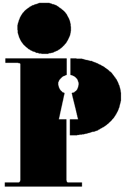

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1887

Appeal MA-030120-1

Toronto Transit Commission

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:

The Toronto Transit Commission (the TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual on behalf of a corporation. The request was for copies of all documents relating to an identified Proposal, including all correspondence, memos, e-mails and reports.

The TTC initially informed the requester that an access decision had been made with respect to some of the responsive records, but that an affected party had been notified in accordance with section 21 of the *Act*. In the same letter, the TTC stated that a separate decision letter regarding access to the remaining responsive records would be made shortly.

The TTC then issued its first decision letter, identifying 77 responsive records (Group B records) and indicating that access was granted to 31 records and denied to 46 records. In denying access, the TTC relied on the exemptions in section 12 of the *Act* (solicitor-client privilege) for 45 of the records and section 6(1)(b) (in-camera meeting) for the other record.

In a second decision letter, the TTC granted partial access to the affected party's proposal (Group A records). In an index of records accompanying that decision, the TTC indicated that portions of four pages were being denied on the basis of sections 10(1)(a) and (b) of the *Act* (third party information), and portions of two pages were denied based on section 14(1) of the *Act* (invasion of privacy).

The requester (now the appellant) appealed the decisions.

During mediation, the appellant stated that he believed that additional records responsive to his request exist. Specifically, he identified that he was interested in reference checks, background checks and other records that would indicate that the TTC had verified the information contained in the proposals it was evaluating.

Also during mediation, the affected party authorized the TTC to disclose to the appellant certain additional information relating to it.

The TTC then issued a supplementary decision letter granting access to additional portions of the Group A records. With respect to the issue of whether additional responsive records exist, the TTC clarified that its Materials and Procurement staff is responsible for issuing and conducting the analysis of the proposals, and that reference checks and other evaluative information is included in the information contained in certain Group B records. The TTC did not identify whether any additional responsive records exist.

Also in the supplementary decision, the TTC revised the exemptions claimed for certain records. Specifically, the TTC identified that section 7(1) (advice and recommendations) applied to Group B Records 2, 33, 43 and 68, and that section 6(1)(b) (closed meeting) applied to Record 7 in Group B. As well, the TTC disclosed three additional records.

The TTC also provided an amended index of records, reflecting the changes made in its supplementary decision.

Mediation did not resolve the remaining issues, and this file was transferred to the adjudication stage. I sent a Notice of Inquiry to the TTC and the affected party, initially. The TTC was invited to address all of the issues, and the affected party was invited to address issues concerning the application of the exemptions in sections 10(1) and 14(1) of the *Act*. Both parties provided representations in response to the Notice of Inquiry.

In its representations, the TTC withdrew the exemption claim for three additional records.

I then sent the Notice of Inquiry, along with a copy of the affected party's representations and a severed copy of the TTC's representations, to the appellant. I did not receive representations from the appellant.

RECORDS:

The records remaining at issue are:

Group A records: These records consist of an identified proposal and attached documents submitted by the affected party. Most of these records were disclosed to the requester. The records remaining at issue consist of portions of pages 6, 7, 18, 19 and 20.

Group B records: These records consist of various emails, memoranda, letters, notes, correspondence, reports, summary sheets and other documents related to the identified proposal (Records 1, 2, 7-18, 23-25, 27, 28, 30-33, 38-40, 43, 44, 46, 47, 50-52, 55, 59, 60, 64-66, 68, 70, 74 and 75).

DISCUSSION:

LATE RAISING OF THE SECTION 6 AND 7 EXEMPTIONS

In the latter stages of this appeal, the TTC first raised the application of the discretionary exemption in section 7, and also applied the discretionary exemption in section 6 to certain additional records 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.

Previous orders have identified that the objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. [Order PO-2113] However, the 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period [Orders PO-2113 and PO-2331].

The TTC submits that the appellant has not been prejudiced in any way as a result of the TTC raising further exemptions after the commencement of the appeal. The TTC also identifies that the further exemptions were raised during the mediation stage of the process, and the parties had the opportunity to resolve these issues in mediation. The appellant did not make submissions.

