ORDER MO-1553

Appeal MA-010380-1

City of Mississauga

NATURE OF THE APPEAL:

This appeal concerns a decision of the City of Mississauga (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to information relating to whether the companies providing bus shelter advertising and bus advertising to the City have been allowed by the City to renegotiate the "Guaranteed Amount" in their contracts. Upon receipt of the request, the City notified an affected party of the appellant's request and invited submissions. In response, the affected party indicated that it opposed disclosure.

The City then issued a decision letter stating that there were no responsive records to the part of the request relating to bus shelter advertising and denying access to the records responsive to the part of the request relating to bus advertising, pursuant to section 10 (third party information) and sections 11(a) and (d) (economic and other interests) of the *Act*.

The appellant appealed the City's decision to this office.

During the mediation stage of this appeal, the appellant clarified that she was appealing only the City's decision to deny access to records relating to bus advertising.

The appeal was moved to inquiry. I initially sought representations from the City and the affected party. The City was asked to make representations on the possible application of sections 10 and 11 of the *Act*. The affected party was asked to make representations on section 10 only. The non-confidential representations of the City and the affected party were shared with the appellant. I then sought and received representations from the appellant on sections 10 and 11 of the *Act*.

RECORD:

The record at issue consists of a cover letter from the Corporate Services Department of the City of Mississauga to the affected party, dated May 17, 2001 (cover letter), a document titled "Change Order #1" in respect of an existing contract between the City and an affected party (change order) and a document titled "Acknowledgement", dated May 18, 2001 (acknowledgement).

CONCLUSION:

I have concluded that the record is not exempt from disclosure.

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1) of the Act states, in part:

> 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the City and/or the affected party 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 (a), (b) or (c) of section 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the

> language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words *"detailed and convincing"* do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*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 (Div. Ct.)]

Part 1 – Type of Information

The City submits that the contract contains "highly sensitive, commercial and financial information regarding commercial and financial practices of the affected party as related to the delivery of advertising services contracted from the affected party by the City.".

Previous orders of this office have defined the terms commercial and financial information as follows:

> The term [financial information] refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs.
>
> [Orders P-47, P-87, P-113, P-228, P-295 and P-394]
>
> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.
>
> [Order P-493]

The record contains information setting out contractual terms including term of contract, performance surety arrangements, financial reporting requirements, net billings projections and percentage of net billings to be distributed to the City.

I find that the record contains information that qualifies as financial and/or commercial information for the purposes of section 10(1) of the *Act*. Accordingly, I am satisfied that part 1 of the test has been met.

Part 2 – Supplied in Confidence

In order to satisfy part two of the test, the affected parties and/or the Region must show that the information was *supplied* to the City *in confidence*, either implicitly or explicitly.

Supplied

Introduction

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which provided the foundation of this *Act*:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind.
> (pp. 312-315) [emphasis added]

Because the information in a contract is typically the product of a negotiation process between an institution and an affected party, the content of contracts will generally not qualify as originally having been "supplied" for the purposes of section 10(1) of the *Act*. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusions reached in these orders is that, for such information to have been "supplied", it must be the same as that originally provided by the affected party, not the information that has resulted from negotiations between the institution and the affected party. [Orders P-36, P-204, P-251 and P-1105]

The fact, however, that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been "supplied" by a third party,

even where they were proposed by the third party and agreed to with little discussion [see Order P-1545].

In addition, information contained in a record not actually submitted to an institution will nonetheless be considered to have been "supplied" for the purposes of section 10(1) if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the City [Orders P-179, P-203, PO-1802 and PO-1816].

Representations

The City states that "the records contain information that was supplied to the City…[and] unique terms and proposals that were developed solely for the City…"

The affected party submits that:

> The information requested was provided and submitted to the City under a sealed bid and supplemented with confidential correspondence as it relates to any financial information.

Analysis

As indicated above, this element of the three-part test under section 10(1) has been the subject of a number of prior orders involving contracts. Most of these orders have concluded that contracts between government and private businesses do not reveal or contain information "supplied" by the private businesses. These findings reflect the common understanding of a contract as the expression of an agreement between two parties. Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of arrangements the parties agreed to accept, this information is not in itself considered proprietary information that qualifies for exemption under section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party.

