



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **INTERIM ORDER MO-1870-I**

**Appeal MA-020403-3**

**City of Toronto**



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## **NATURE OF THE APPEAL:**

The requester made a request to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the City Auditor's report dated June 19, 2001 entitled "Selection and Hiring of Professional and Consulting Services." The requester subsequently clarified that he was seeking access to the complete research and preparation file of the City Auditor for the report.

This Office has previously dealt with two other appeals in connection with this request. The requester (now the appellant) initiated Appeal MA-020403-1, a "deemed refusal" appeal, when the City did not respond to his initial request for records relating to the City Auditor's report. That appeal was resolved when the City issued a decision letter.

In that decision, the City denied access to the requested records on the basis that they fall outside the scope of the *Act* due to the operation of sections 52(3)1 and 3 of the *Act*. This decision resulted in Appeal MA-020403-2. That appeal was resolved by Order MO-1711, in which Adjudicator Donald Hale found that with the exception of Records 768-776, the *Act* applies to the records at issue. Adjudicator Hale ordered the City to provide the appellant with an access decision for the records to which the *Act* applies.

The City then issued an access decision to the appellant, granting partial access to the records. The City denied access to the remaining information, relying on exemptions in sections 7 (advice or recommendations), 11 (economic and other interests), 12 (solicitor-client privilege) and 14 (invasion of privacy).

The appellant appealed the City's exemption claim, and this appeal is the subject of this order.

The context surrounding the creation of the records that are the subject of this appeal, as well as related records no longer in issue, is set out in Order MO-1711:

[I]n 2001, the City Auditor noted that a significant increase in expenditures for the provision of consulting services had taken place during the years following the amalgamation of the former municipalities into the new City of Toronto. As a result, the Auditor's work plan for 2001 included undertaking a review of "consulting expenses". The scope and objectives of this review were included in the work plan. As the review progressed, the City indicates that it became apparent that "there were serious implications and concerns related to specific staff members' handling of the hiring of consultants and the awarding of contracts that required the Auditor's further attention".

During mediation of this appeal, the parties removed a number of records and exemption claims from the scope of the appeal, and the City decided to disclose some additional records to the appellant. As a result, only pages 162-176 and 183-191, and the City's section 7 claim, remain at issue.

Pages 162 to 176 appear from their headings and footers to be two parts of one record, saved in a computer under different file names. Both parts of this record are entitled "Summary of Observations, Conclusions, Recommendations and Client Comments", and were prepared by the

Audit Services Department of the City of Toronto (the City Auditor). This record states that it relates to a project named "Use of Consultants". It addresses several topics under the following headings: Observation, Implication/Conclusion, Cause(s), Recommendation, Client Comments, and Disposition.

Pages 183 to 191 are identified by the City as "E-mail and meeting notes – Revisions to draft report – June 12-25/01". The City has described these records as "staff notes (including meeting notes) and emails detailing discussions between Audit staff and other departments concerning the findings and recommendations contained in a version of the Auditor's report on the City's practices in procuring consulting and professional services".

During the inquiry stage of this appeal, representations were requested from the City initially. The non-confidential portions of these representations were shared with the appellant. He was invited to respond and submitted representations.

## **DISCUSSION:**

### **Does the discretionary exemption at section 7 apply to the records?**

#### **The application of section 7(1)**

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.), leave to appeal granted [2004] O.J. No. 2845 (C.A.)].

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)*, cited above.]

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, and 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.), and PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, cited above].

### ***1. The application of s. 7(1) to pages 162 to 176***

In its representations, the City describes this record as “an Audit staff member’s working document that outlines findings, observations and proposed recommendations for departmental staff to consider and comment on”. The City states that it contains “preliminary advice and recommendations that were conveyed to departments for their comments at a particular step in the audit”.

#### ***(a) Recommendations in pages 162 to 176***

The non-confidential portions of the City’s representations were provided to the appellant, who was invited to comment on them. In his comments, he stated:

I would submit that the words “findings and observations” are in audit terminology the same thing and relate to what the auditor found in his/her examination of the factual records of actions already taken. Findings and observation are, or should be accurate statement of things that have already transpired. These could be disclosed. *I have not requested that the City disclose recommendation for future actions.* (Emphasis added).

It is clear, therefore, that the appellant has removed the actual recommendations for future actions from the scope of this appeal.

