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

ORDER MO-1832

Appeal MA-030350-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a privately-owned and operated recreational facility located in a City park in the former City of Etobicoke. The requester specifically sought access to the following records:

Free Standing Bumper Car Building

1. Permission to view Building Department file and obtain copy of documentation, if required – site plan/survey; floor plan; elevation drawings; permit applications; and permits issued

2. Permission to view Planning Department file and obtain copy of documentation if required – site plan application; site plan agreement; site plan/survey; floor plan; elevation drawings; comments of city departments and other governmental agencies

3. Staff report to Community Council and/or Committees; reports to Council; Council amendments and decision

4. Staff report to Community Council and/or Committees; reports to Council; Council amendments and decision regarding change of use to Special Events Building – refreshments, including alcoholic beverages

5. Request to Community Council, report to Council, Council Decision recognizing Molson's Tournament (baseball) as a special event and giving consent to liquor permits; report to Council and Council amendments and decision

Cabana/Outdoor Patio (adjacent to Bumper Car building)

1. Permission to view Building Department File and obtain documentation, if required – site plan/survey; floor plan; elevation drawings; building inspectors report, June 2002; building inspectors report, April 2003; permit applications and permits

2. Permission to view Planning Department file and obtain copy of documentation, if required – site plan agreement; site plan/survey; floor plan; elevation drawings; comments of city departments and other governmental agencies

3. Report to Community Council/Committees; reports to Council; Council amendments and decision re use of this facility for Special Events and serving/drinking of alcoholic beverages

Storage Room/Area

1. Permission to view Building Department file re new roof over storage room (File No. 03119211, March 31, 2003) and obtain copy of documents, if required – building permit application, building permit, elevation plans, etc.

2. Permission to view Planning Department file and obtain copy of documentation if require re storage area – site plan application; site plan agreement; site plan/survey; floor plan; elevation drawings; comments of city departments and other governmental agencies

3. Staff report to appropriate committees; committee recommendation; reports to Council, amendments and decision of Council

New one storey Recreation and Meeting Rooms Activities Center – December 18, 2001 (open file as to the date of the request, May 14, 2003)

1. Permission to view Building Department file and obtain copy of documentation, if required – application for permits; permits (when issued; site plan/survey; floor plan; elevation drawings; parking lots, etc.)

2. Permission to view Planning Department file and obtain copy of documentation, if required – site plan application; site plan agreement; site plan/survey; floor plan; elevation drawings; comments of city departments and other governmental agencies

3. Staff report to Committees/Community Council, recommendation to Council, Council amendments and decision

Volleyball Courts/Parking Lots

1. Staff report to Community Council and Community Council and/or appropriate standing committee report to Council; amendments and decision of Council

2. Permission to view Parks & Recreation File – West District and obtain copy of documentation, if required – site plan/survey, city department comments and other government agency comments

Trailers/Tractor Trailers – Storage, etc.

1. Staff report to Committees/Community Council. Report to Council; Council amendments and decision and permission to view Parks and Recreation file and obtain copy of documentation if required – site plan/survey; elevation drawings; comments of city departments and other agencies

Agreements Leases – Mini Indy and sub-tenants

1. Permission to view and obtain copy of documentation between Mini Indy and sub tenants – Diamond Beach/Sports Leagues, etc.

In response to the request, the City located several responsive records and granted the requester access to them in part, denying the remainder pursuant to sections 8(1)(i) and 14(1) of the *Act*. With respect to the specific exemptions claimed, the City stated:

> … Section 8(1)(i) has been relied upon to deny access to an interior building drawing (Record #16), as it has been determined that the disclosure of this record could reasonably be expected to endanger the security of a building for which protection is reasonably required.
>
> Section 14(1) has been relied upon to sever the personal information of individuals, as it has been determined that the disclosure of this information would constitute an unjustified invasion of privacy. …

The requester, now the appellant, appealed the City's decision. In her letter of appeal, the appellant indicated that:

> The following is a summary of the information I did not receive –
>
> a) Free Standing Bumper Car Building, items 1 to 5 inclusive – NO RESPONSE
>
> b) Cabana/Outdoor Patio (adjacent to Bumper Car Building), items 1 to 3 inclusive – NO RESPONSE
>
> c) Storage Room/Area, items 1 to 3 inclusive – NO RESPONSE
>
> d) New one storey Recreation and Meeting Rooms Activities Center, item 1-NO RESPONSE, item 2-site plan application, site plan agreement, site plan survey, comments of city departments and other governmental agencies – NO RESPONSE
> -Floor plans (interior drawings) – Access denied – Section 8(1)(i)item 3-NO RESPONSE
>
> e) Volleyball Courts/Parking Lots, items 1 & 2 inclusive -NO RESPONSE
>
> f) Trailers/Tractor Trailers – Storage, etc., item 1 – NO RESPONSE
>
> g) Agreements/Leases - Mini Indy and sub-tenants, item 1–NO RESPONSE

During the mediation stage of the appeal the Mediator determined that the City had identified 25 records as responsive and disclosed all but Record 16, which was denied in its entirety, pursuant to the discretionary exemption in section 8(1)(i). The City also denied access to portions of Records 12 and 25 under the mandatory invasion of privacy exemption in section 14(1).