A recent decision of Adjudicator Sherry Liang [Order PO-2018] reinforces this interpretation of the word "supplied" in the context of the three-part test. In that decision, Adjudicator Liang stated:

> Consistent with this general approach, certain cases have recognized that the absence of negotiations does not in itself lead to a conclusion that the information in the contract was "supplied" within the meaning of section 17(1). In Order P-1545, for instance, the evidence of the parties was that a consultant was asked to set out the terms and conditions of a consulting contract, which became the basis of the contract. In that decision, Assistant Commissioner Mitchinson concluded:
>
> Although some of the terms of the contract, and perhaps the contract as a whole, may have been agreed to with little discussion or the more extensive negotiation process normally associated with this type of agreement, I find that the record nonetheless represents a negotiated arrangement between Hydro and the affected person. In its representations on section 18(1)(c), quoted earlier in this order,

> Hydro appears to acknowledge that there is an element of negotiation to this type of contract when it argues that disclosure of the record could result in a potential future candidate choosing to "negotiate more advantageous terms". I find that the contract was the result of negotiations, however minimal, and that the record was not "supplied" for the purposes of section 17(1).

Further in Order PO-2018, Adjudicator Liang stated:

> Applying the above to the facts of this case, I find that the information in or revealed by Articles 8.5(d), 11.7(a) and (b), 12.1(a) and (c) was not "supplied" by the affected party, within the meaning of section 17(1) of the *Act*. Although they reveal the terms of the bargain the affected party agreed to when it entered into the contract, this is not in itself information "supplied" to MBS. Rather, the terms were mutually generated, as the product of negotiation. This is so regardless of the fact that some of the language in these provisions is substantially based on proposals of the affected party.
>
> It should be noted that even the representations of the MBA acknowledge that the final wording of Articles 8.5(d), 12.1(a) and (c) does not mirror the proposals submitted by the affected party. Indeed, a comparison of the RFP, the proposals by the affected party and the final wording reveals the existence of some level of exchange between the parties as to the final wording. I also have regard to the representations of the affected party referring to the negotiations on these issues.
>
> MBS expresses a concern that even if the information in Articles 8.5(d), 12.1(a) and (c) is found not to have been "supplied" by the affected party, the disclosure of these terms would result in *revealing* information supplied confidentially to MBS during the RFP process. MBS submits that a comparison of the terms of the pro-forma agreement against the terms of the final agreement would allow the requester to determine substantially all of the information in the affected party's proposal.
>
> In my view, this concern is not a basis for exempting the information at issue from disclosure. If it were, then I would see no reason to distinguish the information in the specific articles in dispute, from the rest of the contract which has been disclosed to the requester. As a general proposition, this interpretation of section 17(1) would result in the exemption from disclosure of the terms of any number of contracts awarded through a similar process to that used in this case. Such a result would clearly not be in keeping with the intent of the *Act*. In any event, the disclosure of the final terms of a contract, and the comparison of those terms with the terms of a pro-forma agreement, would only indicate the starting point and concluding point of negotiations. It would not, with any precision, reveal all of the details of the two parties' positions during those negotiations and the various proposals, counterproposals and changes to positions that might have been involved.

I agree with Adjudicator Liang's approach to this issue and adopt it for the purposes of this appeal.

Turning to this case, the City does not identify in its representations what "information", "terms" and "proposals" were actually supplied by the affected party to the City. Further, the affected party does not identify the substance of the "information" and "correspondence" that it refers to in its representations. In addition, the information requested is not the contents of the affected party's sealed bid but rather the product of negotiations between the City and the affected party.

In my view, the reasonable inference to be drawn from the City's cover letter to the affected party, and the surrounding circumstances, is that the contents of the change order were the result of negotiations between the affected party and the City. The affected party submitted a proposal requesting specific modifications to the original contract; the City responded to this proposal with a counter-proposal, consisting of the cover letter, change order and acknowledgement. Some time later, an authorized officer representing the affected party signed and dated the acknowledgement and confirmed the affected party's agreement to the City's counter-proposal.

Based on my review of the cover letter, change order and acknowledgement, and in the absence of detailed representations on this point from the City and the affected party, I am not satisfied that any of the information in the records was supplied by the affected party or would reveal information actually supplied, as required under section 10(1), as opposed to mutually generated through negotiation. My finding applies even if it could be said that some of the language in the record is substantially based on the proposal submitted by the affected party.

In conclusion, I find that the information contained in the record at issue was not "supplied". Accordingly, the second part of the test has not been met, and the section 10(1) exemption does not apply.

