and the testing of specific hypotheses, and as such the information in the records at issue does not constitute "scientific information" as that term has been defined by [the Commissioner's Office].

In its reply representations, the appellant takes issue with the City's position, arguing that it does not simply report the views of the adult population:

> As social scientists, we actually report on the views of a representative sample of the population. The data that we report on are representative because we apply the science of random probability sampling to our sample design and selection criteria. And unlike some other sort of sampling which is not based on science, we are able to measure the accuracy of our results…within a mathematically derived margin of error.

In Order P-454, former Assistant Commissioner Irwin Glasberg established the following definition of the term "scientific information":

> Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in [section 10(1)].

This definition has been applied in a number of subsequent orders, and I will also adopt it for the purposes of this appeal.

In Order PO-1666, Adjudicator Laurel Cropley had to determine whether certain site evaluation reports were "scientific information" for the purpose of section 17(1) of the *Freedom of Information and Protection of Privacy Act* (which is equivalent to section 10(1) of the *Act*). She stated:

> The Company [who was the party resisting disclosure in that appeal] submits that the records contain scientific information as they relate to the field of environmental science which involves the testing of soils to determine the absence of pollutants. It also argues that the records contain technical information as they relate to environmental engineering, which is a field of applied science.
>
> …
>
> Although I accept that the methods employed by the Company are the result of scientific development, testing and analysis, I find that the information in the

> records at issue does not relate to the observation and testing of specific hypothesis or conclusions. Rather, the records contain information regarding the application of the methods which have been developed by the Company. Therefore, I find that they do not contain scientific information within the meaning of the above definition.

Similarly, in Order PO-1732, I had to determine whether information relating to certain remediation efforts concerning a particular property constituted "scientific information". I stated:

> The appellant [who was the party resisting disclosure in that appeal] submits that all of the records contain scientific and technical information. The appellant states that the remaining records have been prepared by environmental advisors, specialists and consultants and include water and soil sampling, monitoring reports, proposed remediation plans, reports interpreting monitoring results or commenting on remediation proposals, applications for and documents related to Certificates of Approval, schematic drawings, site plans and incident reports.
> ….
>
> Although I accept that some methods employed by the appellant and its consultants were created as a result of scientific development, testing and analysis, I find that none of the actual information in the records themselves relates to "the observation and testing of specific hypotheses or conclusions". Rather, the information reflects the application of these methods in the context of the appellant's remediation efforts. Therefore, I find that the records do not contain "scientific information", as that phrase has been defined in Order P-454.

Adjudicator Cropley reached a different conclusion on the set of facts before her in Order MO-1379. In that appeal she was dealing with a request for a number of records including a specific teacher questionnaire. After reviewing the definition of "scientific information" from Order P-454, she stated:

> Although I do not have any evidence from the parties on this, I am prepared to accept, based on my review of the record, that the development of the Teacher Questionnaire would have involved research that was likely based on the observation and testing of specific hypotheses or conclusions undertaken by experts in the field of psychology as would the development of the Woodcock Johnson test. In my view, this would similarly apply to the application of the tests. Accordingly, I accept that the information contained in these two records falls within the scope of scientific information as it relates to the "social sciences."

As a preliminary matter, it is clear to me that the appellant, as a company that is involved in survey research, is engaged in an area of study dealing with an organized field of knowledge,

which can properly be characterized as a social science. As such, the methods employed by the appellant in conducting its work are the result of scientific development, testing and analysis.

However, I am not persuaded that the information contained in the actual records at issue in this appeal deal with "the observation and testing of specific hypotheses or conclusions". Similar to the situation I faced in Order PO-1732, the information contained in the records in this case reflects the application of the scientific methods used by the appellant in undertaking the survey research, not the actual observation and testing of specific hypotheses or conclusions. Although I accept that the appellant engages in a social science and applies its scientific knowledge and expertise when undertaking survey work, I find that the results of this work as reflected in the records at issue in this appeal do not themselves reveal any "scientific information", as that term has been defined by this Office.

