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

ORDER MO-1982

Appeal MA-050014-1

City of Kingston

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NATURE OF THE APPEAL:

The City of Kingston (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a number of documents relating to a specific Traffic Impact Analysis and Addendum Report. The requester sought access to:

1) a copy of the findings of the review conducted by the City's Engineering Division;

2) a copy of the peer review conducted by the independent expert in the transportation planning field;

3) a copy of the terms of reference under which the independent expert was requested to conduct the peer review;

4) copies of all notes of meetings, telephone conversations or e-mails between the Engineering Division and the independent expert;

5) copies of all notes, memos, or other written forms of correspondence or records of verbal communication between the City's Engineering Division and other members of the City Staff, or with members of Council.

The City responded to the request by stating that there were no records responsive to part one of the request. It denied access to the peer review, responsive to part two of the request, on the basis of the exemptions found in section 11(g) (proposed plans, policies or projects of an institution) and section 10(1)(b) (third party information) of the *Act*. A copy of the "terms of reference" responsive to part three of the request was disclosed. The City also subsequently disclosed a number of records responsive to parts four and five of the request, but withheld four records under section 7(1) (advice or recommendations) of the *Act*.

The requester (now the appellant) appealed the City's decision to deny access to the records, and also appealed on the basis that records responsive to part one of his request should exist.

During the mediation stage of the appeal, issues regarding access to three of the four records which had been withheld under section 7(1) were resolved. Mediation did not resolve all of the issues, however, and the file was transferred to the inquiry stage of the process.

I sent a Notice of Inquiry to the City and the author of the peer review (the affected party), initially. The Notice sent to the affected party invited it to provide representations on the possible application of section 10(1) to the records. The Notice sent to the City invited the City to address all of the issues. Based on my review of the background to this appeal, I also asked the City to provide representations on the scope of the request and the responsiveness of certain records.

I received representations from the City and the affected party. In its representations, the affected party stated that, as the project which is the subject of the record at issue has been completed, it no longer had an interest in the record at issue in the appeal, and had no objection to the City releasing any material if it chose to do so.

In addition, the City indicated in its representations that it was prepared to disclose one of the records at issue (page 173) to the appellant. Accordingly, this page is no longer at issue in this appeal.

I then sent the Notice of Inquiry, along with a copy of the representations of the City, to the appellant, who also provided representations in response.

PRELIMINARY ISSUE

Responsiveness of the Records/Scope of the request

The request giving rise to this appeal was for five identified categories of records, including a "review" and a "peer review". In response to the request and in the course of this appeal, the City identified that the responsive records included an identified "report" (pages 99-111) and a "study" (pages 112-166). Upon my review, it was unclear how those records relate to the request and, in the Notice of Inquiry sent to the City and the appellant, I invited them to address the issue of the responsiveness of those records to the request.

In its representations, the City identified that both of these documents are public, and were provided as background information which formed part of the Planning Application for Zone Change. The City states that these records are not, therefore, responsive to the request.

The appellant does not directly address this issue, but does identify the specific records he requested and is interested in; these do not include the identified "report" or the "study". In the circumstances of this appeal and based on the representations of the parties, I am satisfied that these two records are not responsive to the request.

An additional issue regarding the responsiveness of records was raised in the appellant's representations. Specifically, with respect to the issue of whether additional responsive records exist, the appellant identifies that the records he seeks in this appeal "must have been completed by City staff or received by the City prior to [an identified date], the date of the Planning Committee meeting, for which the [identified staff report] was prepared, and which makes reference to them." On my review of the record remaining at issue in this appeal, I note that this record is dated *after* the date of the identified Planning Committee meeting, referenced by the appellant. Given these circumstances, I must determine whether the record remaining at issue is or is not a responsive record.

In this appeal, I am satisfied that the record remaining at issue, the 98-page peer review, is responsive to the request. It is the record identified as responsive by the City, and is responsive to the request as originally framed. Furthermore, although dated after the date of the identified Planning Committee meeting, it refers in some detail to materials prepared prior to that meeting. Based on my review of the record, I am satisfied that it contains information responsive to the appellant's request, and I find that it qualifies as a responsive record.

I will address the issue of whether other responsive records exist in my discussion of the reasonableness of the search for responsive records below.

RECORD:

The sole record at issue is a 98-page peer review.

DISCUSSION:

THIRD PARTY INFORMATION

As identified above, the City denied access to the record on the basis of section 10(1) of the *Act*. 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;

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:

- the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

- 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.