ECONOMIC AND OTHER INTERESTS

Introduction

At the close of mediation, the City had indicated that it was relying upon sections 11(a) and (d) to withhold the record. However, in its representations, the City indicated that it was also relying on section 11(c). Although the City raised this section beyond the 35-day time period for claiming new discretionary exemptions, as set out in section 11 of this office's *Code of Procedure*, I have decided that in the circumstances the appellant will not be prejudiced by my considering it. First, paragraphs (c) and (d) are quite similar in nature, and thus it cannot be said that the appellant was substantially "taken by surprise" by the paragraph (c) claim. Second, the appellant was given an opportunity to respond to the City's representations on the new exemption claim. Finally, for the reasons set out below, I am not persuaded that any of paragraphs (a), (c) or (d) apply to the record, in any event.

Sections 11 (a), (c) and (d) state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> …
>
> (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;

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

Section 11(a)

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 [Orders 87, PO-1763 and PO-1921].

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. (Ontario Information and Privacy Commissioner)*, [2001]O.J. No. 2552 (Div. Ct.)], Senior Adjudicator David Goodis reviewed a number of past orders of the Commissioner's office regarding the interpretation of the phrase "belongs to" in part 2 of the test in the context of the provincial equivalent of section 11 of the *Act*. He drew the following conclusions regarding the interpretation of the phrase "belongs to":

> With reference to the meaning of the phrase "belongs to", Assistant Commissioner Tom Mitchinson stated in Order P-1281:
>
> > The Ministry submits that the database, the data elements, and the selection and arrangement of the data in the database belong to the

> Government of Ontario or an institution. The Ministry argues that the term "belongs to" in section 18(1)(a) denotes a standard less than ownership or copyright, but does not clearly articulate what the standard is or how it is applicable here. If these words do mean "ownership", the Ministry argues that, quite apart from any consideration of copyright, it has ownership by virtue of its right to possess, use and dispose of the data as outlined in the various statutes authorizing its collection, retention and use under the [Ontario Business Information System (ONBIS)] system, as well as by virtue of its physical possession of the database and its control of the access and use of the ONBIS system.
>
> I do not accept these submissions. In my view, the fact that a government body has authority to collect and use information, and can, as a practical matter control physical access to information, does not necessarily mean that this information "belongs to" the government within the meaning of section 18(1)(a). While the government may own the physical paper, computer disk or other record on which information is stored, the *Act* is specifically designed to create a right of public access to this information unless a specific exemption applies. The public has a right to use any information obtained from the government under the *Act*, within the limits of the law, such as laws relating to libel and slander, passing off and copyright, as discussed below.
>
> If the Ministry's reasoning applied, all information held by the government would "belong to" it and, presumably, the rights to use information belonging to government could be restricted for this reason alone...

Similarly, in his earlier Order P-1114, the Assistant Commissioner stated:

> Individuals, businesses and other entities may be required by statute, regulation, by-law or custom to provide information about themselves to various government bodies in order to access services or meet civic obligations. However, it does not necessarily follow that government bodies acquire legal ownership of this information, in the sense of having copyright, trade mark or other proprietary interest in it. Rather, the government merely acts as a repository of information supplied by these external sources for regulatory purposes.

The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use or dispose of information, or control access to the physical record in which the information is

> contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein].

In Order M-654, Adjudicator Holly Big Canoe stated with respect to part 3 of the test for exemption under section 11(a):

> The use of the term "monetary value" in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information . . . [emphasis in original].

The City submits the following in support of the application of section 11(a):

> Section 11(a) applies to this record because the contract and any amendments thereto, contain commercial information which has monetary value, both to the affected party and to the City.

Having already found that the information at issue qualifies as both financial and commercial information for the purposes of section 10(1), I find that the City has satisfied part 1 of the three-part test under section 11(a).

In order for the City to meet parts 2 and 3 of the test under section 11(a), the City needs to establish that the contract belongs to the City and has monetary value. Adjudicator Liang in Order MO-1462 recently addressed the application of section 11(a) to a contract. In that order, Adjudicator Liang was asked to decide whether a contract for land ambulance services between an institution and a successful bidder should be disclosed to the requester. In that case, Adjudicator Liang made the following finding in respect of the contract and parts 2 and 3 of the test:

> Applying the above principles to the facts of this appeal, I find that the information in Record 3 [the contract] does not qualify either as information having "monetary value", or the type of information which has been found to

> "belong to" an institution. The representations of the County describe what it believes would be the harmful consequences of releasing this information, but do not establish that the information has inherent value, resulting for instance from the expenditure of money or the application of skill and effort to develop the information.
>
> I conclude, therefore, that Record 3 [the contract] does not qualify for exemption under section 11(a) of the *Act*.