In the absence of any assertion of prejudice by the appellant, I have decided to allow the late exemption claims in this appeal.

RESPONSIVENESS OF RECORDS

The TTC takes the position that only certain portions of Records 74 and 75 (the portions which were disclosed) are responsive to the request, and that the remaining portions of these records are not responsive.

In its representations the TTC quotes from the appellant's initial request, which identifies that the request is for documents relating to a specific proposal. The TTC submits that the appellant was provided with a copy of the portions of the minutes for the two identified Commission meetings that related to the request (portions of Records 74 and 75). The TTC then states:

> The remaining portions of the minutes were severed as they did not reasonably relate to the appellant's request. … The portions of the records which were severed deal with other, unrelated items that were discussed at the Commission meetings …. and do not in any way relate to the appellant's original request. The Commission meetings … were meetings held in the normal course of conducting Commission business and dealt with a plethora of issues relating to Commission business. The severed portions of records 74 and 75 relate to other Commission business that is wholly unrelated to the appellant's specific request.

Previous orders of this office have identified that, to be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

I have reviewed the severed portions of Records 74 and 75, and I accept that these portions deal with matters unrelated to the appellant's original request. Accordingly, I find that these portions of Records 74 and 75 are not responsive to the request.

THIRD PARTY INFORMATION

The TTC and the affected party claim that section 10(1) applies to the severed portions of pages 18, 19 and 20 of the Group A records. The severed portions of those pages contain the unit costs and extended costs for specified items.

The relevant part of section 10(1) reads:

> 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

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.

Part 1: type of information

The TTC takes the position that the information severed on the basis of section 10 is "financial information" for the purpose of Part 1 of the three-part test. The affected party takes the position that it is both commercial information and "trade secret" information. These terms have been defined in previous orders as follows:

> Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> 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].

It is clear from my review of the information severed from pages 18, 19 and 20 that it consists of detailed pricing information relating to the bid proposal submitted by the affected party. I find that this information qualifies as financial information. Further, I find that it also qualifies as commercial information, as defined above. Accordingly, the first part of the test has been met.

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].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

In this appeal, the TTC submits that the severed information contained in pages 18, 19 and 20 was supplied by the affected party to the TTC, was submitted to it in response to its request for proposal, and that it was a requirement on the part of the proponent to submit pricing information, including a price breakdown, for completing the work. The TTC also submits that, notwithstanding the use of the term "proposal" for this process, the request for submissions resulting in the records at issue in this appeal is more in the nature of a tender invitation, and that there was no possibility of negotiations or changes regarding the severed information on pages 18, 19 and 20. The TTC therefore states that the price breakdown information on these pages was "supplied" as part of the TTC's requirement for pricing information.

The affected party also supports the position that this information was supplied to the TTC.

On the basis of the information provided by the TTC and the affected party, and in the absence of representations from the appellant, I am satisfied that the specific price breakdown information severed from pages 18, 19 and 20 was not the product of negotiations between the TTC and the affected party. This information was originally provided by the affected party, and I find that it was "supplied" by the affected party within the meaning of section 10(1). [Order PO-1791]

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].

Previous orders have established that, 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]

I agree with this approach. In this appeal, both the TTC and the affected party assert that the competitive pricing information (the actual pricing breakdown) was provided by the affected party to the TTC in confidence. The TTC refers to specific documentation in support of this position. In addition, the TTC identifies that, unlike the actual pricing breakdown severed from the record, the overall price (total price) is not confidential and was disclosed.

Based on the representations of the TTC and the affected party, I am satisfied that the affected party had a reasonable expectation of confidentiality when it supplied the price breakdown information to the TTC. This finding is consistent with decisions which have accepted the general proposition that bidders have a reasonably held expectation of confidentiality with respect to the financial details of their submissions, such as unit prices and other "proprietary" information (see Orders PO-1722, PO-1791).

Part 3: harms

General principles

To meet this part of the test, the institution and/or the affected 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.)].

Section 10(1)(a): prejudice to competitive position

The affected party submits that the release of the price breakdown information severed from the record can reasonably be expected to significantly prejudice its competitive position and potentially interfere with contractual negotiations with other organizations. It also states that, if the information is disclosed to the requesting party, it would most certainly give that party a competitive advantage in future negotiations.

