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

ORDER MO-1781

Appeal MA-020395-2

City of Toronto

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BACKGROUND:

Since it opened in 1927, Toronto's Union Station has served as a major railway transportation hub.

In August 2000 the City of Toronto (the City) purchased Union Station from the Toronto Terminals Railway Company. At that time, City Council authorized the City's Commissioner of Corporate Services to prepare and issue an international request for expressions of interest (REOI) to determine the extent of private sector interest in the restoration, revitalization and management of Union Station (the project). The City issued the REOI in January 2001. After receiving a number of expressions of interest, the City decided to narrow the field to three "pre-qualified proponents", and sent a request for proposals (RFP) to the three companies in August 2001; only two responded with proposals (the first and second affected parties).

The City then organized a selection committee composed of three City Commissioners, an outside heritage consultant and two representatives of Transport Canada. The selection committee was to evaluate the proposals, with the assistance of six "technical review teams". Those teams provided assistance to the selection committee in six discrete areas:

1. Development Concept
2. Heritage
3. Commercial Development and Operations
4. Project Management
5. Business Plan
6. Overall Quality and Cohesiveness

The teams were composed of City staff, government representatives and outside consultants.

In late March and early April 2002, each of the six technical review teams submitted final reports to the selection committee.

Later, the selection committee recommended to Council that a specific proponent, (the first affected party) be the "preferred proponent", that is, that the City should enter into negotiations with that proponent with a view to reaching an agreement for the project. In late July/early August 2001, Council considered and approved the selection committee's recommendation. Portions of the late July/early August meeting were held in the absence of the public.

After Council approved the recommendation, the City entered into negotiations with the first affected party, with a view to reaching an agreement for the project. In the fall of 2002 City staff prepared an interim report on the status of negotiations. The status report was brought before the City's Administration Committee on November 5, 2002, but the matter was deferred to February 2003.

In the meantime, on November 15, 2002, an individual (the appellant in this appeal) made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to various records relating to the project, particularly the records revealing the scores that each of the six selection committee members awarded to each of the proposals.

On January 27, 2003, the City advised the appellant that:

- it could not provide access to the scoring records of the individual committee members because those records had been destroyed
- it is denying access to the final reports of the technical review teams under the exemption for third party commercial information (section 10 of the *Act*), since they would reveal information the affected parties supplied to the City in confidence
- some information in the final reports is also exempt under the intergovernmental relations exemption (section 9), since that information was supplied in confidence by the Government of Canada
- the final reports are also exempt under the economic interests of government exemption (section 11), since "the City is currently in negotiations with the preferred proponent"

On January 30, 2003, the appellant appealed the City's decision.

In late January 2003, stemming from the request under the *Act*, media reports emerged raising concerns about the propriety of the RFP process, including concerns about the destruction of RFP-related records. The City's Administration Committee considered these issues during meetings held in early February 2003.

On February 6, 2003, Council suspended the RFP process and requested the Honourable Coulter Osborne (Justice Osborne) to review:

- the process followed in developing the terms of the RFP and the manner in which the proposals were evaluated
- the issue of whether the evaluation scoring should be publicly disclosed and, if so, the timing of disclosure
- the issue of whether certain individuals or organizations involved in the RFP process had a conflict of interest

During early 2003, the City continued negotiating with the first affected party as the "preferred proponent", and the parties eventually reached a "master agreement" to enter into a lease for Union Station (the lease itself has not been finalized).

Justice Osborne prepared a report and presented it to Council on May 22, 2003. In summary, Justice Osborne found that:

- the RFP process, on balance, was fair, although unreasonable in some respects
- there was no bias in the evaluation scoring
- certain changes should be made to the City's RFP processes in future, including changing the scoring methodology, appointing a Fairness Official to oversee the process, and taking steps to ensure greater openness and public participation
- the City's project manager erred by destroying original scoring documents between June 26 and July 11, 2002, but this was not done for any improper purpose
- it would not be appropriate for Justice Osborne to determine what should be produced in response to the appellant's access request under the *Act*, and that these issues were for the Information and Privacy Commissioner/Ontario to decide
- the City should provide certain staff with early job training on freedom of information matters and the *Act*, so that "some of the problems that seem to be encountered in this area might be avoided"
- there is "room for" a single freedom of information office having basic, but not ultimate, responsibility for freedom of information matters
- the City should establish systems so that its Corporate Access and Privacy Office can make decision with "the full benefit of context", through consultation with other departments
- certain identified individuals or organizations involved in the RFP process had no conflict of interest
- there is no evidence to support undue influence by the federal government, the mayor and his office, Council, City staff or others in respect of the RFP process

On July 24, 2003, City Council approved the master agreement between the City and the first affected party to enter into a 100-year lease.

Since the master agreement was approved, the City has been negotiating with the first affected party with a view to finalizing lease terms, concept design and plans that include a construction schedule and development budget. As of this date, the City and the first affected party have not reached a final agreement.

NATURE OF THE APPEAL:

As I stated above, the appellant had requested records relating to the RFP process, the City denied access to them, and the appellant appealed the City's decision to this office.

During the mediation stage of the appeal, the City indicated that, after the appellant's request, the six evaluation team members had created affidavits indicating the scores that they had assigned to the respective proponents. The City advised that it considered the affidavits to be responsive to the request, but that the City would withhold them under section 11.

Also during the mediation stage, the City identified a number of other responsive records, and granted access to some of them, but the City advised that it was still withholding a number of other records.

In addition, the appellant raised the possible application of the public interest override at section 16 during this stage of the appeal.

Mediation was not successful in resolving all of the issues in the appeal, so the matter was streamed to the adjudication stage of the process.

I sent Notice of Inquiry to the City and nine affected parties seeking representations on the issues in the appeal. In a preliminary response, the City identified two additional affected parties who it said I should have notified. I agreed, and sent those parties a revised notice seeking their representations. In addition, the City advised that it had decided to disclose a number of additional records to the appellant. I received representations from the City and three of the affected parties (the first affected party, a federal government agency and a provincial government agency). The City and the first affected party provided detailed representations supporting the City's decision. Both government agencies consented to disclosure of information relating to them.

I then sent a revised notice, together with the representations of the City and the first affected party, to the appellant, seeking representations. The appellant provided representations in response.

RECORDS:

Because the City disclosed a number of records to the appellant during the mediation and adjudication stages of the process, only three records remain at issue, consisting of the six technical review team reports issued in late March/early April 2002 (Records 13 and 14) and a "questions/comments" document dated April 24, 2002 (Record 12). The City claims that all three records are exempt under sections 6, 7, 10 and 11. The City also claims that a portion of one of the reports (Record 14) is exempt under section 9.

DISCUSSION:

CLOSED MEETING

Introduction

The City claims that all three records at issue (Records 12, 13 and 14) are exempt under the section 6(1)(b) closed meeting exemption, which reads:

> 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 holding that meeting in the absence of the public.

For this exemption to apply, the City must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting in the absence of the public

2. a statute authorizes holding that meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

Did Council or its committees hold meetings in the absence of the public?

The City submits:

> . . . Council has considered the Union Station RFP at three committee meetings and two [Council] meetings all held at Toronto City Hall.
>
> A copy of the Council minute for the Special Meeting held July 30, 31 and August 1, 2002, is attached as Appendix A. Confirmation of the resolution that the Committee of the Whole meet in camera is provided at Minute S6.63 found at p. 69. Confirmation that it re-convened in camera the next day is found at p. 71…
>
> The second meeting held February 4, 5 and 6, 2003 post-dated the Access Request. However, a copy of that Council minute is also attached as Appendix B.
>
> . . . . .
>
> At the July 2002 meeting City Council received an in-camera presentation on the commercial terms and financial aspects of the two proposals. City Council also considered the evaluation and selection of [the first affected party] as the

> preferred proponent, including an examination and debate related to the content and release of the Summary Scoresheet. City Council also issued confidential instructions to City staff relating to negotiations with the preferred proponent. As evidenced above, this portion of the meeting was closed to the public.
>
> All discussion of the financial offer and analysis of the two proposals, including the scoring has been considered in camera by City Council . . .

The appellant makes no specific submissions on this point.

Based on the City's representations and the excerpts from the minutes of the July/August 2002 and February 2003 Council meetings, I am satisfied that Council held meetings regarding the project, and that, in part, these meetings took place in the absence of the public.

Does a statute authorize holding the meetings in the absence of the public?

The City implies in its representations that section 239 of the *Municipal Act, 2001* authorizes holding the meetings in the absence of the public, but does not specify which portions of section 239 apply.