Therefore, I find that the records do not contain or reveal "scientific information", and the first part of the section 10(1) has not been established.

The representations received from the appellant provide detailed submissions regarding all three parts of the section 10(1) exemption test. It is for that reason that I have decided to go on and consider the other two parts of the test, even though not having met the requirements of the first part would itself be sufficient for me to find that the exemption claim has not been established.

Part Two: Supplied in Confidence

In order to satisfy part two of the test, the appellant must show that the information was supplied to the City, either implicitly or explicitly in confidence.

The appellant and the City both agree that the information contained in the records was supplied by the appellant in accordance with the terms of its agreement with the City. I concur.

In order to establish confidentiality component of part two of the test, the appellant must demonstrate that an expectation of confidentiality existed at the time the records were submitted, and that this expectation was reasonable and had an objective basis. All factors are considered in determining whether an expectation of confidentiality is reasonable, including whether the information was:

(1) Communicated to the City on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the appellant prior to being communicated to the City.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

The appellant maintains that the survey results were supplied to the City with an explicit expectation of confidentiality, as evidenced by the confidentiality clause included in the subscription agreement. The City acknowledges that the subscription agreement with the appellant contains an explicit statement of confidentiality, but points out that this is not determinative of whether or not information of this nature is accessible under the *Act*. The City states that at the time the agreement was entered into with the appellant "the appellant was informed that notwithstanding any confidentiality clause, the City was bound by provincial statutes, including the provisions of the *Act*." In the City's view, because the limitations of the confidentiality clause were discussed with the appellant, "the appellant could not have reasonably held an expectation of confidentiality that would override any provisions of the *Act* regarding access, notwithstanding the confidentiality clause."

I agree with the City that the provisions of the *Act* apply in the context of requests for access to records created under the terms of its contract with the appellant, notwithstanding the existence of a confidentiality clause. However, in my view, it does not necessarily follow that the appellant did not supply the information provided under the terms of the contract in confidence. Based on the representations provided by the parties, it is clear that the confidential nature of the arrangements between them was not only explicitly addressed in the terms of the contract, but also discussed in some detail at the time the contract was executed. The City's caution to the appellant regarding the extent to which the clause would apply in the context of an access request under the *Act* is an important one that is prudently addressed in contracts of this nature. However, the confidentiality clause is explicit, and evidences a clear intention on the part of the parties that the information would be provided in confidence and treated in that manner by the City. I am satisfied that the appellant's business protocols support its position that information from its surveys is treated confidentially within its organization, and that the survey results were prepared for a purpose that would not involve general disclosure to the public.

Therefore, I find that the appellant supplied the information contained in the records to the City explicitly in confidence, thereby satisfying part two of the section 10(1) test. It should be emphasized that confidentiality is only one component of the section 10(1) exemption claim, and that establishing the requirements of part two of the test does not mean that the document will be exempt from disclosure, unless both of the other parts of the test have also been established.

Part Three: Harms

In order to meet the third part of the test, the appellant must demonstrate that one or more of the harms enumerated in sections 10(1)(a) or (c) could reasonably be expected to result from the disclosure of the records.

Previous orders have established the evidence that must be provided to satisfy the third part of the test. In Order PO-1747 Senior Adjudicator Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 10(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

The appellant's representations focus primarily on the undue loss of revenues if the records are disclosed. This is the type of harm contemplated by section 10(1)(c).

In support of its position, the appellant identifies that the records at issue in this appeal are portions of syndicated studies sold to subscribers on the basis that they contain confidential research data not available to the general public. The appellant also points out that a considerable amount of its business is derived from custom research that is derived from its reputation for syndicated research. In the appellant's view, if the results of its syndicated research studies are accessible to the public under the *Act*, then current subscribers would discontinue purchase arrangements with the appellant, putting both the appellant's subscription and custom research business at significant risk. In summary, the appellant submits:

> We are concerned, not simply because we have provided [certain identified] data to the City of Toronto in confidence (and the City has signed an agreement in this regard), but more importantly, because the *very basis* of [the appellant's] business involves being suppliers of confidential research information to organizations that pay for it and that buy it precisely because it is confidential and not otherwise available.