In this appeal, I sent a Notice of Inquiry to the City and an affected party. As I stated above, in its representations the affected party submitted that, as the project which is the subject of the record at issue has been completed, it no longer had an interest in the records at issue in the appeal, and had no objection to the City releasing this record. The City provided representations in support of its position that section 10(1) applied. These representations were shared with the appellant, who asserted that section 10(1) did not apply to the record.

As an aside, I note that the City has identified in its representations that the information at issue is the City's property, and belongs to the City. The City also states that it is not the third party's information, notwithstanding that section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Furthermore, the third party confirms that it no longer had an interest in the record. However, the City also provides representations in support of the section 10(1) exemption, and I will now review the record and the representations of the City to determine if the three-part test under section 10(1) has been established.

Part one: type of information

The City takes the position that the record contains "technical information" for the purpose of the first part of the three-part test. The term "technical information" has been defined in previous orders as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

I adopt this definition for the purpose of this appeal.

The record at issue is a 98-page peer review (also described as a "technical memorandum") prepared by an engineering firm retained to provide comment on a traffic impact study prepared by another engineering firm. It contains a detailed analysis of the study, including in-depth reviews of the charts and diagrams in the study. I am satisfied that the record was prepared by a professional engineer and that the information contained in it qualifies as "technical information" for the purpose of the *Act*.

Part 2: supplied in confidence

Part two of the test under section 10(1) requires the parties resisting disclosure, in this case the City, to demonstrate that the information was "supplied" to the institution. This requirement 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 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 takes the position that the information was supplied to the City by the third party. I accept that the record was supplied to the City by the engineering firm that prepared it.

However, taking into account all of the circumstances of this appeal, I am not satisfied that the third party supplied the information to the City with a reasonable expectation that it would be treated as "confidential". In fact, the third party who supplied the information to the City specifically states that it no longer has an interest in the record, and that it has no objection to the City disclosing the record. In the circumstances, I am not satisfied that the record was supplied to the City with a reasonable expectation that it would be treated confidentially, and I find that the second part of the three-part test under section 10(1) has not been met.

The City raises one additional matter in its submissions concerning the possible application of section 10(1). In its submission, the City refers to the possible interest the third party that prepared the initial traffic impact study may have in the disclosure of the record at issue. Although neither the City nor this office notified that party, the City states that a firm that prepares a traffic impact study could be "negatively impacted" if a draft peer review is released. However, it is clear from the City's representations that the initial traffic impact study has been made a public document and is not exempt under section 10(1). Accordingly, there is no suggestion that the third party that prepared the traffic impact study had an expectation that its

information would be kept confidential. That information would be the only information "supplied to" the City by that third party. Based on the City's representations, I am not satisfied that that the authors of the initial traffic impact study would have supplied the information with a reasonable expectation that it would be treated confidentially.

Accordingly, I find that the second part of the three-part test under section 10(1) has not been met for the record at issue. As all three parts of the section 10(1) exemption must be satisfied, the record does not qualify for exemption under section 10(1) of the *Act*.

ECONOMIC OR OTHER INTERESTS

The City takes the position that section 11(1)(g) applies to the record. That section reads:

> A head may refuse to disclose a record that contains,
>
> > information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

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 section 11(g) 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.)].

Furthermore, in order for section 11(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

> (i) premature disclosure of a pending policy decision, or
> (ii) undue financial benefit or loss to a person.
>
> [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.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

In this appeal, the representations from the City in support of its view that section 11(g) applies are sparse. The City states:

> Because this document is still in draft, it is information in the form of a proposed plan, the disclosure of which could reasonably be expected to result in premature disclosure of a pending policy decision. Premature release of this document could risk side tracking the issue before ideas have been solidified and decisions have been finalized.

Findings

As far as the first part of the test is concerned, the record at issue is described as a peer review. It was prepared by the affected party and reviews the traffic impact study provided to the City by another party. I am not persuaded that this record constitutes a proposed "plan, policy or project" of an institution for the purpose of section 11(g) of the *Act*.

Even in the event that the record could be considered a "plan, policy or project" (which I specifically reject), I have not been provided with "detailed and convincing" evidence from the City that the harm contemplated by section 11(1)(g) could reasonably be expected to occur should the information in the record be disclosed. The representations provided by the City in support of its view that section 11(g) applies are speculative and, in any event, do not support a finding that disclosure could result in a premature disclosure of a pending policy decision.

Accordingly, I find that section 11(g) does not apply to the record.

ADVICE TO GOVERNMENT

In its representations the City takes the position that section 7(1) applies to the record. Although the City had earlier identified that section 7(1) applies to other records (which are no longer at issue), it is in its representations that the City for the first time claims that section 7(1) applies to the record remaining at issue. Although this raises the issue of whether or not the City is entitled to claim a new discretionary exemption for this record at this point in the process (see Order MO-1887), in the circumstances of this appeal, and in light of my finding on the application of the exemption, I will consider its possible application to the record at issue.