Section 239(1) of the *Municipal Act, 2001* says that all meetings shall be open to the public, subject to any exceptions later on in the section. Section 239(2) says that a meeting may be closed to the public if certain subject matters are being considered. The subject matters that appear to be relevant here are:

> (a) the security of the property of the municipality or local board
>
> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose

The appellant submits:

> . . . [T]he *Municipal Act* provides very specific justifications for holding of in camera meetings. The Minutes supplied by the City in support of exemption 6(1)(b) state that the meetings were held in camera in accordance with the provisions of the *Municipal Act*, having regard that they relate to *solicitor client privilege* and that certain motions were to remain confidential in that they relate to the *security of the property*.
>
> I contend that these meetings were not lawfully held in camera as it is likely that the contents and substance of the exempted documents are not subject to solicitor client privilege or security of the property.

The minutes provided by the City indicate that Council went *in camera* on the basis that the matters being discussed:

- are subject to solicitor-client privilege [July 30 and 31, 2002, item S6.63, pp. 69-71; February 5 and 6, 2003, item 1.85, p. 129

- relate to the security of the City's property [July 31, 2002, item S6.64, p. 71]

The two grounds upon which City Council ostensibly held *in camera* meetings are referred to in sections 239(2)(a) (security of property) and 239(2)(f) (solicitor-client privilege) of the *Municipal Act, 2001*.

Based on the material before me, I am not convinced that there was a sufficient basis under section 239 of the *Municipal Act, 2001* to hold these meetings in the absence of the public. While it is conceivable in the circumstances that the portions of the subject matters being discussed were subject to solicitor-client privilege or related to the security of the City's property, I have very little information before me to support these grounds, other than bare assertions in the minutes. In addition, the City does not direct me to any specific portions of the records that would shed light on why the meetings were held in the absence of the public based on solicitor-client privilege or security of the property concerns. Further, as I have indicated, the City does not even go so far as to identify which portions of section 239 it relies on as the basis for these *in camera* meetings. In my view, under section 6(1)(b), it is not sufficient for the City to proceed as if the applicability of the exemption is self-evident from the record, or rest its position on the simple fact that it held *in camera* meetings on the topic of Union Station. Therefore, I find that the City has not met its onus of establishing the second part of the three-part test for exemption under section 6(1)(b).

Although the City has failed to meet one of the three requirements under section 6(1)(b), I will nevertheless go on to consider the third part of the test.

Would disclosure of the record reveal the actual substance of the deliberations of the meetings?

Under this part of the test:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found *not* to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

The City submits simply that disclosure of Records 12-14 would reveal the substance of the *in camera* deliberations.

The appellant submits:

> . . . I fail to see how an evaluation record generated in April, 2002 would reveal or reflect the *actual substance of the deliberation* of that portion of an in camera meeting lawfully pertaining to solicitor client privilege or security of property held in July, 2002 and February, 2003. I note with interest that nine records have already been disclosed that were previously held exempt on grounds of 6(1)(b) and they in fact do not reveal or permit the drawing of accurate inferences as to the substance of those discussions to the degree necessary to bring it within the ambit of section 6(1)(b).

I agree with the appellant. Previous orders of this office have established that it is not sufficient that the record itself was the *subject* of deliberations at the meeting in question [see Order M-98, M-208], where the record does not reveal the actual *substance* of the deliberations or discussions that took place leading up to the decisions that were made. Again, the City fails to direct me to any portions of the record that might reveal the substance of deliberations that raise confidentiality concerns surrounding solicitor-client privilege or security of property. Therefore, I find that the City has failed to establish the third part of the three-part test under section 6(1)(b).

Section 6(2)(b): exception to the exemption

Section 6(2)(b) of the *Act* sets out an exception to the section 6(1)(b) exemption:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> > in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public;

The City submits that the section 6(2)(b) exception does not apply:

> . . . While there has been considerable public discussion and debate on the RFP process and the general content of the two proposals at public sessions of Council and its Administration Committee and community meetings, the financial offer and analysis, negotiating instructions to staff and the actual scores have never been the subject of a public session of Council, a standing committee or other meeting.

The subject matter of the Union Station project has been considered in several meetings open to the public since the July/August 2002 and February 2003 *in camera* meetings. In particular, at

its meetings of June 24, 25, 26, 2003 (see Minutes, pages 4, 7, 54, 55, 209, 251-260) and July 22, 23, 24, 2003 (see Minutes, pages 2, 6, 73-76, 80, 146, 243-252), a wide range of aspects of the project were discussed in detail in Council meetings open to the public.

In addition, as indicated above, Council received the report of Justice Osborne Council on May 22, 2003, and thereby the report entered the public domain. The report contains extensive detail surrounding the project, including information about the scores and the financial aspects of the proposals.

Further, the City has made public a detailed internal document from its Commissioner of Corporate Services to its Administration Committee, reporting on the status of negotiations with the first affected party, dated January 22, 2002. This report reveals a significant amount of information about the first affected party's proposal.

In the circumstances, I am satisfied that the section 6(2)(b) exception applies to the records.

Conclusion

I find that the City has not established that the records are exempt under section 6(1)(b) and that, even if it did apply, the section 6(2)(b) exception would remove the records from the scope of the section 6 exemption.

ADVICE TO GOVERNMENT

General principles

The City claims that all three records qualify for exemption under section 7(1), which states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)]

Representations

Only the City made representations on this issue. The City submits:

> . . . Records 13-14 do contain more than mere information. They contain specific advice throughout as to the positive and negative aspects of the proposals intended to influence the selection committee. They intertwine factual information with opinion and commentary. Positive attributes of the two proposals are indicated by bold type and negative aspects are highlighted with italic type. These comments provide an opinion or assessment of the two proposals and constitute advice given to the Selection Committee to assist it in its deliberations and decision making process.
>
> Record 12 constitutes a form of interactive exchange of questions and commentary, which was provided to advise and assist the selection committee in determining what further information to request from the proponents. It is comparable to a draft that can be accepted or rejected by the decision-maker (see Order M-606).
>
> The decision of Commissioner Linden at Order P-118 supports the City's claim by defining advice as:
>
> - made "to invite [the selection committee] to do or not do a certain thing"
> - made with respect to "a decision making process in progress"
> - made "after research and examination into the facts, i.e. study has taken place"
>
> In addition to the advice on positive and negative elements of the two proposals, the last page of each review team report also identifies key issues to be addressed and provides specific recommendations for negotiations with the preferred proponents. The advice and recommendations contained in records 12-14 were

> created solely to assist the Selection committee in making its decision by providing a technical review and analysis of the two proposals including advice as to how well each satisfied the evaluation criteria set out in the RFP.
>
> A list of the City staff members, federal government staff and outside consultants that participated in the various review teams is attached as Appendix D. All are either public servants or consultants retained by the City.
>
> The intention of this exemption is to allow a full and frank exchange. Because the review teams are reviewing and commenting on the experience of the team members and responsiveness of the proposals, knowing that the advice could be disclosed to the proponents or members of the public, could inhibit a full and frank exchange of ideas as intended by the exemption. It also raises the possibility of at least a perception of undue influence being brought to bear on the staff members by the proponents' consortium members, their superiors, councilors or others, particularly where, as here, the disclosure is made before a contract is awarded.

The appellant makes no specific submissions on this issue.

Analysis

Records 13 and 14 largely consist of the technical review teams' evaluation and analysis of the various strengths and weaknesses of the two proposals.

Previous orders of this office stand for the proposition that analytical or evaluative material generally is not considered to be "advice or recommendations" under section 7. For example, in Order PO-1993, Adjudicator Laurel Cropley considered the application of the provincial equivalent to section 7 to records containing technical evaluations of various proposals for the awarding of a construction contract. Adjudicator Cropley held as follows:

> . . . [T]he development of the advice or recommendations would only occur once the completed scores for the technical component are given to the Chairperson (or Manager) and the remaining calculations are made based on the overall compilation of all of the variables.
>
> I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed. Broadly viewed, the Ministry's approach could be taken to mean that every time a government employee expresses an opinion on a policy-related matter, or sets pen to paper, the resultant work is

intended to form part of that employee's recommendations or advice to senior staff on any issue.

. . . [T]he purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations within the deliberative process. The importance of protecting this type of information is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice within the deliberative process of government decision-making and policy-making. Ultimately, it is the recipient of the advice or recommendations who will make the decision and thus be held accountable for it.