The City takes issue with the appellant's position, and submits:

> … the information at issue pertains only to the City and, as such, constitutes only a small part of the [reports]. Because this information relates only to the City, it may be of little or no use or interest to other subscribers. The City believes that most subscribers are most interested in the data pertaining to themselves.
>
> The City further submits that because survey research is dynamic, and as such survey data changes from report to report, subscribers (including the City) will continue to subscribe, regardless of whether the information at issue is released or not.

The City also refers to the type of information available on the appellant's website in support of its position that certain information contained in the records is already publicly available. Finally, the City takes the view that the appellant's representations concerning the anticipated losses in revenue and future earnings are, at best, speculative.

In its reply representations, the appellant disputes the positions put forward by the City, and argues that survey information relating to the City is also of interest to other subscribers. The appellant states that the interest in syndicated surveys that report on the same information to a number of paying customers is precisely the reason they are able to make a business case for these syndicated studies. The appellant goes on to state:

> In any event, even if other subscribers were *not* interested in the Toronto-specific information in [the reports], they would surely be interested in some other material included in the report (they subscribe to the report after all) …. Current subscribers, whether they be in the private sector, the not-for-profit sector, even other levels of government, will reason that they do not need to subscribe to our confidential syndicated service because all they need to do is request any material that interests them through the Act and it will be released to them free of charge!

The appellant also distinguishes the information which is available on its website from the information contained in the records. In the appellant's view, the website information relates to methodological information, not the actual substantive, confidential survey results.

Although I can appreciate that the appellant might be concerned about future lost revenues should the records at issue in this appeal be disclosed, I am not satisfied that the appellant has provided me with the type of detailed and convincing evidence necessary to establish a reasonable expectation of harm. The possible loss of revenue is clearly speculative and, in my view, it is also remote. As the City indicates, the information contained in surveys of this nature is dynamic and its value diminishes over time. The information contained in the records at issue in this appeal was gathered in 2000, and it is not reasonable to assume that its disclosure now could have a significant impact on future subscriber decisions. While the appellant may be correct in its position that information about the City contained in the records is of interest to other subscribers, it does not necessarily follow that these subscribers would henceforth cancel their subscriptions and rely on the City to provide this information through the *Act*. The appellant's subscriber base is presumably acquired and maintained on the basis of demonstrated expertise and earned reputation in the field of survey design and analysis, and there is no evidence or clear indication that subscribers, including the City, will alter their purchasing practices because a requester under the *Act* is provided with access to specific information of interest to him. Having reviewed the actual information contained in the records, it is also clear that much of it is the type of information routinely reported at the time surveys of this nature are completed. The information deals with various issues of concern to the public, their relative ranking in importance, and an analysis of the change in priorities over time. Although not necessarily the same type of information available through the appellant's website, it is nonetheless the type of information generally disseminated and reported to the public on a regular basis.

Accordingly, the appellant has failed to establish a reasonable expectation of any of the harms outlined in section 10(1) should the records be disclosed, and I find that the third part of the section 10(1) exemption test is not satisfied.

As stated earlier, all three parts of the section 10(1) test must be established in order for records to qualify for this exemption. In this case, the first and third parts have both not been established. Therefore, the records do not qualify for exemption and should be disclosed to the requester.

ORDER:

1. I order the City to disclose the records to the requester in accordance with its original decision by **November 20, 2001** but not before **November 15, 2001**.

2. In order to verify compliance with the terms of this order, I reserve the right to require the City to provide me with a copy of the records that are disclosed to the requester pursuant to this order.

Original signed by: October 16, 2001
Tom Mitchinson
Assistant Commissioner