The TTC also supports the position that disclosure of the information would allow the affected party's competitors to have an unfair advantage in bidding on other projects, and states that the disclosure of the pricing structure breakdown would provide competitors with such an advantage.

Based on the representations of the parties, and on my review of the portions of the records at issue, I accept the position of the affected party and the TTC that the disclosure of the detailed pricing information in the records would provide an advantage to the affected party's competitors. Therefore, I find that disclosure of the pricing information severed from pages 18, 19 and 20 of the Group A records could reasonably be expected to result in significant prejudice to the affected party's competitive position, within the meaning of section 10(1)(a). The undisclosed information in those records is, accordingly, exempt from disclosure under section 10(1).

PERSONAL INFORMATION/INVASION OF PRIVACY

Personal information

The section 14(1) personal privacy exemption only applies to "personal information". "Personal information" is defined in section 2(1) of the *Act*, in part, to mean recorded information about an identifiable individual, including information relating to the education or the employment history of the individual [paragraph (b)], the views or opinions of another individual about that individual [paragraph (g)] and the individual's name where it appears with other personal information relating to the individual [paragraph (h)].

The TTC and the affected party submit that the information severed from pages 6 and 7 of the Group A records represents the personal information of identifiable individuals, as it relates to their employment history and previous work experience. The affected party also identifies that some of the information contains the education history and the views or opinions of other individuals about these individuals.

I agree with the position taken by the TTC and the affected party that the information severed from pages 6 and 7 of the Group A records contains the personal information of four identified individuals.

Invasion of privacy

Where a requester seeks the personal information of other individuals, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only section with potential application in the circumstances of this appeal is section 14(1)(f) which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of privacy. Section 14(2) provides some criteria for the institution to consider in making this determination, and section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure under section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Sections 14(3)(d) and (g) of the *Act* read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (d) relates to employment or educational history;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

The TTC and the affected party submit that the information severed from pages 6 and 7 of the Group A records constitutes the employment history of the identified individuals. The TTC relies on Order MO-1257 in support of its position that the information fits within the presumption in section 14(3)(d).

I accept the position put forward by the TTC and the affected party, and find that the severed information on pages 6 and 7 includes the employment history of four identifiable individuals, and that its disclosure would constitute a presumed unjustified invasion of privacy under section 14(3)(d) of the *Act*. This information is, therefore, exempt from disclosure under section 14(1).

SOLICITOR-CLIENT PRIVILEGE

The TTC claims that section 12 applies to the following Group B records: Records 1, 7-14, 16-18, 23-25, 27, 28, 30-32, 38-40, 44, 46, 47, 50-52, 55, 59, 60, 64, 65, 68 and 70.

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. The institution must establish that one or the other (or both) branches apply.

The TTC has taken the position that the records qualify for exemption because of litigation privilege. In the chart which comprises a portion of their representations, they also indicate that some of the records are exempt because of solicitor-client communication 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.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

Courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.), cited with approval in *General Accident Assurance Co.*; see also Order PO-2037, upheld on judicial review in *Ontario (Attorney*

General) v. Ontario (Information and Privacy Commissioner), [2003] O.J. No. 2182 (Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if, through research or the exercise of skill and knowledge, counsel has selected them for inclusion in the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two types of privilege as derived from the common law:

- solicitor-client communication privilege
- litigation privilege

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Statutory litigation privilege

Branch 2 applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

The TTC identifies by name the solicitors involved in the matter to which the records relate, or who provided advice on various issues relating to the records. The TTC then states that, as of a specified date, the TTC had a reasonable belief that litigation was contemplated. It also refers to correspondence which supports its position.

As part of its representations, the TTC also provided a chart which identifies each record by number and by description, indicates the type of privilege claimed, and provides an explanation as to how the privilege claim is applicable to each record.

I have reviewed in detail the records for which the solicitor-client privilege claim is made, and make the following findings:

- Records 1, 10, 11, 12, 14, 16, 17, 23, 24, 25, 27, 28, 30, 39, 44, 51, 52, 59 and 68 consist of confidential correspondence to or from counsel and form part of the "continuum of communications" for the purpose of providing legal advice or in contemplation of or for use in litigation. I am satisfied that these records qualify for exemption under section 12 of the *Act*.