Support for this approach to the interpretation of section 13(1) can be found 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) at p. 292:

> A second point concerns the status of material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations. Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind [16]
>
> Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and "advice." Yet, it is relatively easy to distinguish between professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government. [emphases added]

> According to the Ministry, its evaluators are "Ministry staff with the requisite education and knowledge of the construction industry needed to evaluate the consultants' proposals". In conducting their review of the proposals submitted to the Ministry pursuant to RFP's, these individuals are, as I noted above, establishing the factual basis upon which advice and/or recommendations may ultimately be made. Moreover, in this case, the entire exercise may be even further removed from the deliberative process through its very design.
>
> Even if a broader definition were adopted for "advice" and "recommendations", to include, for example, all expressions of opinion on policy-related matters, I would not find the Project Supervisor scores exempt because they are, as I noted above, primarily of a factual or background nature. In and of themselves, they do not "advise" or "recommend" anything, nor can they be seen as predictive of the advice or recommendations that would ultimately be given. It would not be accurate to view them as advice or recommendations in the sense required by section 13(1). On this basis, I find that section 13(1) does not apply to the records at issue or the records in their entirety.

The Divisional Court upheld Adjudicator Cropley's Order PO-1993 in *Ontario (Minister of Transportation) v. Ontario (Assistant Information and Privacy Commissioner),* [2004] O.J. No. 224. In doing so, the court stated:

> As argued by counsel for the Commissioner, to the extent that the factual information is to be translated, it involves an element of judgment; however, it is not advice, because it represents an objective assessment of factual information.
>
> The reasoning of the Commissioner is consistent with the fundamental purpose of an access to information regime, which is to ensure that the public has the information it requires to permit it to assess the factual and analytical basis upon which decisions affecting the public interest have been or are to be made, to participate in that process, and to hold government accountable.

In my view, the principles articulated by Adjudicator Cropley and the Divisional Court in *Ontario (Minister of Transportation)* are applicable here. I accept that the records in this case are not identical, in that in the present case the records consist of more than just scores assigned to proposals based on pre-set criteria. However, in my view, the records consist of the review teams' technical and objective evaluation of the proposals, based on the team members' expertise in their particular areas. As in Order PO-1993, the purpose of the technical review team reports was to establish the factual basis upon which advice and/or recommendations of the selection committee may ultimately be made. Therefore, in this context, there was no particular course of action for the selection committee to take. Rather, the selection committee was set up to consider the information provided by the review teams, and develop its own advice to Council on a particular course of action. Any course of action that was to be taken in this context was

Council's, not the selection committee's, in the sense that it was to decide which proposal it preferred and which proponent the City should enter into contract negotiations with.

Record 12 is a set of "proposed questions" and "related comments" on various aspects of the proposals, and was prepared very shortly after the review team reports. For essentially the same reasons set out above, I am not satisfied that this record contains or reveals advice or recommendations for the purpose of section 7.

Even if the records can be considered to contain advice or recommendations, for the reasons set out below, Records 13 and 14 fit within the scope of the section 7(2)(i) exception to the exemption.

Section 7(2)(i): exception to the exemption for committee reports

Section 7(2) creates a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Section 7(2)(i) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:
>
> > a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;

This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

The City submits:

> The review teams are not "established committees" within the City's structure nor can they report directly to Council or a City Committee as a group because some of the teams include outside consultants or federal ministry representatives. In effect, these teams are an ad hoc group of staff and consultants voicing a common opinion.

I do not find that City's submissions convincing.

First, it is obvious, and the City appears to accept, that the technical review teams can be considered "a committee or similar body", since it is a body of persons appointed for a specific function by a larger body [see the definition of "committee" in the *Oxford Dictionary*].

Second, I am satisfied that the technical review teams were "established". The City suggests that the word "establish" requires that the body be one that fits within the City's structure on a permanent basis. I do not accept this overly technical argument. The words that follow "establish", which are "for the purpose of preparing a report on a particular topic", imply otherwise, that is, that the body may be established for a particular purpose and that it may cease to exist once it has fulfilled its purpose.

In addition, I am not satisfied that because the technical review teams contained individuals who were not City employees, the teams cannot be considered to be established by the City. Section 7(1)(i) neither contains nor suggests any such limitation. To the contrary, section 7(1) indicates that the person or persons giving the advice may be non-employees, since they may expressly include "a consultant retained by an institution". In my view, the non-City employee members of the teams can reasonably be considered to be consultants retained by the City.

Finally, it is clear that the technical review teams were established for the purpose of "preparing a report on a particular topic", and that Records 13 and 14 are reports on a particular topic.

I conclude that Records 13 and 14 qualify for the section 7(2)(i) exception and, therefore, they cannot be exempt under section 7(1).

RELATIONS WITH OTHER GOVERNMENTS

The City claims that three records that form part of Record 14, from one Ontario government body and two federal government bodies, are exempt under the section 9 "relations with other governments" exemption.

Section 9 states, in part:

> (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (d) an agency of a government referred to in clause (a) [or] (b)
>
> (2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

The City submits:

> At pages 179 to 181 [of] Record 14 is a letter from GO Transit stated to be "Strictly Confidential".
>
> At pages 182 to 193 [of] Record 14 is a letter from VIA Rail Canada. This letter is not marked confidential, however, it was the City's understanding that there comments on the two proposals along with an outline of VIA's plans for their space at Union Station were submitted in confidence.
>
> At pages 207 to 217 [of] Record 14 is a summary chart of comments prepared by staff in the federal Heritage Conservation Program, submitted by Parks Canada. This chart was not marked confidential, however, it was the City's understanding that it was submitted in confidence and without prejudice to any future application for approval required under the Heritage Easement Agreement for Union Station.
>
> The City as recipient of this information would not want to discourage the co-operation and assistance given by the three outside governmental agencies that provided the records noted above. This type of review and assistance is critical particularly when the agencies are stakeholders in the project . . . [I]t is reasonable to expect that if the City cannot guarantee that information such as was provided in this instance would be kept confidential other government agencies would be reticent to provide this type of assistance in future.
>
> The City relies on the response of the three government agencies as to their views with respect to disclosure of these records under this section . . .

The appellant makes no submissions on this issue.

I notified all three government agencies in question of this inquiry and sought their views on disclosure of their respective records. Both GO Transit and Parks Canada consented to disclosure, while VIA Rail Canada did not respond.

In the circumstances, I am satisfied that the GO Transit and Parks Canada records are not exempt under section 9(1) due to the application of the consent exception in section 9(2). Further, in the absence of any detailed submissions from the City on the concerns surrounding the VIA Rail Canada record, as well as the absence of any submissions at all from VIA Rail Canada, I am not persuaded that the VIA Rail Canada record was supplied with a reasonable expectation that it be held in confidence. Therefore, section 9 does not apply to any of the records at issue.

THIRD PARTY INFORMATION

Introduction

The City and the first affected party rely on paragraphs (a), (b) and (c) of section 10(1):

> 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, where 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;

Section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 10(1) is designed to protect the "informational assets" of businesses or other organizations that provide information to the government [Order PO-1805].

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of information which, while held by government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information,

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.

Part 1: type of information

The City submits that the application contains commercial, financial and technical information. These terms have been discussed in prior orders as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

The City states:

> . . . [R]ecords 12-14 would reveal the affected parties' commercial and financial information either directly or indirectly by inference. To a lesser degree technical information is also contained in the records.
>
> . . . . .
>
> Records 12 and 14 contain a combination of financial and/or commercial information either directly or indirectly relating to the two proposals, including financial offers made to the City by the two proponents as part of the ongoing RFP process, proposed lease terms, renewal periods, rents and percentage rents, capital investment, operating costs and proposed rental rates for retail and commercial space in the station. Record 13 also includes a detailed financial analysis of the two proposals, a summary of reference checks and a consultant's report on the financial stability of one proponent.
>
> Records 12 and 13 include information about merchandising and marketing plans, and other information to station operations; comparative analyses of both financial and commercial data and the information about proposed uses/tenants.

The development proposal coupled with the commercial implementation strategy and financial pro-formas constitutes commercial information, which is specific to each proponent and comprises their competitive "bid".

Previous IPC Orders have found that this type of information constitutes "commercial" and/or "financial" information (see Orders PO-1645, PO-1816 and MO-1228).

Specific examples of similar information that has been held to satisfy the definition of commercial includes:

- pricing information pertaining to the sale of goods and services (Order M-531, MO-1364)
- tender proposals, interview notes and reference check reports (Order PO-1816)
- correspondence supplied by bidders in response to requests for further information and clarification regarding their proposals (Order MO-1239)

Specific examples of similar information that has been held to satisfy the definition of financial information includes:

- financial budget projections for the delivery of services (Order PO-1816)
- the number of submissions received, scores associated with some of the criteria and scores assigned to contractors (Order PO-1816)
- detailed financial analysis and financial modelling (Order PO-2019)

. . . . .

