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

INTERIM ORDER MO-1851-I

Appeal MA-030222-1

City of Windsor

Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This is an appeal from a decision of the City of Windsor (the City), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appeal arises out of a request for access to all records sent to and received from specified companies and their affiliates that relate to:

> (1) the financing of or the management of infrastructure assets or
> (2) the financing of or the management of projects or
> (3) project financing
>
> including for all of the three categories above, financing or management for capital projects including but not limited to roads, sanitary sewer system, storm sewer system, Lou Romano Water Reclamation Plant, Solid Waste Control Centre, New Huron Lodge home for the aged in the time period from January 1, 2002 to March 19, 2003.

The City granted access to some of the records it located. In denying access to others, the City relied on the mandatory exemptions in sections 10 (third party information) and 14 (unjustified invasion of personal privacy) of the *Act*, as well as the discretionary exemption in section 11 (economic and other interests of an institution).

The requester (now the appellant) appealed from the City's decision. During mediation through this office, certain matters were narrowed or clarified. As not all issues were resolved, the appeal was referred to me for adjudication. I sent a Notice of Inquiry to the City and to certain affected parties, initially, inviting them to submit representations on the appeal. The City and one affected party sent representations. In this order, "the affected party" refers to this party. I then sent the Notice, along with portions of the representations of the City and the affected party, to the appellant, who was also invited to submit representations. The appellant did not submit any.

The City raised the application of sections 7 (advice or recommendations) and 12 (solicitor-client privilege) to some of the records in its representations, and the issue of whether it is entitled to claim these discretionary exemptions at this stage was added to the issues in the appeal.

As well, I will deal with an argument raised by the affected party that some of the records are not responsive to, or covered by, the scope of the request.

RECORDS:

The records remaining at issue in this appeal consist of e-mails, correspondence, and presentation materials. They are identified as Records 2, 3, 4, 5, 7, and 9 in the Index of Records prepared by the City.

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The affected party submits that the request must be fairly and reasonably interpreted as seeking access to records relating to *actual* financing or management projects or ventures that the City has undertaken. There is no reference in the request, it states, to records relating to "proposed" ventures or projects or ventures or projects that the City may have *considered*. The affected party submits that all of the records in issue relate merely to proposals made by it relating to financing and management projects and ventures and as such are not responsive to the request.

Further, the affected party submits that two of the records, namely records 3 and 4, are clearly outside the date range specified in the request.

In Order P-1039, Senior Adjudicator John Higgins expressed doubt about whether an affected party could raise issues relating to the responsiveness of records:

> The trust company submits that Record 19 and parts of Records 21 and 26 should not be disclosed because they are not responsive to the appellant's request. The Ministry has not taken this approach. In my view, there is a parallel between this submission by the trust company and the question of whether an affected party should be able to raise a discretionary exemption, which I canvassed above.
>
> I am of the view that similar considerations to those enunciated by former Assistant Commissioner Mitchinson in Order P-257, and quoted above, should be applied to decide whether an affected party will be permitted to argue that records are not responsive. The *Act* requires institutions such as the Ministry to make this determination when requests are received, and does not contemplate that affected parties will enter into this assessment. However, there may be rare occasions when the Commissioner and his delegates could consider such a submission from an affected party, in order to protect the integrity of Ontario's access and privacy scheme. In my view, this appeal does not present such an occasion, and I am not prepared to consider the trust company's submissions concerning the responsiveness of these records. Rather, I rely on the Ministry's determination in this regard.

I agree with the above reasons. The City has treated all of the records at issue in this appeal as responsive to the request. In the absence of any extraordinary circumstances that would prompt my review of the City's decision, I rely on its determination and see no reason to consider the appellant's submissions in this regard.

In any event, I do not accept the affected party's contention that the request should be interpreted to cover only records relating to actual financing or management projects or ventures, and not proposals. By its very terms, the request is broad enough to include both actual and proposed projects or ventures. Further, it is apparent that none of the specific projects listed in the request had actually been undertaken at the time the request was made, supporting the conclusion that the requester intended to include both actual and proposed projects in the request.

LATE RAISING OF THE SECTION 7 AND 12 EXEMPTIONS

In its representations, the City raises the application of sections 7 and 12 for the first time.

The *Code of Procedure for Appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal before this office. Section 11 of the *Code* (New Discretionary Exemption Claims) sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The City submits that it will suffer prejudice if the additional grounds are not considered because documents will be released into the public domain that will adversely impact the City's future ability to negotiate with corporate entities. The City's representations, it submits, are not frivolous or an attempt to delay. The City refers to the solicitor-client privilege as a "concept of long historical importance." The City states that there is little prejudice to the appellant who has the opportunity to respond to the arguments of the City. The appellant has not responded.