In my view, Adjudicator Liang's reasoning applies to the facts of this appeal. The City has failed to provide adequate evidence and argument for me to conclude that the information contained in the record either belongs to it or qualifies as information that has monetary or potential monetary value. Accordingly, the City does not meet part 2 of the test under section 11(a) and I conclude that section 11(a) has no application to the record.

Sections 11(c) and 11(d)

In order to establish the requirements of sections 11(c) or (d), the City must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in these sections resulting from disclosure of the record.

In Order PO-1747, Senior Adjudicator David Goodis provided the following guidance in interpreting the words "could reasonably be expected to":

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the [provincial *Freedom of Information and Protection of Privacy*] *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.)].

Senior Adjudicator Goodis' statement applies equally to sections 11(c) and (d) of the *Act*, which both include the phrase "could reasonably be expected to". Accordingly, in order to establish the requirements of either of these exemptions, the City must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" as described in those sections.

The City makes the following submissions in support of the application of sections 11(c) and (d).

> Sections 11(c) and (d) apply to the records because disclosure of the records could reasonably be expected to prejudice the economic and financial interests of the City, as well as the competitive position of the City when the City goes to the marketplace seeking new partners for its advertising programs. In Order P-1190, which was upheld on judicial review, Assistant Commissioner Mitchinson stated:
>
>> In my view, the purpose of Section 11(c) is to protect the ability of institutions to earn money in the marketplace. 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.
>
> It is submitted, that in contractual arrangements where the City receives a share of revenue earned from bus advertising, it can reasonably be expected that disclosure of the contractual records will have a detrimental impact on the City's ability to negotiate the best deal in other similar situations. Also, as previously noted, if disclosure of this information causes [the affected party] to breach its obligations with advertisers, then there will be detrimental effect on the financial and economic interests of the City as revenue under this contractual arrangement would diminish.

The City also appears to rely on the following submissions originally made under section 10(1):

> . . . [D]isclosure of such information would not only undermine the competitive position of [the affected party], resulting in undue loss to that Company, but would also have a serious negative impact on the potential for the City to gain revenue from such a contract. Disclosure of this information would result in an undue loss from the City because if advertisers feel [the affected party] has breached their agreement and limit their business with the [affected party], revenues otherwise achievable by the City would also be negatively impacted. As the City enters into other revenue-sharing agreements, release of the records could have a "domino effect" causing other companies to request amended terms to agreements.
>
> In respect of [the affected party], it is submitted that the disclosure of this information would significantly interfere with the ability of [the affected party] to carry on business if it resulted in a breach of confidentiality of its agreements with its advertisers. In Order M-250, the Commissioner was satisfied that records, although not explicitly supplied in confidence, should be treated as supplied implicitly in confidence by the City where they contained unit pricing information that would allow competition a window into the company's operations. Similarly, as noted in [the affected party's] November 3, 2001 letter, disclosure of the

> financial information requested would "completely undermine and undercut [the affected party's] position in the marketplace and possibly breach the confidentiality of (its) advertisers that expect (it) to keep confidential all transactions and dealings." The City relies on Order 47 and Order 113 in this respect.

The appellant submits that the City has not provided evidence that disclosure of the contents of the record could reasonably be expected to prejudice its financial interests. In addition the appellant submits that the City has failed to demonstrate that any harm it may envision is present and reasonably foreseeable or that the release of requested information would restrict the ability of the City to attract bidders in the future. The appellant makes the point that the disclosure of this information would actually enhance the highly competitive nature of bidding for the City's advertising business, which would benefit the City financially.

I will begin by considering the City's argument that disclosure of the record could reasonably be expected to prejudice the economic and financial interests of the City as well as the competitive position of the City when it goes to the marketplace to seek new partners for advertising. In my view, the City has failed to put forward detailed and convincing evidence of a reasonable expectation of probable harm should the information contained in this record be released to the appellant. The City has not specified what harms it would suffer and the impacts that these harms would exact upon its existing and future relationships with business partners. In essence, the City's representations on this point amount to nothing more than unsupported assertions. Further, and in keeping with the appellant's representations, making this information available to the public is reasonably likely to benefit, rather than harm, the City by enhancing its ability to increase competition in bidding for these advertising contracts, thus reducing the City's cost of advertising and increasing the City's advertising revenue.