Records 12-14 also contain information relating to architectural details, heritage restoration strategies, project management and engineering details.

Examples by analogy of similar information that has been held to satisfy the definition of [technical] information includes:

- engineering reports, drawings, site plans and correspondence related thereto ([Order] MO-1372)

The first affected party states that Records 12-14 are records created by the City, and that it has no specific knowledge as to the contents of these records. However, the first affected party takes the position that it is likely these records contain or reveal information it supplied in confidence to the City. This affected party sent me copies of two records it submitted to the City:

- the Executive Summary to its Union Station proposal, including five appendices (Executive Summary)

- a large document entitled "Response to Request for Clarification Nos. 1 thru 9" dated February 28, 2002 (Clarification)

The first affected party states that it is mainly concerned with certain "limited" marked portions of the records described above. It submits that to the extent Records 12-14 reveal this information, Records 12-14 should be withheld.

The first affected party is concerned about disclosure of the following types of financial and commercial information:

- dollar figures showing the breakdown of costs to develop a hotel versus an office (Executive Summary, p. 2)

- dollar figures showing the projected amount of income from vending machines/lockers, storage, phones/antennas, promotions/events, and advertising (Executive Summary, p. 6)

- percentage market management fee, dollar figure showing minimum management fee and estimated management costs per annum (Executive Summary, p. 7)

- dollar figures showing the breakdown of the total capital expenditures estimate (Executive Summary, p. 8)

- estimated vacancy/credit loss rate (Executive Summary, p. 8)

- "Base Case – Lease Summary" showing details of proposed minimum rent, tenant inducement and other figures, broken down by tenant (Executive Summary, Appendix 2, Clarification, tab 1)

- "Base Case – Hotel" showing (among other things) cash flow projections (Executive Summary, Appendix 2, 3, Clarification, tab 1)

- "Base Case – Conceptual Budget" (Clarification, tab 1)

- "Base Case" – figures showing cost of development in specific scenario, and percentage of net revenue to be derived from rent (Clarification, tab 4)

- figures showing projected net operating income and "debt component" (Executive Summary, Appendix 4)

- the first affected party's detailed proposal to reinvest certain money should a particular expansion not take place (Clarification, tab 4)

- rental rate figures from similar transportation centres in other cities (Clarification, tab 4)

- "business plan/financial offer" containing details regarding rent payments to the City and "rent stabilization" (Clarification, tab 7)

The first affected party is also concerned with other information that can be described as commercial information, but is not explicitly financial in nature:

- narrative explaining the first affected party's "expanded density proposal" (Executive Summary, pp. 12-13)

- regarding the expanded density proposal, figures showing the amount of square feet of retail space and office/residential space, and the number of rooms in the proposed hotel (Executive Summary, Appendix 5)

- narrative describing the first affected party's expanded density proposal (Clarification, tabs 5, 8)

- the first affected party's answers to detailed questions from the City regarding its plans for the VIA departures concourse, the area available for development, and the food market (Clarification, tab 2)

Importantly, there is a significant amount of commercial and financial information contained in the Executive Summary and Clarification documents that the first affected party does *not* object to being disclosed.

The first affected party then states:

> All of the information which [the first affected party] objects to the disclosure of is commercial information. Most of it also constitutes financial information since most of it consists of information concerning projected costs, revenues, etc. involved in [our] proposal for the Union Station Project.
>
> The portions of the information [we] object to the disclosure of that are not financial information constitute information about [our] development proposal and strategy, its plans and its intentions for the Union Station Project. [If we are] the successful bidder for the Union Station Project, [we] will have as [our] principal business, the Union Station Project. Any information relating to that Project is commercial information of [us] both in the ordinary sense of that word and for the purposes of section 10 of the *Act*.

The appellant makes no specific submissions on this issue or any other aspect of the section 10 exemption.

In addition, as indicated above, the second affected party, the other party that submitted a proposal to the City, made no representations.

I agree with the City and the first affected party that several portions of the records consist of commercial or financial information, as described in some detail by the City above. In addition, I accept the City's submission that portions of the records also contain technical information, including engineering information.

Part 2: supplied in confidence

Supplied

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 [Order MO-1706].

The City submits:

> . . . [W]hile the records at issue were generated by the City or consultants retained by the City, direct inferences can be made about the proposals submitted to the City by the proponents in response to the [RFP] . . .
>
> The original source of the factual information contained in the three records was the third party proponents' proposals. It is also possible to draw accurate inferences from the analyses/commentary contained in the 3 records with respect to the information actually supplied to the City.
>
> . . . [T]he commercial, financial and technical information supplied by the third parties is inextricably linked throughout the reports, either explicitly or as the underlying basis for other analyses, such that it would be impractical to attempt to sever the third party information which clearly falls within the section 10 exemption from those parts of the records which provide non-third party or more general information.

The first affected party submits:

> All of the information thought likely to be contained in any of the records which [we] object to the disclosure of was supplied to the City by [us] as part of [our] proposal in the competition for the [project].

I am satisfied that some of the information contained in the records, while not originally supplied by the affected parties, reveals information that the affected parties supplied to the City during the RFP process. For example, there are several passages in the records that reveal information described by the first affected party above, which the first affected party originally supplied in its proposal, including the Executive Summary and Clarification.

On the other hand, the records contain a substantial amount of information that was not supplied by the affected parties, but was internally generated by City staff. This information cannot be said to "reveal" information that was actually supplied to the City.

Therefore, this aspect of part 2 of the test has been met, but only with respect to some of the information in the records.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [PO-2043]

The City submits:

> . . . [T]he whole RFP process has been subject to a higher than usual level of confidentiality because only 2 bids were received. If either proponent were to learn the details of the other's proposal before the RFP process is completed it would provide that party with a competitive advantage over the other party and the City.

> In the RFP document issued by the City, the City specifically advised proponents that all information obtained in connection with or arising out of this RFP process was to be treated in a highly confidential manner and that the proposals would be "received in confidence subject to the disclosure requirements of [the *Act*]".
>
> Members of the two proponent teams were required to sign confidentiality agreements with respect to confidential financial and commercial information supplied to them about the operations of Union Station involving third parties (e.g. lease terms with current tenants contractual information related to suppliers and service providers, and labour/employment contracts) and which could form part of their proposals.
>
> The City went to great lengths during the evaluation process to preserve the confidentiality of the two proposals and their evaluation to ensure that it was not disclosed. A strict security protocol was put in place (as detailed in the Evaluation Process and Instructions, record #10, s. 4.3). All review team members, consultants and the members of the Selection Committee were required to sign a confidentiality agreement agreeing to keep all material relating to the proposals and any analysis or conclusions based on their review of the proposals confidential, except as may be required at law, until the process was complete. All review team reports were clearly marked confidential.
>
> In addition, much of the information contained in the records at issue was the subject of deliberations of in-camera meetings of Council and the Administration Committee (see submissions re s.6). City Council and staff have stated publicly throughout the RFP process in staff reports, news releases and in the media (attached as Appendix E) that at least until the negotiations are concluded, certain aspects of the proposals being considered by the City must remain confidential to protect all parties' business interests and to ensure a fair and equitable RFP process.
>
> The City submits as Appendix F a letter addressed to City Council from [the first affected party] on this very point.
>
> . . . . .
>
> The IPC has recognized that there is a reasonable expectation of confidentiality with respect to the financial details of bid submissions or information that has proprietary value to the organization. (Order PO-1722; Order PO-1816)

The first affected party submits:

> [We] supplied all that information to the City in confidence. The City's [RFP] (dated August 2001) contained the following provisions:

> s. 8.15(3) All correspondence, documentation and information provided to the City by every Proponent in connection with, or arising out of, this RFP, and the submission of any Proposal shall become the property of the City. As a result, such Proposals may be subject to [the *Act*]. A partial list of the criteria contained in [the *Act*], which deal with the release of certain information to the public, is attached. the Proponent's name, at a minimum, shall be made public on request.
>
> (4) Because of the [*Act*], Proponents are hereby advised to identify in their Proposal material any specific scientific, technical, commercial, proprietary or similar confidential information, the disclosure of which could cause them injury.
>
> (5) While the City will endeavour to maintain the confidentiality of all such information, the Proponent must realize that such information may become public or be disclosed through a number of ways, including operation of the [*Act*] and at all times as a result of the need for transparency and accountability in decisions made by the City in retaining outside contractors of any kind.