Having regard to the prejudice cited by the City, and in the absence of any assertion of prejudice by the appellant, I have decided to allow the late exemption claims in this appeal.

THIRD PARTY INFORMATION

Section 10(1) states:

> 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; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

At the outset, it should be noted that Record 2 is composed of four separate documents, an email cover memo between members of City staff, a memo from the affected party, and two presentations by the affected party, one of which was presented to a conference (the first presentation) and the other containing a proposal presented to the City specifically (the second presentation). The affected party states in its representations that it does not object to the release of the first presentation. In light of this, it is unnecessary to include this part of Record 2 in the following discussion.

It is also unnecessary to consider whether section 10(1) exempts Record 4 from disclosure since I find below that it is exempt under the solicitor-client privilege in section 12.

Record 3 is composed of two documents. Although the City does not claim that section 10(1) applies to the first document in Record 3, the affected party takes the position that specific information in this record is exempt under this section. As section 10(1) is a mandatory exemption, I will consider whether it applies to this information.

In this section, I discuss the application of section 10(1) to Records 5, 7 and 9 and portions of Records 2 and 3.

Part 1: type of information

The types of information listed in section 10(1) have been discussed in prior orders. It is only necessary in the circumstances of this appeal to refer to the definition of "commercial information":

> *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].

The City submits that Records 2 and the second document in Record 3 contain commercial information. The affected party submits that Records 2, 3 and 5 contain commercial and/or financial information. It submits that these records identify and provide details of business proposals made by it. On my review of the representations and records, I am satisfied that Records 2, 3 and 5 contain commercial information within the meaning of section 10(1), in that they identify and in some cases contain details about business proposals made by the affected party to the City.

Although the City claimed that section 10(1) applies to exempt Records 7 and 9, it did not make specific representations on the application of this section to these records. The affected party named in these records was notified of the appeal and did not make representations. As section 10(1) is a mandatory exemption, I have nonetheless reviewed the material before me in order to determine whether this exemption applies. On my review, I am persuaded that Records 7 and 9 contain commercial information. They record information obtained by the City through a business contact, containing an assessment and some advice as to the business practices of a commercial entity.

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].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

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 [Order 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 [Order PO-2043]

The City submits that some of the information in Records 2 and 3 was supplied in confidence by the affected party. The affected party submits that the information in these records, as well as in Record 5, was supplied in confidence.

The first presentation in Record 2 is not at issue, as indicated above.

With respect to the information at issue under section 10(1), in an affidavit, the president of the affected party states that prior to providing City officials with any of this information, he specifically stated that it was to remain confidential. The email cover memo refers to nature of the proposal made in the second presentation, describes it as "confidential", and requests that

recipients of it maintain this confidentiality. I find that the proposal was communicated to the City on the basis that it was confidential, and the City treated it as such. Further, the expectation of confidentiality was reasonably held, in that the information was not provided in a context that normally entails public disclosure.

I therefore find that the email cover memo, the memo from the affected party and the second presentation in Record 2 contain or reveal information supplied in confidence by the affected party, relating to a business proposal made to the City.

Record 3 consists of a cover letter and an attached memo. The City has indicated that it is prepared to release the cover letter. The affected party maintains that section 10(1) applies to exempt portions of these documents, on the basis that they identify proposals made by it to the City. I find that Record 3 does not provide any details about the proposals; it merely identifies the subjects of the proposals. It is unnecessary for me to make a finding as to whether this in itself is "information supplied in confidence" by the affected party since, below, I reach the conclusion that disclosure of this information could not reasonably be expected to result in harm under section 10(1).

Although Record 5 consists of email messages exchanged between members of City staff, the affected party submits that it reveals commercial information supplied in confidence by it to the City. The affected party states that this record contains very specific details of the proposals made by it. The information about the proposals was provided to the City during teleconferences with officials from the City. The email messages provide an account of what the third party stated in the teleconference. Further, the affected party states that prior to providing this information, it made it clear that the information was to remain confidential. It refers to specific aspects of the email messages in support of its contention that the parties intended the discussions to remain confidential. The affected party also submits that the nature of the information disclosed to the City would create in the parties a reasonable expectation that it would remain confidential.

On my review, and for the same reasons I expressed above with respect to Record 2, I am satisfied that the affected party supplied the information about its proposals in Record 5 under a reasonably held expectation of confidentiality.