In addition, the City's submissions regarding breaches of confidentiality, the actions that advertisers might take in response to disclosure of the record, and the resulting "domino effect" are at best speculative and the City provides little or no evidence to explain how or why these events could reasonably be expected to occur.

Finally, the orders relied upon by the City are distinguishable from the facts in this appeal. In Order M-250, former Adjudicator John Higgins dealt with a request for access to the unit prices quoted by the successful bidder in a tender for a construction project. The sole issue in that appeal was the application of the section 10 exemption and, consistent with many previous orders, the former adjudicator found that unit pricing was exempt. That case involved a different exemption and different records, and is clearly distinguishable from this case. Similarly, Orders 47 and 113 also involved the third party commercial information exemption in the provincial *Act*, and different records. These cases also are distinguishable on their facts.

For the above reasons, I am not satisfied that disclosure of the record can reasonably be expected to prejudice the City's economic interests or be injurious to its financial or economic interests. Accordingly, I find that sections 11(c) and (d) do not apply in the circumstances of this appeal.

PROCESS AT THE REQUEST STAGE

Adequacy of Decision Letter

The appellant indicated that it considered the City's November 12, 2001 decision letter not to be in compliance with section 22(1)(b) of the *Act* in that the City did not provide the reasons that the specific provisions of the *Act* cited apply to the record.

Section 22(1)(b) of the *Act* reads:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> (b) where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

In Order M-913, former Adjudicator Anita Fineberg stated:

> The appellant submits that the decision letter of the Police was inadequate in that it failed to provide any reasons for denying access to the requested information. He states that the decision merely refers to sections of the *Act* and that it is insufficient "... to allow our client to make informed decisions and meaningful representations in this appeal".
>
> The decision letter issued by the Police stated that access was being denied to the listing of police officers pursuant to sections 13, 14(1)(f) and 14(3)(d) of the *Act*. The letter went on to note that "... These sections apply because ..." followed by a paragraph setting out the language of these sections.
>
> In my view, the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the head's decision (Orders 158, P-235 and P-324). In this case, I agree with the appellant that the decision letter of the Police should have provided him with reasons for the denial of access. A restatement of the language of the legislation is not sufficient to satisfy the requirement in section 29(1)(b)(ii) of the *Act*. It does not provide an explanation of why the exemptions

> claimed by the Police apply to the record. Section 29(1)(b)(i) already requires that the notice contain the provision of the *Act* under which access is refused.
>
> Notwithstanding the inadequacy of the decision letter, the appellant has exercised his right of appeal and provided extensive representations, which I have referred to in my disposition of all the issues relating to the information in this order. In these circumstances, there would be no useful purpose served in requiring the Police to provide a new decision letter to the appellant.

Former Adjudicator Fineberg's statements are applicable here. The City's decision makes only general reference to access to documentation relating to advertising on buses being denied under sections 10 and 11. It does not fully comply with the requirements in paragraphs (i) and (ii) of section 22(1)(b).

I agree with the appellant's submissions that the City's decision was inadequate, in light of section 22(1)(b) and the principles expressed in Order M-913. However, I also see no useful purpose in requiring the City to provide a new decision letter to the appellant, or in providing any other remedy [*Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner)*, [1994] O.J. No. 2782 (Div. Ct.); *Brown v. Troia Investments Inc.* (1995), 22 O.R. (3d) 637 (Div. Ct.)]. The appellant has been given a full and fair opportunity to argue the issues in this appeal. I would urge the City to be mindful of its responsibilities under the *Act*, in this case to provide more detailed reasons for withholding information, in accordance with section 22(1)(b).

ORDER:

1. I order the City to disclose to the requester the entire contents of the record, comprised of the cover letter, the change order and the acknowledgement.

2. I order disclosure to be made by sending the requester a copy of the information ordered to be disclosed by no later than **August 2, 2002** but not before **July 29, 2002**.

3. In order to verify compliance with the terms of Provision 1, I reserve the right to require the City to provide me with a copy of the material which it discloses to the requester.

Original signed by: June 28, 2002
Bernard Morrow
Adjudicator