- Records 7 and 66 are cover memoranda from staff addressed to counsel for the TTC, and clearly relate to obtaining or giving of professional legal advice. I find that they qualify for exemption under section 12 of the *Act*.

- Records 8, 13, 31 and 55 are all copies of a legal opinion prepared by counsel for its client (the TTC). It is marked "confidential" and contains legal advice. Record 64 is the same record, although it includes counsel's hand-written notations. In my view these records relate to the giving of professional legal advice and qualify for exemption under section 12 of the *Act*.

- Records 9, 40, 65 and 70 are copies of a document prepared by external counsel and provided to internal counsel for the TTC. It contains the legal advice of external counsel to the TTC. I am satisfied that these records relate to the giving of professional legal advice and qualify for exemption under section 12 of the *Act*.

- Records 18, 32, 38, 46 and 47 consist of handwritten notes made by counsel for the TTC relating to the provision of legal advice. I am satisfied that these records constitute a legal advisor's working papers directly related to seeking, formulating or giving legal advice, and qualify for exemption under section 12.

- Record 50 is a copy of correspondence from external counsel to the TTC's in-house counsel, attaching a draft letter. In my view it contains the legal advice of external counsel to the TTC, and qualifies for exemption under section 12.

- Record 60 is correspondence from in-house counsel to external counsel requesting a legal opinion. I am satisfied that it relates to the obtaining or giving of professional legal advice, and that it qualifies for exemption under section 12.

Accordingly, I uphold the section 12 exemption claim for all of the records for which the TTC has raised that exemption.

In addition, having found that both the cover memorandum for Record 7 and the cover page comprising Record 68 qualify for exemption under section 12, and in light of the TTC's position that the remaining portions of these records have been disclosed, there is no need for me to determine whether these records also qualify for exemption under sections 6(1)(b) or 7(1) of the *Act*.

ADVICE TO GOVERNMENT

The TTC has claimed that section 7(1) applies to Records 2, 33 and 43. 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 (Court of Appeal Doc. M30913 and M30914, June 30, 2004)].

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)*]

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)*].

The TTC states that the relevant portion of Records 2, 33 and 43 are the same document – a commercial analysis concerning the evaluation of proposals. Accordingly, I will only decide on access to one copy of the document (Record 2).

Record 2 consists of a four-page document identified as a commercial analysis, and the TTC submits:

> The record … is a document created by the TTC's Material and Procurement Department in order to advise a client group as to which company [the] Department recommends for an award of a specific contract based on submissions received by the TTC.
>
> The commercial analysis and advice contained in that analysis was communicated to the person being advised, namely the head of the client group requesting the contract.

The TTC also takes the position that the disclosure of the advice and the information relied upon in support of the recommendations could reasonably be expected to inhibit the free flow of advice or recommendations to government. It states:

> The record in question is a commercial analysis which provides a detailed analysis as to how each proposal was evaluated. If the advice is provided to the public, the entire mechanism of how a proposal/tender is evaluated will be inhibited. The ability to provide candid advice to various departments regarding proposal submissions received would be directly impacted. The result would be that any advice that is potentially controversial would not be provided to the other departments or at least not provided in writing. In future, the ability of the TTC to properly award contracts based on knowing all information, including potential problems or legal ramifications, would be impacted.

The TTC acknowledges that section 7(2) creates a list of mandatory exceptions to the section 7(1) exemption, and that if the information falls into one of these categories, it cannot be withheld under section 7(1). The TTC refers to section 7(2)(a) which reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:
>
> > factual material;

The TTC then identifies that some information contained in Record 2 fits within the mandatory exception. The TTC states:

> On page 2 of the commercial analysis [Record 2], under a section entitled "Comments", the TTC acknowledges that the three (3) paragraphs immediately under this section contain a coherent body of fact that is separate and distinct from the advice or recommendation. However, the TTC submits that the exception under section 7(2)(a) of the Act for the remaining portions of the document is not applicable. The remaining portions of the document contain advice and fact that are mixed together.