The City's position was, as set out in its [RFP] was that, to the extent permitted by the *Act* (including, section 10), the City would maintain the confidentiality of information provided to it by parties like [us] provided the party identified its confidential information to the City at the time it was supplied. In response to the City's request, [we] stated on the first page of [our] Executive Summary (see enclosed) in which much of the information submitted to the City by [us] in response to the [RFP] which [we seek] to protect was contained:

> All of the material and information enclosed and submitted with this Financial Offer is confidential information and disclosure of it could cause us injury, and is hereby identified as confidential for purposes of the [*Act*].

The same qualification necessarily applied to information [we] supplied to the City in response to requests by the City for clarification of information provided in [our] original proposal.

. . . [T]o the best of [our] knowledge, none of the information which [we object] to the disclosure of has been publicly released or is available publicly. Thus, the confidential basis on which it was originally submitted to the City continues to apply.

Based on the representations of the City and the first affected party, and the surrounding circumstances, I am persuaded that much the information that the affected parties supplied was provided with either an implicit or explicit expectation of confidentiality, and that this expectation is reasonable. I am also satisfied that much of this information has not been made available to the public.

However, there is also some information that was originally supplied by the affected parties that was not supplied with a reasonable expectation of confidentiality, mainly because it is very generalized in nature or is the type of information that has been made available to the public by some means, including through City Council meetings open to the public. In addition, some information is derived from obviously public sources, such as internet sites, and the January 22, 2002 report from the Commissioner of Corporate Services on the status of negotiations with the primary affected party.

Part 3: harms

General principles

To meet this part of the test, the City and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances [Order PO-2020].

I will first consider the alleged harms under paragraphs (a) and (c), which overlap to a certain extent.

Sections 10(1)(a) and (c): prejudice to competitive position, interference with negotiations, or undue loss or gain

The City submits:

> The two proponents have provided detailed proposals in response to the RFP, incorporating commercial, financial and technical information relating to their business proposition. The release of such information to the public could significantly prejudice the competitive positions of the proponents under this process vis-à-vis each other; could reasonably be expected to undermine the negotiation process currently underway with the preferred proponent [the first affected party] and has the potential to undermine potential future negotiation with the other proponent [the second affected party] in the event a deal can not be reached with [the first affected party].

A high profile redevelopment project such as this is an attractive prospect for private sector participation. The proponents have anticipated a satisfactory rate of return on their investment in the project based on the pro-forma projections provided to the City. However, if the proponents' commercial and financial information were to be disclosed, this could compromise not only the negotiations between the City and the proponent but it could undermine its ability to carry out this project or negotiate rental rates/lease terms with retail or commercial tenants in future. Once the project is awarded to the successful proponent, that proponent will be competing for tenants in the downtown commercial real estate market. As such, it will not want its financial assumptions as to rental rates and operating costs at Union Station or its anticipated revenues available to its competitors or prospective tenants.

For example, if existing or potential tenants know that a proponent has proposed a rental rate of [specified dollar figures per square foot] in their proposal (as identified at pages 63-64 of Record 13 and in the pro formas included at pages 72-85 in Record 13), it is unlikely that this proponent would ever attract rental rates in excess of that amount. [Please note that these rates are found elsewhere throughout records 12 to 14 but these pages are cited by example]. Its competitors could also lure prospective tenants away if they have knowledge of the proposed rental rates or operating expenses thereby causing significant economic harm or financial loss.

Also by example, part of the [second affected party's] proposal contemplates negotiating a buy out of an existing lease with one of the major tenants at Union Station. The proforma included at pp.72-75 of record 13 discloses the amount budgeted for this buy out. Once that information has been made public it is unlikely that [the second affected party] would be able to achieve this objective below the budgeted amount in negotiations with that tenant.

Disclosure of the preferred proponent's financial offer or other commercial information provides the other proponent (or even others outside the process) with a road map to attack the preferred proponent's proposal or to bolster their own proposal particularly where (as in this case) there are only two proponents. It would also allow the other proponent or any other interested/potential developers to make an offer to the City that was even slightly higher than the preferred proponent's without the significant investment in the RFP process made by the preferred proponent.

[The first affected party] has made it expressly clear that they remain opposed to release of this information (see Appendix F). In their words, they have not expended over $4 million to date only to be a "stalking horse" in the process.

> Therefore, . . . disclosure of the commercial, financial or technical information of the proponents contained in the review team reports . . . could significantly prejudice their competitive position or interfere significantly with their contractual or other negotiations or result in them sustaining an undue financial loss.
>
> Moreover, the timing of the release of any information relevant to the RFP is a critical consideration in this case. Once information is in the public realm in the middle of a process, the City loses its ability to control the flow of accurate information to the decision-makers. A proper RFP process must be fair and equitable to both parties based only on the information submitted. Making this type of information public mid-process risks allowing undue influence to be brought upon the decision-makers by those either outside or within the process to misinterpret or misinform. This is neither fair nor equitable to the competing third parties and could cause them significant economic or financial harm. (see also s. 11 submissions from City perspective)

The first affected party explains that there are three different "contexts" within which the harms in section 10(1) could reasonably be expected to occur:

> (i) before the current competition with respect to the Union Station Project is completed (and before it is finally determined who is the winning bidder);
>
> (ii) thereafter, in the course of [our] completion of the Union Station Project, assuming [we are] the successful bidder; and
>
> (iii) in the larger competitive environment within which [our] members (many of whom have provided portions of the confidential information now in issue) operate and in their commercial operations and transactions with both their competitors and those with whom they negotiate contracts of various kinds.

The first affected party then addresses each of these different contexts:

> (i) *Before the Union Station Project Competition is Completed*
>
> Until the winning bidder in this competition is finally determined and a contract with the City is entered into (something that has not yet occurred), if any confidential information about [our] proposal were disclosed, it would (not just could reasonably be expected to) be useful to the other bidder in that competition. [Our] competitor could (and would be expected to) use such information to seek to alter, improve or make more attractive its own bid in a number of ways. For example, it could become aware of aspects of [our] proposal or its financial implications that it could adopt in its own proposal in ways that it had not

previously contemplated. By way of example only, if the information in Appendix 2 to the Executive Summary (which contains detailed information about [our] anticipated lease revenues from various categories of tenants at Union Station) were disclosed, [our] competitor would gain valuable information about the types of tenants considered by [us] to be suitable for Union Station, the likely rental income that could be generated from such tenants, etc. The information in Appendix 2 has been derived from the experience and expertise of [our] member businesses (described below) and not principally from public sources. [We do] not believe that [our] competitor would have access to this information from public sources.

In addition, if [our] competitor had access to the information [we seek] to protect, it could use it as the basis for challenging or seeking to find grounds to dispute the basis on which [our] proposal rests to [our] detriment . . . [We] would not have access to similar information about [our] competitor's proposal with the result that there would not be a "level playing field".

Similarly, all the confidential commercial and financial information which [we object] to the disclosure of could be used for similar purposes if disclosed to prejudice the ultimate success of [our] bid for the Union Station Project.

As a result, disclosure of any of the information to which [we object] would:

> prejudice significantly [our] competitive position and interfere significantly with the negotiations in which [we] and the City have been and can be expected to continue to be involved . . .
>
> result in undue loss to [us] and undue gain to [our] competitor in the continuing competition between [us] . . .

(ii) *During the Redevelopment of Union Station Assuming [we are] the Successful Bidder*

On this assumption, [we] will be seeking to enter into contracts with a variety of third parties, for the work necessary to redevelop Union Station, on favourable economic terms. It would be highly prejudicial to [our] ability to negotiate the terms of those contracts if information concerning [our] anticipated costs in respect of those contracts were disclosed and made public since those anticipated costs would, for practical purposes, become the starting point for negotiations. Similarly, when [we seek] to negotiate leases with prospective tenants at Union Station, if [our] anticipated rent revenue forecasts were disclosed, prospective tenants would be much less likely to be prepared to pay more than those projections, even if market conditions might indicate otherwise. The information

[we seek] to protect from disclosure could, therefore, if disclosed, reasonably be expected to cause both of these harms . . .

The confidential commercial (i.e. non-financial) information which [we object] to the disclosure of, including the information concerning the "Expanded Density Proposal" included in [our] proposal for the Union Station Project - which the City provided for the inclusion of in any proposal but which is not part of the Union Station Project as currently contemplated - is the product of [our] expertise (and that of [our] members). It would put [us] at a competitive disadvantage, when the Expanded Density Proposal issue arises for final decision at a later date, if [our] concepts were available to [our] current competitor and/or others. The City's process for requesting proposals was premised on the basis that bidders could submit information in confidence, subject to the requirements of the *Act*. It is not part of the scheme of the *Act* to require that confidential redevelopment proposals developed by one bidder and submitted to the City in confidence be available to the public or to other bidders for their information and assistance in subsequent competitions.