By letter dated February 5, 2004, the City provided a further decision letter to the appellant responding to each of the items enumerated in her letter of appeal. The City also granted access to additional records identified as responsive to the request (Records 26 to 141). However, the City continued to deny access to documents containing building interior floor plans pursuant to section 8(1)(i) (Records 16, 119 and 136), the undisclosed portions of a lease agreement (Records 65-98) under the discretionary exemption in sections 11(c) and (d) and certain personal information in Records 12, 25, 40 and 41 under section 14(1).

In response to the February 5, 2004 decision letter, the appellant advised that she was no longer seeking access to the personal information in Records 12, 25, 40 and 41 and specified the records she was seeking. The appellant indicated her wish to continue with the appeal, disputing the application of the discretionary exemptions claimed and the adequacy of the City's search for responsive records.

I sought and received the representations of the City, initially. Those representations were then shared with the appellant, who also made submissions in response to the Notice of Inquiry provided to her. Finally, the City made additional representations by way of reply.

RECORDS:

The records remaining at issue consist of:

- Records 16, 119 and 136-interior floor plans (section 8(1)(i))
- Records 65 to 98- the undisclosed portions of a lease agreement (sections 11(c) and (d))

DISCUSSION:

SECURITY OF A BUILDING

The City submits that the interior floor plans that comprise Records 16, 119 and 136 are exempt from disclosure under section 8(1)(i), which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 8(1)(e), where section 8 uses the words "could reasonably be expected to", 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 [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In this context, where concerns have been raised about the prospect of violent attacks against the facilities, section 8(1)(i) may be considered a "health and safety" related exemption. Accordingly, the City and the affected parties must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, it must be demonstrated that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.)].

The City has provided representations in support of its contention that the disclosure of the interior floor plans of the building in question could reasonably be expected to result in a threat to its security. The City's representations focus on the need to ensure that buildings of all sorts are safe from terrorist attack, particularly since the events of September 11, 2001. It points out that disclosure to the appellant represents disclosure to the world and that the building in question is one which is used by the public as a recreational facility.

In Order MO-1719, I made certain findings regarding the application of the section 8(1)(i) exemption to a synagogue and adjoining school which has previously been the subject of vandalism and bomb threats. I found that:

> In my view, the City and the affected parties have provided me with sufficient evidence to establish a reasonable basis for their belief that endangerment to the synagogue and school facility will result from the disclosure of the building plans. I find that the City and the affected parties have demonstrated that their reasons for resisting disclosure are not frivolous or exaggerated. I reach this conclusion for the following reasons:
>
> - while the appellant has been given access by the Committee of Adjustment to certain site plans which describe the subject property as it exists today, those records do not include the type of detailed information that is contained in the records which are the subject of the request and appeal;
>
> - the appellant and the affected parties are embroiled in a land use dispute that has lead to an intractable situation between them. Although the appellant's right of access to the records is a legitimate one and I have been provided with no evidence whatsoever to indicate that the appellant intends to use the records to encourage or create a security problem for the synagogue, disclosure to the appellant may

> be equated with disclosure to the world in these circumstances [Orders P-169 and PO-2197]; and
>
> - the synagogue facility has been the subject of other threats and vandalism in the past and is now subject to certain restrictive security measures. The concerns expressed by the affected parties concerning the security of the facility should disclosure of the requested information be ordered are not, in my view, frivolous or exaggerated.
>
> As a result, I uphold the City's decision to deny access to the requested records on the basis that they are exempt from disclosure under section 8(1)(i).

I adopt the reasoning expressed in Order MO-1719 for the purposes of the present appeal. In the circumstances, I find that the exemption in section 8(1)(i) has no application to the interior floor plans at issue. The plans relate to a building which forms part of a go-kart track, as opposed to a place of worship in the appeal which gave rise to Order MO-1719. I find that the concerns expressed by the City regarding security are frivolous and exaggerated. Any threat to the security of the building described in the floor plans is, in my view, highly unlikely. I find that the City has not provided a reasonable basis for believing that endangerment will result from disclosure. Accordingly, I do not uphold the City's decision to deny access to the interior floor plans comprising Records 16, 119 and 136 and will order that they be disclosed to the appellant.

ECONOMIC INTERESTS OF AN INSTITUTION

The City claims the application of the discretionary exemptions in sections 11(c) and (d) to certain portions of a lease agreement, Records 65 to 98. These sections state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c) and (d) take into consideration the **consequences** which would result to an institution if a record was released. [Order MO-1199-F]

In Order P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694, Assistant Commissioner Mitchinson stated in reference to the provincial counterpart of section 11(1)(c):

> In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

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.)].