I agree with the TTC's position that the first three paragraphs under the "Comments" section of page 2 are factual material and that, as the exception in section 7(2)(a) applies to these paragraphs, they should be disclosed. However, I do not agree that all of the remaining portions of the document qualify for exemption under section 7(1).

As identified above, "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. Furthermore, advice or recommendations may be revealed in two ways: 1) the information itself consists of advice or recommendations; or 2) the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

In my view, only small portions of Record 2 contain information which can be described as "advice" or "recommendations". Much of Record 2 consists of a summary of the information in the proposals submitted to the TTC. Although the TTC takes the position that the information in the record (except for three paragraphs), contain advice and fact mixed together, I find that only portions of this record contain advice or recommendations, and that these discreet portions can simply be severed from the record. The remaining information contained in this record does not qualify as "advice or recommendations" for the purpose of section 7(1).

Specifically, the information in Record 2 which does contain "advice or recommendations" for the purpose of section 7(1) is the first paragraph on page 1 under the heading "Recommendation", and two sentences on page 3 of the record. These portions of the record clearly contain the advice or recommendations of the staff with respect to a suggested course of action that will ultimately be accepted or rejected by the person being advised.

This remaining information is, in my view, similar to the type of information which was considered by Assistant Commissioner Mitchinson in Order PO-2028, and which he determined did not constitute "advice or recommendations" for the purpose of section 13(1) of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent of section 7(1) of the *Act*). In that Order, which was upheld on judicial review, the Assistant Commissioner stated:

> … the content [of the record at issue] must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific

> advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain "mere information" and what, if any, contain information that actually "advises" the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing "mere information", then section 13(1) applies.

I adopt the approach to this issue as set out above. Although in this appeal, the record does contain "advice or recommendations", in my view this information can be severed, and the remaining portions of the record can be disclosed.

I have also considered whether the disclosure of the remaining portions would allow one to accurately infer any advice given or recommendations made. On my review of the information, I find that disclosure of this information would not permit accurate inferences to be drawn as to the nature of any advice.

Finally, I do not accept the TTC's submission that the disclosure of the remaining portions of this record would inhibit the mechanism of how a proposal/tender is evaluated, nor do I accept the TTC's position that the disclosure would impact the future awarding of contracts. I have found that the information consists of a summary of the information in the proposals, and that it does not constitute advice or recommendations.

Accordingly, I find that section 7(1) of the *Act* does not apply to much of the information contained in Record 2.

As an additional note, Record 2 contains the names of four parties who were not notified in the course of this request and appeal. In the absence of such notification, I will not order that these names be disclosed.

SEARCH FOR RESPONSIVE RECORDS

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 TTC provided substantial representations identifying the nature of the searches conducted and the results of the searches for responsive records. Specifically, the TTC identifies that it conducted searches for responsive records within the Material and Procurement Department and the Legal Department. In addition, a search for records in the General Secretary's office was conducted. The TTC identifies that the responsive records at issue in this appeal were located as a result of those searches.

Furthermore, the TTC identifies that, during the mediation stage of this appeal, it conducted an additional search of the Finance Department.

Finally, the TTC states that it is not aware of any records that would have been responsive to the request but that no longer exist, and states:

> The TTC has done a detailed search of the records involving every department that was involved in [the identified proposal] and have noted every record that exists in these files.

The appellant has not provided any representations in response to the TTC's representations.

In light of the representations provided by the TTC, and in the absence of any representations from the appellant, I find that the searches undertaken by the TTC in response to the request was reasonable in the circumstances of this appeal.

ORDER:

1. I order the TTC to disclose a copy of the non-highlighted portions of Record 2 to the appellant by sending the appellant a copy of the information by **January 14, 2005**. I have provided the TTC with a highlighted copy of Record 2, indicating those portions which should be disclosed, and highlighting the portions that should not be disclosed.

2. I uphold the TTC's decision that the other responsive records qualify for exemption under the *Act*.

3. I uphold the TTC's search for responsive records.

4. In order to verify compliance with the terms of Order provision 1, I reserve the right to require the TTC to provide me with a copy of the material which it discloses to the appellant.

Original signed by: December 21, 2004
Frank DeVries
Adjudicator