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.), aff'd [2005] O.J. No. 4048 (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)*]

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-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 City states that the record contains recommendations, but in a draft form that have not yet been finalized. The City then states that there is a process that will be followed "by the staff and the consultant who prepared the traffic study, and this will continue back and forth until the document is finalized". The City takes the position that it would be premature to release the information, and that the peer review will be released once it is finalized. The City states that the recommendations and the record are "interwoven" and require further work prior to finalization.

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.

Based on my review of the record at issue, it is not clear what portions of the record contain "advice or recommendations" for the purpose of section 7(1). The Notice of Inquiry sent to the City asked the City to identify what the specific advice is, what the recommended course of action is and to whom the recommendation was communicated. The City has chosen to provide representations on this exemption which are general in nature, and has taken the position that the whole record contains advice or recommendations.

I find that much of the record contains a detailed review of the factual basis for the traffic impact study being reviewed. Much of this information is factual in nature, and does not contain advice or recommendations for the purpose of section 7(1). Portions of the record might contain information which could be considered advice, or which refers to recommendations; however, it is not clear to me from either the record or the representations who is being advised, or if the "recommendations" referred to in the record are the recommendations of the firm that initially prepared the traffic study, or the third party who conducted the review. Furthermore, the representations of the City suggest that the draft information in the record is not yet finalized, and serves only as the basis upon which further discussions will ensue.

In my view, based on the City's representations and the record at issue, I have not been provided with sufficient evidence to find that the record contains information which can be described as "advice" or "recommendations" for the purpose of section 7(1), and I find that this section does not apply to the record.

REASONABLE SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in

the circumstances, the decision of the City will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example: Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

Representations

During the mediation stage of this appeal, the appellant took the position that, based on a reference in a report to the City's Planning Committee on a specified date, an identified traffic impact analysis had "been reviewed by the City's engineering department and has also been peer reviewed by an independent expert in the transportation planning field". It was on that basis that the appellant took the position that additional responsive records should exist.

The City addressed this issue in its representations, and identified that the report referred to by the appellant had been prepared by a different City department, and that the comments in the report were based on a reference in an identified memorandum. The City provided the appellant with a copy of that memorandum, which refers to a review of the traffic analysis which is "near completion". The City also provided me with evidence of the searches which had been conducted for the responsive records, and the outcome of those searches. The City then stated that all responsive records were either provided to the appellant, or were identified and withheld under the *Act*, and that no additional responsive records exist or ever existed.

The City's representations were shared with the appellant, and the appellant maintains that, based on the reference to the review of the identified traffic impact analysis on a certain date (and prior to an identified Planning Committee meeting), additional responsive records ought to exist.

Analysis

In this appeal, the City has provided explanations regarding the references in certain records to additional records which may exist. Furthermore, the City has provided some details regarding the nature of the searches conducted for responsive records and the results of those searches.

However, as identified above in the discussion of the issue of the responsiveness of records, I identified that the record at issue in this appeal, although dated after the date of the identified Planning Committee meeting, refers in some detail to materials prepared prior to that meeting. On that basis, I found that the record at issue in this appeal is responsive to the request.

In the circumstances, I am not satisfied that all reasonable efforts were made by the City to locate or identify additional responsive records. Specifically, in light of the extensive references in the record at issue in this appeal to materials prepared prior to the date of the identified meeting, I find that the City has not conducted a reasonable search for responsive records. I will therefore order the City to conduct further searches for the records responsive to the request, with particular attention to the references to these records (created prior to the date of the identified Planning Committee meeting) found in the record remaining at issue in this appeal.

Conclusions

I find that the City has not adequately discharged its responsibilities under section 17 of the *Act* to conduct a reasonable search for all responsive records.

ORDER:

1. I order the City to disclose the record to the appellant by **November 28, 2005** but not before **November 21, 2005**.

2. I order the City to conduct further searches for additional responsive records**,** with particular attention to the references to additional records (created prior to the date of the identified Planning Committee meeting) found in the record at issue in this appeal.

3. I order the City to communicate the results of the searches to the appellant by sending him a letter summarizing the search results on or before **November 28, 2005.**

4. If additional responsive records are located, I order the City to provide a decision letter to the appellant regarding access to those records in accordance with sections 19, 21 and 22 of the *Act*.

5. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, and copies of the correspondence referred to in Provisions 3 and 4, as applicable.

Original Signed By: October 24, 2005
Frank DeVries
Adjudicator