With respect to Records 7 and 9, I am also satisfied on my review of these records that the information was conveyed to the City in accordance with a reasonably held expectation of confidentiality, supported by express references to its confidentiality at the time the information was supplied.

Part 3: harms

To meet this part of the test, the institution and/or the third party 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. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The affected party submits that the release of the information in the records at issue can reasonably be expected to significantly prejudice its competitive position, result in undue loss to it and potentially result in significant gain to its competitors. It states:

> The industry in which the third party operates, namely the independent management of alternative capital assets, is a highly competitive one. The third party has achieved a leadership position in this industry through its ability to identify business opportunities where its competitors have not. It has achieved its leadership position through its ability to develop innovative and unique financing and management proposals which are tailored to the needs of its particular clients. The information in Records #2, 3, 4 and 5 represent the result of the application of the third party's skills to identify business opportunities and to develop proposals directed at taking advantage of these opportunities. They are the information assets of the third party. It is the policy of the third party to maintain the confidentiality of these informational assets. The release of these records would provide competitors of the third party with access to this information. The competitors will be able to benefit, without charge, from the application of the third party's skills, to the direct prejudice of the third party. Potentially, they will be able to use the third party's information assets to compete against the third party. At a minimum, they will gain an insight into the business and operations of the third party.

The affected party also submits that the release of the information will result in similar information not being supplied to the City or other municipalities in the future or result in less detailed information being provided. In the result, it is said, the City will be provided with fewer proposals or less detailed proposals that it clearly has an interest in receiving and reviewing, proposals that may potentially advance the City's economic, financial or social interests.

I accept the contentions of the affected party, in relation to the parts of the record that provide details as to the nature and structure of the proposals submitted to the City. I accept that these proposals were developed through the application of its skills and knowledge and that disclosure of this information would provide advantage to its competitors. Therefore, I find that disclosure of the second presentation in Record 2, in which the affected party outlines the nature of specific financing and management proposals in relation to City assets, could reasonably be expected to result in significant prejudice to the affected party's competitive position, within the meaning of

section 10(1)(a). My finding also applies to the portions of Record 5 that discuss the nature of the specific proposals made by the affected party.

However, I am not convinced that disclosure of the very fact that proposals were made by the affected party, and the subjects of the proposals, could reasonably be expected to lead to the detriment described in section 10(1). As the first presentation in Record 2 demonstrates, the affected party is in the business, among other things, of pursuing investment opportunities in infrastructure assets. It has made no secret of this. The request itself demonstrates that the appellant has some level of knowledge about the nature of the affected party's business. Given this, I am not persuaded that disclosing the subject matters of its proposals, without revealing the details of the proposed transactions, could reasonably lead to prejudice under section 10(1). This information is not detailed enough that disclosure could reasonably be expected to significantly prejudice the competitive interests of the affected party, or cause undue loss or gain. I also find it unlikely in the circumstances that its disclosure would result in similar information no longer being supplied to the City, given the apparently powerful incentives to make such proposals. I therefore find that the portions of Record 2, 3 and 5 that identify or list the subject matters of the affected party's proposals do not qualify for exemption under section 10(1).

On my review of Records 7 and 9, I find that section 10(1)(b) applies in that disclosure of these records could reasonably be expected to result in similar information no longer being supplied to the City, where it in the public interest that such information be supplied. I reach this conclusion on the basis of the contents and context of the records themselves. I am satisfied that the information could be useful to the City in negotiations with third parties, and therefore help in the protection of its economic interests. I find it a reasonable conclusion that similar information would be difficult to obtain if the party supplying it understood it was subject to disclosure.

In conclusion, I find that the second presentation in Record 2 and the portions of Record 5 that provide the details of business proposals made by the affected party to the City are exempt under section 10(1). Other information in Records 2, 3 and 5, such as that which serves merely to identify the subject of those proposals, is not exempt. In addition, Records 7 and 9 meet the three-part test for exemption under this section.

ECONOMIC AND OTHER INTERESTS

In the alternative to section 10(1), the City relies on the discretionary exemption in sections 11(c), (d) and (e) for some of the Records. As I have found portions of Records 2, 5 and the entirety of 7 and 9 exempt under section 10(1), it is unnecessary to consider whether this information might also be exempt under section 11. Further, below, I find Record 4 exempt under section 12, and the second page of Record 3 exempt under section 7(1). Therefore, the following discussion only applies to portions of Records 2 and 5 not exempt under any other section.