The City gives the following examples of information that it considers to be advice or recommendations: On page 163, all text under the heading “Recommendation”; one of the two statements under the heading “Recommendation” on page 169; and all the text under the heading “Recommendation” on page 171.

Having reviewed the information under each “Recommendation” heading, I agree with the City that the passages that it cited as examples in its representations are, in fact, recommendations, as well as all other information found under the heading “Recommendation” in pages 162 to 176, including the handwritten notation beside the typed recommendation on page 176. Therefore, this information would be subject to the discretionary exemption in section 7 of the *Act*.

However, I also find that all these passages are “recommendations for future actions” and therefore fall within the category of records which the appellant states he has not requested. Therefore, these recommendations, which I will highlight on a copy of the record that I will provide to the City with this order, are no longer in issue in this appeal and need not be disclosed.

***(b) Information in pages 162 to 176 that constitutes advice or information from which advice or recommendations could be inferred***

In addition to the actual recommendations found in pages 162 to 176, the City claims that:

[O]ther information in the records such as the Observations and Causes sections would permit the drawing of accurate references (sic) as to the nature of the advice and recommendations.

This contrasts with the position of the appellant, set out above, that the findings and observations are merely factual statements disclosing past actions and events, and not indicators of possible future action. The appellant, however, does not address the City’s representation that the “Causes” portion of the record could permit the drawing of inferences as to the nature of the advice and recommendations.

Although the City alleges that disclosing information such as observations and causes would reveal the advice and recommendations flowing from them, it does not explain why this would be the case. It provides only one example, involving the description of observations and causes on page 162.

The City does not specifically identify or discuss any other observations or causes set out in the records as ones that may reveal advice or recommendations. Other than providing the example at page 162, the City does not provide explanations, facts or principles that would assist me in deciding which observations, causes or other information might qualify for the exemption.

Nor does the City address whether the information under the headings “Implication/Conclusion”, “Client Comments” and “Disposition” would reveal advice or recommendations.

However, the records themselves must be carefully examined as well as the other evidence and arguments tendered by the parties. In reviewing the records and applying the tests used in previous orders, I have concluded that certain information, which I have highlighted, is subject to the exemption in section 7(1) in some cases because it contains advice and in others because it

would permit the drawing of inferences as to the nature of the advice and recommendations contained elsewhere in the record.

In this appeal, this City relies in part on its representations in the appeal resulting in Order MO-1711. The objectives and scope of the audit were communicated to the appellant in those representations. Some of the information in the record merely reveals or elaborates on the objectives and scope of the audit and I find that this information is factual material that does not constitute advice or recommendations.

Much of the information under the various headings consists of facts or opinions that are not exempt. In particular, the information under the headings "Implication/Conclusion" and "Causes" generally does not consist of advice or recommendations but rather a combination of facts and opinions. As stated above, factual material generally is not advice. Opinions that do not set out a recommended course of action are not advice. [Order P-493, Order P-920]. However, in some cases I find that disclosure of the information under some headings together with the "Causes" would constitute or reveal advice or recommendations. I have highlighted the information that is exempt to prevent this.

In addition, I have severed portions of client comments that I find to be exempt. Comments on a proposal or draft proposal are not necessarily "advice". This Office has previously held that comments, questions, remarks and exchanges of ideas regarding a proposal that represent a collective effort by numerous individuals to achieve a common goal do not fall within the section 7(1) exemption. [Order M-394]. Where the client comments are of a nature that their disclosure would constitute or reveal advice or recommendations, I have indicated that they are exempt by highlighting them.

## ***2. The application of s. 7(1) to pages 183 to 191***

Pages 183 to 191 consist of a request by the City Auditor for comments on the first draft of the auditor's report together with the comments provided by City staff. Parts of the comments from staff reveal advice or recommendations in the draft report or by staff in response to the draft report or would permit an accurate inference about such advice or recommendations. I have highlighted those portions I find to be exempt.

The remainder of the information in these pages does not fall within the exemption because it would not reveal advice or recommendations.

## **Section 7(2): exceptions to the exemption**

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. The exception that requires consideration in this case is section 7(2) (e).

Section 7(2) states, in part:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:

(e) a report or study on the performance or efficiency of an institution;

**Section 7(2)(e): report or study on the performance or efficiency of an institution**

The word “report” appears in several parts of section 7(2). 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.)].

It is clear that all the records in question relate to the development of a report or study on the performance or efficiency of an institution, the City of Toronto. However, it is obvious that the emails that constitute pages 183 to 194 are not a report or study.