In support of its contention that certain information contained in the lease agreements is exempt under sections 11(c) and (d), the City argues that "it has only severed that information from the contract which could be the subject of contracts with other lessees." It goes on to add that:

> The information relates to the specifics that are negotiated in each individual contract. The information includes, but is not limited to, such items as the terms of the lease, the amount of the rent free period, amount of deposit required, structural change limits, payments under fire loss policies, right to order repairs and the percentage charge for supervision of repairs if they are not carried out within the time limit set out in the repair notice.
>
> These are all the factors in the contract that are negotiated with each individual contractor and are specific to the deal at hand.
>
> The City exercised its discretion to withhold this information as it could affect the city's negotiating strength with other firms in other locations across the city. The City has an obligation to ensure that it maximizes the return to the citizens when renting out facilities to third parties. The City submits that to disclose this information would tip its hand to other potential parties to agreements with the City and this could be injurious to both the City's competitive position and its financial interests.

The appellant states that she has, in the past, received similar lease agreements from the City and its predecessor City of Etobicoke, including the current 1996 lease for the subject property. The appellant also points out that the recitals contained in a 1994 sublease between the parties respecting additional lands indicate that the parties agreed to release each other from their respective obligations in the 1988 lease, thereby making the record that is subject to this request "redundant". She further submits that the 1988 lease has been made available to the public in the past, without providing any specific information to verify this fact.

In my view, the recitals contained in the 1994 sublease confirm that the parties to the 1988 which is the lease agreement at issue in this appeal agreed in 1994 to release each other from its obligations. As a result, I cannot agree with the position taken by the City that the disclosure of this information could reasonably be expected to prejudice the City's economic or financial interests, as contemplated by sections 11(c) and (d). I also note that the lease agreement was entered into in July 1988, making it over 16 years old. I find that the likelihood of prejudice to the City's economic or financial interests through the disclosure of a document of that vintage is significantly diminished due to the passage of time.

Accordingly, I find that the discretionary exemptions in sections 11(c) and (d) have no application to the undisclosed portions of the lease agreement set out in Records 65 to 98.

SCOPE OF THE REQUEST

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

As is evident from the description of the request above, the appellant's request was extremely broad in nature and potentially captured a large number of records from a variety of sources within the City's record-holdings. Because the request was so broadly-worded and all-encompassing in its approach, it was very difficult for the City to respond in a coherent and comprehensive fashion. The appellant indicates that, in her view, additional records beyond those identified by the City ought to exist and that the City's search for records was inadequate.

The City argues that it has responded to each of the enumerated items contained in the appellant's request, suggesting that in some cases, the appellant is attempting to further broaden the scope of what was already a very broadly-worded request.

The appellant takes issue with the City's interpretation of certain parts of her request. Specifically, the appellant seeks access to a Management Agreement entered into between the operator of the recreational facility and a private management company in 2002 and the 1996 lease agreement referred to above. The City submits that these documents fall outside the ambit of the appellant's original request while the appellant argues that they are responsive. The appellant indicates that she has already obtained a copy of the 1996 lease agreement through legitimate means. As a result, I find that no useful purpose would be serviced by ordering the City to provide her with an additional copy. Insofar as the 2002 management agreement is concerned, I will order the City to undertake a search of its record-holdings for this document and provide the appellant with a decision letter respecting access to it, if it is located, within the time frame prescribed in section 19 of the *Act*.

In addition, the appellant is seeking access to a building permit relating to a Storage Area Room. She indicates that she was shown a copy of this document in January 2004 and conceded at that time to the Building Department Customer Liaison Officer that she had "had not requested this information." I agree with the position taken by the City that, in the case of the building permit, this document falls outside the scope of the original request.

REASONABLENESS OF SEARCH

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 takes the position that additional records relating to building inspection reports in 2002 and 2003 ought to exist. The City responded to this by pointing out that its second decision letter indicated clearly to the appellant whether responsive records existed with respect to each aspect of the requests, including those relating to building inspection reports. I find that the appellant has not provided a reasonable basis for concluding that additional records relating to building inspections beyond those originally identified and disclosed by the City, in fact, exist. As a result, I will dismiss this aspect of her appeal.

By way of conclusion, I find that although it required the intervention of the Mediator with the Commissioner's office, the City has provided the appellant with a reasonable explanation as to the nature and extent of the searches it undertook for records responsive to all facets of her

request, with the single exception described above. Based on the content of those decision letters and the representations made by the City, I am satisfied that the searches undertaken for responsive records were reasonable in the circumstances.

ORDER:

1. I order the City to provide the appellant with complete copies of Records 16, 65 to 98, 119 and 136 by **October 5, 2004**.

2. I order the City to undertake a search of its record-holdings for the 2002 Management Agreement and provide the appellant with a decision letter respecting access to it, if it is located, within the time frame prescribed in section 19 of the *Act* and without recourse to a time extension under section 20 of the *Act*, treating the date of this order as the date of the request.

3. With the exception of the search required under Order Provision 2, I dismiss the appeal with respect to the adequacy of the City's search for responsive records.

September 14, 2004

Donald Hale
Adjudicator