(iii) *Broader Context Involving [our] Principals*

[Our] member companies . . . are some of the leading development, engineering, construction, transportation, finance and management expertise organizations in North America.

. . . . .

Much of the information which [we seek] to protect has been provided to [us] on a confidential basis by [our] members for the purpose of [our] proposal concerning the Union Station Project. By way of example, the information concerning rents at [other transportation centres] contained on page 4 to [the] letter dated November 28, 2001 attached to [our] letter to the City of February 15, 2002 (one of [our] responses to the City for clarification concerning its proposal) was provided confidentially by [named firm] and the information concerning the [named transportation centre] rental rates in that same letter was provided confidentially by [named firms], all . . . members [of our group], based on their own confidential commercial information resulting from their management of the buildings in issue. [Our] representatives have confirmed that this information is not publicly available.

Each of these members of [our group] would, if this information were disclosed, suffer both of the harms identified in paragraphs (a) and (c) of section 10 . . . in their future lease negotiations with renewing tenants and prospective new tenants concerning premises within their own buildings since such tenants would have access to confidential information about rents not normally available to them. In addition, [our] members who manage these properties would also be prejudiced in their ability to compete for tenants with those managing comparable properties if

> their competitors had access to this confidential rental information. Such competitors could reasonably be expected to use such information to try to "outbid" [our] members for prospective tenants on the basis of rent.

I find the representations of the City and particularly the first affected party to be detailed and persuasive. Both parties have laid out the possible competitive harm, and harm to continuing negotiations, that could reasonably be expected to occur should some of the types of information that the first affected party is concerned about be disclosed.

However, in my view, there is a lesser degree of sensitivity surrounding much of the information supplied by the affected parties at this time, given that the process has now advanced to the point where the first affected party has been confirmed as the preferred proponent and the City and the first affected party have executed a master agreement to enter into a lease. Many of the concerns expressed by the City and the first affected party would have resonated more powerfully had the request been made at an earlier stage, prior to the selection of the preferred proponent and the signing of the master agreement. I recognize that it is still possible that negotiations with the first affected party may not result in a final agreement. Nevertheless, it must be recognized that the risk of competitive harm and harm to negotiations has been lessened significantly through the passage of time, the disclosure of information to the public, and the passing of milestones in the process.

I note also that there is a great deal of information in the records that, by implication, the first affected party is not concerned about being disclosed, because the first affected party did not express a concern with this information in its representations and in its highlighting of the two documents it supplied to me. This is particularly applicable to details surrounding the first affected party's main, "base case" proposal (in contrast to its additional density proposal).

Still, there is some information in the records, supplied by the affected parties, that could reasonably be expected to cause harm under paragraphs (a) and/or (c), if disclosed. This information includes:

- details surrounding the affected parties' "additional density" proposals, including construction details and income projections

- proposed and/or projected retail rental rates

Section 10(1)(b): similar information no longer supplied

The City and the first affected party argue that the records are also exempt under section 10(1)(b). The positions of both the City and the first affected party are founded on the types of harms that could be expected to occur under paragraphs (a) and (c).

First, the City states:

> . . . [U]nless they can be confident that the City will keep their proprietary and other financial information confidential, potential private sector partners will not provide the information to the City and in effect not bid on these projects.

The first affected party states that disclosure will:

> . . . result in similar information no longer being supplied to the City and other institutions where it is in the public interest that it continue to be supplied. If this sort of confidential information is disclosed, it is highly likely that, in other competitions held by government institutions, qualified bidders will either not participate or not provide the detailed confidential information here in issue for fear of its disclosure. Either possibility would be detrimental to the public interest which seeks to have government institutions be able to make requests for proposals which generate detailed confidential information from highly qualified bidders so that the institutions are in the best position possible to select the most appropriate bid from a group of desirable bids . . .
>
> . . . . .
>
> . . . [I]f this information were released, both [our] members and similar entities would be unlikely to be willing to provide this type of detailed information to any government institution in connection with other competitions in the future, for fear it would also be disclosed . . .

Neither the City nor the first affected party has persuaded me that the information I have found not to be exempt under section 10(1)(a) and/or (c) meets the test for exemption under section 10(1)(b). As indicated above, much of the remaining information either was not supplied with a reasonable expectation of confidentiality, or cannot reasonably be expected to cause harm under paragraphs (a) and/or (c). In the circumstances, there is no reasonable basis for a finding that additional information, apart from that found exempt under sections 10(1)(a) and/or (c), should be withheld under section 10(1)(b). Once the more sensitive financial and/or commercial information is removed from the records, there is no reasonable basis for additional paragraph (b) concerns.

Conclusion

Some portions of each of Records 12, 13 and 14 qualify for exemption under section 10(1), while the remaining information is not so exempt.

ECONOMIC AND OTHER INTERESTS

Introduction

The City takes the position that the records are exempt under sections 11(c), (d) and (e). Those sections read:

> A head may refuse to disclose a record that contains,
>
> (c) information where the 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 purpose of section 11 is to protect certain economic interests of institutions. The report titled *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) provides the following description of the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The appellant made no submissions on section 11.

Sections 11(c) and (d): prejudice to economic interests/injury to financial interests

The City submits:

The City's Economic Interest

As noted earlier, when it purchased Union Station the City identified three primary objectives: to enhance it as a transportation hub; restore and preserve its heritage elements; and revitalize the commercial space within the building to create a solid financial foundation and ensure that the ongoing repairs and maintenance required for a building of Union Station's vintage would be funded properly.

One of the City's primary functions is to preserve and maintain its capital assets and preserve heritage structures such as this in a state of good repair. Union Station is a strategic asset and cultural treasure that has fallen into a state of disrepair. In addition, the revitalization of Union Station is anticipated as a vehicle to promote economic growth and urban development through improved transit capabilities and by linking the financial core of downtown to the waterfront. The benefits to the City and the public of this project have been extensively canvassed by City Council in numerous reports generated at the time the station was acquired by the City and during City Council's deliberations on the RFP. No one has suggested the status quo is an acceptable option. However, revitalization is a complex undertaking that will require significant capital investment and experienced, quality management at a time when City resources are stretched to the limit.

As a result, private sector participation in this development has been pursued from the outset. Partnership with the private sector is of great importance to the City and achieves numerous public objectives. The ability of the City to initiate and successfully complete projects such as this depends on commercial sensitivity, including the keeping of third party commercial and financial information confidential.

Prejudice to the Economic Interests of the City

The City submits that if it cannot guarantee that parties can submit commercial and other information and negotiate in confidence, it will find that the private sector is unwilling to participate further in this (or any other future) partnership with the City. Private sector parties will not negotiate with the City if their proprietary information cannot be held confidential, particularly from other competitors. (See also submissions on section 10). The City is competing with the private realty market where issues such as disclosure of financial or other third party information is not an issue. It may be considered less complicated and thus more attractive to deal only with other private sector properties/ projects. This

would diminish the economic benefits that flow to the City from such partnerships and would not be in the public interest.

Disclosure of information from the proposals directly or indirectly through disclosure of the evaluation of those proposals in the middle of the process could potentially work an unfairness on both proponents and ultimately the City as noted in the submission on section 10 above. Public private partnerships are an increasingly important tool for the City to deal with aging infrastructure and capital facilities as municipal resources are decreasing. If the private sector cannot be comfortable that they will be dealt with fairly, in confidence and in a business like manner they may not be attracted to invest in these projects. This would have a significant economic impact on City finances and lost development opportunities.

Prejudice to the City's Competitive Position

As a result of the retail/commercial component in this project, the successful proponent (operating on the City's behalf) will be competing with private sector developers and other municipalities for key tenants. The City must act in a manner that does not compromise its own best interests. Its ability to maintain the confidentiality of third party information including the financial terms of the two proposals, proposed lease rental rates and operating costs etc. is crucial to the City's competitive position in the real estate market and the return to the City on this project.

In addition, the City submits that a more immediate concern is the fact that the City's RFP process with respect to the revitalization of Union Station is not completed. All records contain sensitive and confidential information relating to the City's evaluation of the two proposals, financial impact on the City of the two proposals, strengths and weaknesses of each and negotiating points for negotiations with the preferred proponent. Because there are only two proponents, once this information is made available, each will be able to determine the other's position.