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

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) explains 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 City submits that Records 2 and 5 contain details of financing options that would prejudice the City's negotiations with other entities wishing to offer the same or similar services/products to the City. Its bargaining position in the marketplace, it submits, would be substantially weakened should information of this type become public. It is said that release of the information will prejudice both the City and the affected party. With respect to Record 5 in particular, the City states that this email contains sensitive information relative to the City's policies concerning how it pursues commercial/financial overtures from outside parties and its treatment of assets. Disclosure of this information would, it is submitted, reasonably give rise to an expectation that the economic interests and competitive position of the City would be prejudiced.

The portions of Record 2 that remain at issue are an email cover memo between members of City staff, a memo from the affected party listing the topics to be discussed in a meeting, and a presentation by the affected party (the first presentation). On my review, I find that release of this information could not reasonably be expected to prejudice the economic interests or competitive position of the City or be injurious to its financial interests, within the meaning of sections 11(c) or (d). The email cover memo does not convey any information of substance about the proposal from the affected party, or the City's position on that proposal. Neither does the memo from the affected party, or the contents of the first presentation. I am not persuaded that the information discloses anything that could reasonably be expected to affect the City's bargaining position in the marketplace. I also find that this record does not contain any of the types of information described in section 11(e).

I therefore conclude that these portions of Record 2 are not exempt from disclosure under section 11. As no other exemption applies, I will order this information disclosed.

As to Record 5, the only information that I have not found exempt under section 10(1) consists of email exchanges arranging and confirming a teleconference with the affected party. I am not convinced that this information qualifies for exemption under section 11. As no other exemption applies, I will order this information disclosed.

SOLICITOR-CLIENT PRIVILEGE

The City claims that Record 4 is exempt from disclosure under the solicitor-client privilege in section 12.

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches, a common law privilege and a statutory privilege as described below. The institution must establish that one or the other (or both) branches apply. As I find Record 4 exempt under common law solicitor-client privilege, it is unnecessary to consider the statutory privilege.

Common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The City submits that Record 4 is clearly subject to solicitor-client privilege. It states that legal counsel employed by the City prepared it, it is of a confidential nature and its purpose was for giving professional legal advice.

On my review of Record 4, I accept the position of the City. Record 4 is a memo from the City's Commissioner of Legal and Human Resources to other City staff, containing legal advice. By its very nature, it is reasonable to infer that the information was given in confidence.

I find that Record 4 qualifies for exemption under the solicitor-client communication privilege in section 12.

ADVICE TO GOVERNMENT

The City submits that section 7(1) applies to exempt the second page of Record 3 from disclosure. Section 7(1) 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.)]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, 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.)].

The City submits that the memo which comprises the second page of Record 3 reveals advice and recommendations of an employee of the City, and that its disclosure would detrimentally

impact the free flow of advice and recommendations within the deliberative process of government-decision making.

On my review of the second page of Record 3, I am satisfied that it contains advice or recommendations from one member of the City's staff, to others. It analyses a specific issue and suggests several courses of action in relation to the issue. I find that this portion of Record 3 qualifies for exemption under section 7(1).

EXERCISE OF DISCRETION

I have found that Record 4 and the second page of Record 3 qualify for exemption under sections 12 and 7(1), respectively. These exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution

- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person

- the age of the information

- the historic practice of the institution with respect to similar information

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In the Notice of Inquiry sent to the City, I requested its representations on the exercise of its discretion under these sections. The City did not provide any representations on this issue. Neither does its decision letter refer to the exercise of discretion. On the material before me, I am not able to determine whether the City has exercised its discretion, and if so, on what basis. I will therefore send this part of the appeal back to the City.

ORDER:

1. I order the City to disclose Record 2 (with the exception of the second presentation), the cover letter in Record 3, and the portions of Record 5 that I have found not exempt under the *Act*. For greater certainty, I have enclosed copies of these records showing the portions to be withheld in yellow highlighting.

2. Disclosure is to be made by sending the appellant copies of the records or portions of records ordered to be disclosed by **November 17, 2004** but not before **November 9, 2004**.

3. Although I uphold the City's decision that Record 4 and the second page of Record 3 fall within the scope of the discretionary exemptions at sections 12 and 7(1), respectively, I order the City to exercise discretion regarding the application of these exemptions to these records, and to provide me and the appellant with an outline of the factors considered in exercising discretion in this context by **October 26, 2004**. I then ask the appellant to provide representations to me on whether the City property exercised its discretion by **November 9, 2004**.

4. In order to verify compliance, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to the above provisions, upon request.

5. I remain seized of this appeal in order to deal with any issues stemming from the exercise of discretion by the City.

Original Signed By: October 8, 2004
Sherry Liang
Adjudicator