This is less obvious in regard to pages 162 to 176, since from their appearance they could be a draft of a report or of part of a report. However, the City makes the following representations:

[T]he records at issue constitute the Auditor’s working papers. Some of the records, i.e., Records 162 to 176 contain preliminary advice and recommendations that were conveyed to departments for their comments at a particular step in the audit.

...

The working document was not intended to be part of any final report but was rather a discussion document for staff (i.e., clients) who were encouraged to provide their comments. Although some of the information it contains was considered, it did not contain the same information as the Auditor’s report and was not the formal statement of account.

Having compared the record with the actual draft report of the auditor, which was provided to me as one of the records originally in issue, I am satisfied that the City’s representations in this regard are correct, and that pages 162 to 176 are not a report or even a draft of a report.

I find that none of the records fall within section 7(2)(e).

**Did the City exercise its discretion under section 7? If so, should this office uphold the exercise of discretion?**

In regard to the information that the City has decided not to disclose and which I have held to be exempt from disclosure, it is not clear to me why the City exercised its discretion against disclosure.

The section 7 exemption is discretionary, and permits 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

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 its representations, the City describes its exercise of discretion in this case:

The City has exercised its discretion to deny access to the records under section 7 of the *Act* in accordance with the provisions and purposes of the *Act* and after specifically considering a) the nature of the information that has already been disclosed including the Auditor's report b) what is available publicly c) the impact of the disclosure of the records at issue on the ability of staff to freely provide their advice and recommendations and to exchange ideas to guide the decision and policy making processes.

The purpose of the *Act* and the interests that the exemption seeks to protect are significant factors to be considered in exercising discretion. Section 1 of the *Act* stipulates that exemptions from the right of access should be limited and specific. As described earlier, 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.

Pages 162 to 176 of the records in issue in this appeal reflect the City Auditor's practice of submitting preliminary findings and recommendations to affected departments to obtain feedback. Providing draft findings and recommendations to affected parties for comment and making revisions based on their input is standard audit practice. While the City's representations refer generally to a "chilling effect" on discourse if this information were subject to public access, it is not clear to me how this would arise. Direct evidence from the City Auditor or members of his or her staff would be of more value in determining this issue than general assertions of a chilling effect.



The final auditor's report with recommendations is available to the public. It is not clear how permitting the public to compare preliminary findings and recommendations with the final version and to see how the Auditor's thinking evolved in response to feedback is likely to make professional auditors any less candid in formulating their findings and recommendations and seeking feedback.

In addition, if a decision on the subject matter of the advice or recommendations has been made at the time of the institution's decision on an access request, this is also a factor that should be considered by the head of an institution in the exercise of his or her discretion. [Order P-920]. The age of the information may also be a relevant factor. In this case, the advice and recommendations that have been withheld were made in June of 2001 and earlier. By the time the City issued its decision on this access request on December 23, 2003, two and one-half years had passed. By December 2003, the draft recommendations discussed in the two sets of records had been either incorporated, modified or deleted in a report by the City Auditor to a committee of the municipal council, and this report had already been made public. There is also evidence throughout pages 183 to 194 that to a significant extent the same or similar recommendations had been made elsewhere within the City and had already been implemented or were in the process of implementation before June of 2001. These are facts which may be relevant to this consideration.

While the City states that one of the factors that it took into account was the impact of the disclosure of the records on the ability of staff to freely provide their advice and recommendations and to exchange ideas, it is not clear to me why the City believes disclosure of information in the auditor's working notes is likely to have this effect, given the nature of the auditing process and the age and disposition of the information set out in the records, particularly in pages 162 to 176. Without an explanation, it is unclear whether the City took into account all relevant factors. Accordingly, I will require the City to provide a clearer explanation of why it exercised its discretion against disclosure in light of the nature of the auditing process and the age and disposition of the information set out in the records.

### **ORDER:**

1. I order the City to disclose the portions of the records that I have **not** highlighted by **December 14, 2004**.
2. To verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.
3. In relation to the portions of the records that I have highlighted as falling within the discretionary exemption, I order the City to provide the appellant and me with a clearer explanation of why it has chosen to exercise its discretion against disclosure by **December 6, 2004**. I then ask the appellant to provide representations to me on whether the City properly exercised its discretion by **December 20, 2004**.

4. 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: \_\_\_\_\_

John Swaigen  
Adjudicator

November 23, 2004 \_\_\_\_\_