This could in turn give the two proponents an unfair advantage not only over each other but also against the City since they may seek to use the information as leverage in negotiations with the City or to derail the RFP process. The effect of disclosure would be akin to asking the City to play poker with its cards face up. Disclosure could seriously jeopardise the City's ability to negotiate the best deal for the City and could result in expensive delays or other undue costs and therefore could reasonably be expected to prejudice the economic interests of the City or be injurious to its financial interests.

Prejudice to the City's Financial Interest.

Similarly, financial benefits may not accrue to the City if it cannot complete this project or other public-private projects in future, as the result of not being able to engage private sector participants. Specifically, if no private sector developer can be found to complete this project, the City will have to take on all the costs and associated risks to revitalize this station itself. Preliminary estimates indicate the basic capital costs could exceed $50 million. If the City is unable to afford to do so - does not have the financial resources to revitalize Union Station, or other City assets such as this, a valuable heritage site may be forever lost.

The City submits that clearly its economic and financial interests (as well as the public interest) lie in the City's ability to be able to successfully and expeditiously complete a project of this nature.

The City submits that the findings of Adjudicator Donald Hale in Order [PO-2019] provide support for the City's position:

> these records contain a detailed analysis of a series of assumptions and scenarios for the sale or lease of the Bruce facility. The records describe in great detail all of the financial ramifications of the proposed transaction, along with a number of alternative scenarios.
>
> In my view, the disclosure of this information could reasonably be likely to prejudice significantly the competitive position of OPG with respect to future sales of not only this but other nuclear facilities . . . The valuation calculations of potential earnings contained in these records would be of great interest to potential purchasers of such facilities and could be used to the detriment of OPG in its future negotiations.

The disclosure of the records at issue containing confidential financial and commercial information could, therefore, reasonably be expected to prejudice the City's economic interests or its competitive position or be injurious to its financial interests.

The City's position on harm to its economic interests is very closely tied to its position regarding section 10(1)(a), (b) and (c). In addition, much of the City's representations are focussed on the importance of the project and the significance of Union Station for the residents of Toronto, facts which are not really in dispute. For essentially the same reasons cited above, I am not persuaded that there is a reasonable expectation of harm to the interests of the affected parties through disclosure of the information found not exempt under paragraphs (a) and (c). In addition, again for the reasons cited above, I am not persuaded that the "similar information no longer supplied"

harm under section 10(1)(b) applies to the information I found not exempt under section 10. Once the section 10(1) harms are not made out, the City has no further, reasonable basis to expect that disclosure of the remaining information could reasonably be expected to cause economic harm or harm to its negotiations with respect to the project under section 11(c) and (d).

Section 11(e): positions, plans, procedures, criteria or instructions

In order for section 11(e) to apply, the City must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution. [Order PO-2064]

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

The City submits:

> *Disclosing Positions for Negotiations*
>
> Records 12-14 clearly contain: "positions" (the bolded or italicized features from each proposal and the narrative commentary); references - both directly and indirectly to the evaluation "criteria"; and
>
> "instructions" (found in the Key Issues summary at the end of each review report) intended to be applied to negotiations.
>
> Specific examples can be highlighted from Record 14 as follows:
>
> Positions — see pp. 157-158 and the commentary found within the charts found in each report
>
> Criteria — criteria are listed throughout the record in the left column of the chart found in each report (see for example pp. 159, 163-177)
>
> Instructions — see p. 160
>
> The City has commenced negotiations with the preferred proponent as described in the background section above. Although those negotiations are currently on hold, barring any unforeseen circumstance, they will eventually continue with one

> or other of the proponents. It is therefore submitted that the test set out in section 11(e) is clearly met.

I do not accept the City's position. The information the City refers to cannot be characterized as positions, criteria or instructions. Rather, the records, including the specific portions identified by the City, contain evaluations of various aspects of the proposals, and identification of certain issues to be considered. This type of information falls short of actual positions, criteria or instructions to be applied to negotiations, and does not reveal "pre-determined courses of action or ways of proceeding" [see Order PO-2034]. In my view, had the Legislature intended that evaluative material of this nature to be caught by the exemption, it would have used express language to do so.

Conclusion

None of the information in the records remaining at issue qualifies for exemption under paragraphs (a), (c) or (e) of section 11.

PUBLIC INTEREST OVERRIDE

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, **10**, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption [emphasis added]

The appellant originally took the position that any information found to be exempt should be disclosed on the basis of a compelling public interest. However, due to recent events, the appellant has modified his position:

> . . . I must decline to offer submissions on the application of Section 16 at this point in time as they can not be properly or justly established until the benefit of further findings are obtained concerning disclosure issues and process.
>
> The Section 16 claim was made before the release of Justice Osborne's review. While in my view, there are certainly myriad problems relating to the substance and actual merit of the Review, far beyond the scope of this appeal, it would likely have effect of largely undermining many of the claims I would need to make to successfully apply Section 16.
>
> I strongly maintain that Section 16 does ultimately apply and hope to revisit this issue at a future time, but I doubt that the venue of this appeal does reasonably possess the ability to test questionable facts presented in the Review or conduct a lengthy legal analysis necessary to properly assess the validity of the Review's conclusions. It would certainly be a novel case.

The City argues that section 16 does not apply.

In the circumstances, it is reasonable to conclude that there is no compelling public interest in the disclosure of the records, especially given that I have found that the vast majority of information in the records does not qualify for exemption.

Therefore, I find that section 16 does not apply to the information that qualifies for exemption under section 10.

SCOPE OF THE REQUEST/SEARCH FOR RESPONSIVE RECORDS

Introduction

The appellant argues that the City has misinterpreted the scope of his original request. The appellant also takes the position that the City erroneously concluded that, after he made his request, the appellant narrowed it through discussions with the City and/or this office. Finally, the appellant states that as a result of the above, the City has failed to search for and locate additional records he is seeking.

Did the City misinterpret the scope of the appellant's original request?

The appellant's request is broadly worded:

> All documents relating to the evaluation of proposals submitted by [the affected parties] in response to Request for Proposals to Restore, Develop and Operate Toronto Union Station . . .
>
> This request specifically includes the precise and exact scores awarded by individual members of the Selection Committee and/or Evaluation Committee according to each individual category of evaluation regarding the proposals submitted by both [affected parties]. This particular document might be referred to as the "Score Card" or "Evaluation Card" . . .

The appellant argues that the City has unreasonably narrowed the scope of his request, by referring to the second paragraph of the request as a statement that limits the scope of his request. The appellant takes the position that the second paragraph is merely a statement of what should be included, but that it in no way limits the first, broader paragraph.

More specifically, the appellant submits:

> . . . [T]here does appear to be considerable misstatement of fact as to the scope of the records that are responsive to my request. The City Clerk in her memorandum introducing their submission, has rewritten my access request stating:
>
> > As you are aware, on November 15, 2002, the City of Toronto received a request under the Municipal Freedom of Information & Protection of Privacy Act for:
> >
> > > all documents relating to the evaluation of proposals submitted by [the affected parties] in response to Request for Proposals to Restore, Develop and Operate Toronto Union Station ... that specifically includes the precise and exact scores awarded by individual members of the Selection Committee and/or Evaluation Committee according to each individual category of evaluation regarding the proposals submitted by [the affected parties]. This particular document might be referred to as the "Score Card" or "Evaluation Card".
>
> The joining of two separate paragraphs with the addition of the word "that", by the City Clerk, compromises the integrity of my request by substantially changing the meaning and intent of my request.
>
> . . . . .
>
> The request is clear in that it seeks all "documents relating to the evaluation of proposals..." The second paragraph is clearly in aid of identifying responsive records and in no way is exclusive to any other record responsive to the request as formulated in the first paragraph. I interpret the request "all documents relating to the evaluation of proposals..." in part to mean any document that is connected to or supportive of, or otherwise illuminates or explains or justifies the proposal evaluation process or the results of those evaluations.

I do not accept the appellant's position. Clearly, the City looked for and identified records that go beyond the scope of the second paragraph of the request. Why would the City have identified Records 12, 13 and 14, if it believed the appellant was only interested in the scoring information? Therefore, I find that the City did not misconstrue the scope of the appellant's request.

Did the appellant subsequently narrow the scope of his original request?

The appellant believes that the City erroneously concluded that, in discussions with him and a mediator from this office, the appellant narrowed the scope of his request. The City states the following with respect to this issue:

> The access request was seeking records related to the evaluation of the proposals submitted in response to the Union Station RFP and specifically included the exact scores awarded by individual members of the selection committee and/or the evaluation committee for each individual category of evaluation of the proposals.
>
> It was understood that this had been narrowed to the scores of the individual selection committee members and the review team reports . . .

In an affidavit included with the City's representations, the City's Project Coordinator states:

> I am the Project Co-ordinator for the Union Station Request for Proposals and in that capacity I responded to the access request made through the Corporate Access and Privacy office for the City of Toronto that is the subject of this appeal.
>
> In order to inform myself of actions taken by others, I have reviewed the file maintained by [first named employee], the officer who handled this request in the City's Corporate Access and Privacy ("CAP") Office as [he] has since retired from the City.
>
> . . . . .
>
> As the project co-ordinator for this RFP it was my responsibility to maintain all City records for this project. I have those records in my office that have not already been forwarded to City Archives for storage. I reviewed with [first named employee] over the telephone what types of records I had that might be responsive to the request. In addition to the summary scoresheet, we identified the review team reports and a series of questions generated by the Selection Committee as being responsive to the request.
>
> It was my understanding at that time that [first named employee] was going to have further discussions with the appellant as to the material he wanted to see. [First named employee's] notes confirm that he had such a conversation with the appellant who narrowed his request to the documents identified [in the paragraph immediately] above.

He states:

> . . . [T]he Project Manager, (and also a Solicitor in the Legal Services Division of the City of Toronto) in her affidavit . . . states:
>
> > [Named employee's] notes confirm that he had such a conversation with the appellant who narrowed his request to the documents identified in paragraph 12 above.

> It was understood that this [access request] had been narrowed to the scores of the individual selection committee members and the review team reports.

> These statements are simply not correct. It is true that [named employee] had proposed limitations to the scope to the request in order to improve the City's efficacy in responding to my access request but I had at no time agreed to do so ...

> It was made perfectly clear to the Corporate Access and Privacy Office that I would not agree to any limitations to my request, well before their issuing of a decision letter. I believe that both [named employee] and the former Director of [CAP] could substantiate this fact.

I have reviewed the mediator's report prepared by the mediator assigned to this appeal, and there is no indication in this report that the appellant narrowed the scope of his request. In addition, there is no other evidence before me to indicate that such a narrowing took place. In the circumstances, I find that the appellant's original request stands.

Was the City's search for responsive records reasonable?

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a "reasonable search" for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The appellant maintains that additional responsive records must exist:

> On its face, I can only conclude that the City's search was in fact unreasonable.

> As previously noted . . . the City improperly narrowed my request so as to the exclude relevant documents. The affidavit submitted by the Project Manager (a City solicitor of 19 years experience) only evidences the shallowest canvassing of personnel for responsive records, even if only considered responsive to a narrowed request. The affidavit does not even declare which personnel were explicitly canvassed for responsive records.

> The Project Manager states in paragraph 20 of her affidavit that she only became aware of the existence of the record through Justice Osborne (and not the Selection Committee Member) on or about April 7, 2003.
>
> How was it possible, that in the wake of intense media and political pressure over the shredding of documents, that it took a further two months for the RFP Project Manager, who was also was a City solicitor actively involved with my access request, to become aware that a member of the Selection Committee (the City's Commissioner of Urban Development Services) still retained an "original" copy of a responsive record that was previously thought to be destroyed.
>
> Why were members of the Technical Review Teams as identified in Appendix D of the City's submissions not canvassed for responsive records?
>
> Justice Osborne's Review provides a fulsome account of the complexities of the process to evaluate an RFP of this size, rife with accounts of numerous meetings and communications. The Review provides direct identification of some responsive records.
>
> The most glaring example is given on Page 46 of the Review. It describes a briefing note prepared by the City's Commissioner of Corporate Services and Chair of the Selection Committee that provided critical guidance for Selection Committee Members in evaluating the proposals. That document and resulting discussion of it led to a decision to "revisit the evaluation scoring..." on page 47 of the Review. Such a record is undoubtedly material to my access request.
>
> As well, on page 36 of Justice Osborne's Review, he states: "the process manager, MMM, made notes on the various items of discussion at the Selection Committee meetings." Justice Osborne makes use of these notes in his Review to substantiate "what was discussed and decided upon at the various Selection Committee meetings." Such a record is undoubtedly material to my access request.

As I found above, the City erroneously concluded that the appellant had narrowed the scope of his request through discussions with City staff and a mediator with this office. Therefore, there is a basis to conclude that the City has not conducted a reasonable search for responsive records. In addition, the appellant has pointed to records that must exist, in part as referred to in Justice Osborne's report. Accordingly, I find that the City did not conduct a reasonable search for responsive records.

DESTRUCTION OF RECORDS

In his report, Justice Osborne found that the project manager erred by destroying (by shredding) original scoring documents sometime between June 26 and July 11, 2002, but this was not done for any improper purpose. More specifically, Justice Osborne found:

> [The project manager] advised me that she discarded (the more pejorative term is shredded) the original score sheets during the municipal strike which extended from June 26, 2002 to July 11, 2002. During that period [she] was doing her regular work in the City's Legal Department and because of the strike night work prosecuting *Provincial Offences Act* offences for the City.
>
> I accept as truthful [the project manager's] explanation that she discarded the material to which I have referred because she had recorded the results of the scoring on a spreadsheet and because of that she thought that the score sheets did not have to be kept. However, being truthful and being right are different. I have no doubt that [her] decision to discard what I think are original, not transitory, documents was a mistake – a significant error in judgment. However, I do not think that [she] discarded the original score sheets for the purpose of hiding the scores of the scorers. This was, pure and simple, a mistake. I should add that in my meetings with her, [the project manager], to her credit, has done no more than try and explain her decision to discard these original scoring material. She has not attempted to justify it.
>
> I do not accept the suggestion made by some that the original score sheets were only discarded after [the appellant] filed his November 15, 2002 FOI request for disclosure of the score sheets, among other things.

The City's project manager, in her affidavit, provides evidence consistent with Justice Osborne's findings.

The appellant submits:

> The sworn accounts made the Project Manager . . . in her affidavit are not credible to me by reason of faith or logic. From its inception, it was recognized that the RFP evaluation process needed to auditable. This fact, common to all RFPs issued by the City, is specifically and explicitly listed in Record Number 11 on its third page in the box entitled Evaluation Process.
>
> It is not credible to me that the RFP Project Manager, would destroy the single most crucial original documents to the RFP's evaluation and thereby degrade the audit ability of the financially largest RFP in the City's history. It is not credible to me that the RFP Project Manager would fail to understand that the scorecards are the evaluation and that the spreadsheet is only a summary.

> It is all the more incredible that she would do so in the wake of Ward 2 Councillor Rob Ford forceful expressions of concern over perceived irregularities in the scoring during an Administration Committee meeting held on July 16, 2002.

Had the evidence indicated that the City destroyed records *after* the date of the appellant's request under the *Act*, this would be a matter of concern to this office (see, for example, my Order MO-1725). However, based on the submissions of the project manager and the findings of Justice Osborne, I find that this was not the case. In addition, it appears from Justice Osbourne's findings that the destruction took place prior to the Administration Committee's July 16, meeting. Finally, it is clear from Justice Osborne's report that the City is well aware that the project manager erred by destroying these records

In the circumstances, I will make no order with respect to the destruction of records.

ORDER:

1. I order the City, not later than **May 31, 2004**, but not earlier than **May 25, 2004**, to disclose to the appellant Records 12, 13 and 14 in accordance with the highlighted version of the record I have enclosed with the City's copy of this order. To be clear the City is *not* to disclose the highlighted portions.

2. I order the City to conduct a further search of records in its custody or under its control for additional records responsive to the appellant's request as originally worded.

3. I order the City to communicate the results of its search to the appellant, in writing, on or before **May 14, 2004**.

4. If the City identifies any additional records responsive to the appellant's request, I order the City to provide the appellant with a decision letter regarding access to these records in accordance with section 19 of the *Act*, treating the date of this order as the date of the request, without recourse to a time extension.

5. In the event that the City locates additional responsive records as a result of the searches referred to in Provision 2, I order the City to provide the appellant with a final decision on access to such records in accordance with the provisions of Part I of the *Act*, treating the date of this order as the date of the request, and without recourse to a time extension under the *Act*.

6. I order the City to provide me with copies of the correspondence referred to in provisions 3 and 4, as applicable, by sending a copy to me when they send this correspondence to the appellant.

7. In order to verify compliance with provision 1, I reserve the right to require the City to provide me with copies of the material disclosed to the appellant.

Original signed by: April 23, 2004
David Goodis
Senior Adjudicator