



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2011

Appeal MA-040222-1

City of Ottawa



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NATURE OF THE APPEAL:

The City of Ottawa (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records concerning the City's plans in the event of an emergency. The request was for the following records which the requester believed to be in the possession of the City's Emergency Measures Unit (EMU):

- A. vulnerability analysis report
- B.
 - i. brief status report on the current draft emergency plan, timetable and costs and how work checks off against provincial emergency guidelines
 - ii. brief description of 2001 to present completed, on-going emergency study consultants reports and costs, including the Morris and Hershfield study (if interim or final reports/executive summaries are available, please provide)
 - iii. List 2001 to present on past contingency plans (ice storm, G8, G20 etc) (if available, please provide or at least executive summaries)
 - iv. List 2001 to present emergency City of Ottawa branch emergency plans (especially police, fire)

After initial discussions with the EMU, the appellant was provided with the following records:

1. RMOE Emergency plan
2. City of Ottawa by-law 2001-41
3. 2001 City of Ottawa Emergency Plan
4. 2002 City of Ottawa Emergency Plan
5. Ice storm - Lessons Learned

As a result of discussions with the FOI coordinator for the City, the appellant was granted access to the following additional records:

1. October 20, 2003 Report to Emergency and Protective Services (EPS) Committee
2. October 27, 2003 excerpt from Minutes for EPS Committee
3. the pending plan
4. the presentation given by the EPS committee on October 27, 2003
5. a report to EPS committee dated January 27, 2003

In addition, the City:

- advised the appellant that the current draft emergency plan will be going to committee

- and Council shortly, and would then become a public document;
- provided a link to the *Emergency Management Act* with respect to provincial guidelines, and;
- advised the appellant that the G8 and G20 plans are Ottawa Police Service records .

Consequently, the appellant narrowed his request, limiting it to the following records:

1. Vulnerability Analysis Report (VAR)
2. Status report on current draft emergency plan timetable and costs
3. Description of 2001 to present completed, ongoing emergency study consultant reports and costs including the Morris and Hershfield study (if interim or final/reports/executive summaries are available, please provide)

The City issued a decision with a detailed index outlining the records that were released and those that were withheld. The index included a list of the exemptions on which the City based its denial of access to the records. In support of its decision to deny access, the City relied on sections 7(1) (advice and recommendations); 8(1)(e), (i) and (l) (law enforcement); 11(f) and (g) (economic and other interests of the City); and 13 (danger to safety or health) of the *Act*.

The City's decision also advised the appellant that the records are being withheld under section 4 of the *Emergency Management Act*. In addition, the City decided to charge the requester \$98.00 for processing his request.

The requester, now the appellant, appealed both the decision to deny access and the fee.

This office appointed a mediator to assist the parties to resolve issues. During mediation, the City reiterated that the draft emergency plan would be sent to committee and City Council in December 2004, and would become a public document at that time. The City agreed to review the appellant's request again at that time with a view to releasing additional documents. The City also advised the mediator that it intended to rely on section 2.1(4) of the *Emergency Management Act*, not section 4, as it had stated in its decision letter. Section 2.1(4) creates an exemption from disclosure in connection with an access request under the *Act*.

Mediation did not resolve the issues, and the appellant asked that his appeal proceed to adjudication. Accordingly, the appeal entered the adjudication stage. I initially sent the City a Notice of Inquiry setting out the facts and issues in this appeal and invited representations.

The City provided representations. In these representations, the City asked that I notify "institutions that have provided information to the City in confidence and whose information is contained in the appendices (tabs) to the full VAR" (the affected persons). The City stated that these bodies should have the opportunity to provide representation on disclosure of their materials.

At my request, the City provided a list of five public agencies and private organizations and the names of representatives and their contact information. I sent each of them a Notice of Inquiry inviting them to provide representations on whether information relating to them should be disclosed. The City had asked that portions of its representations not be shared with the appellant or with these affected persons. Accordingly, I sent them the non-confidential portion of the City's representations.

I received representations from two of the affected persons, who did not consent to disclosure of the information they had provided the City. The other three affected persons that were notified did not respond.

Subsequently, the City disclosed to the appellant the Five Year Emergency Response Program Action Plan in part and the Duty Officer Briefing, City of Ottawa Emergency Plan, in part.

I then sent a Notice of Inquiry to the appellant with a copy of the non-confidential portion of the City's representations and the representations of the two affected parties that responded in their entirety, and invited him to provide representations. The appellant advised this office by telephone that he did not intend to provide representations. He said, however, that he would like to know about the City's vulnerabilities more than ever in light of the recent bombings in the City of London, in the United Kingdom.

RECORDS:

The records still at issue, as described in the City's representations, are the following:

- The "Vulnerability Analysis Report" together with its tabbed attachments, (hereinafter "full VAR"), 308 pages (first document listed in the revised Index of Records)
- The "Comprehensive Vulnerability Analysis Report" (hereinafter "condensed VAR"), 69 pages, (second document listed in the revised Index of Records)
- Page #6 of the "Five Year Emergency Response Program Action Plan", dated December 17, 2002 (third document listed in the revised Index of Records)
- Slide 12 of the "Duty Officer Briefing, City of Ottawa Emergency Plan" (fourth document listed in the revised Index of Records)

DISCUSSION:

BACKGROUND

Amendments to the *Emergency Management Act* passed in 2002 require municipalities in Ontario to adopt and implement emergency management programs and create emergency plans.

The plans must be approved by the municipal council and, according to the City, are public once approved.

As part of this emergency planning process, municipalities must identify and assess various hazards and risk to public safety that could give rise to emergencies in the municipality. They must also identify the facilities and infrastructure elements that are at risk of being affected by these emergencies. The municipality created the records in question as part of the process of identifying hazards and risks, including identifying facilities and infrastructure that are vulnerable to emergencies.

The full and condensed VARs explain the methodology used to identify and assess the hazards and risks; the risks and hazards identified; the consultant's assessment of the probability of these events occurring; the possible consequences of such events; and the City's capacity to respond to each of the events. The VARs also rank the seriousness of the risks and hazards that are identified in them.

The first 69 pages of the two VARs are identical. The full VAR contains several appendices consisting of information relevant to certain identified risks and hazards that is not in the condensed VAR. Some of this information was compiled by City staff and some was provided to the City by external public and private entities that are also concerned with a particular hazard or risk.

Page 6 of the Five Year Emergency Response Program Action Plan describes emergency event scenarios that are also identified in the VARs, anticipated consequences of these events, and "operational objectives" for responding to these events.

Slide 12 of the Duty Officer Briefing sets out criteria used to assess and categorize emergencies affecting certain infrastructure.

The City claims that this information is subject to the exemptions discussed below.

ADVICE TO GOVERNMENT

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

The City claims the section 7(1) exemption for section 4 of both VARs, entitled "Recommendations". In its representations, the City states that it no longer relies on the section 7(1) exemption for any other information at issue in this appeal.

General principles

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.), leave to appeal applied for September 26, 2005, S.C.C. 31226; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal applied for September 26, 2005, S.C.C. 31224].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations;
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), both cited above]

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

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

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224; Order PO-2115; Order 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.); Order PO-2028, 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.), cited above].

Sections 7(2) and (3): exceptions to the exemption

Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Sections 7(2) and (3) state:

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

- (a) factual material;
- (b) a statistical survey;
- (c) a report by a valuator;
- (d) an environmental impact statement or similar record;
- (e) a report or study on the performance or efficiency of an institution;
- (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
- (g) a report containing the results of field research undertaken before the formulation of a policy proposal;
- (h) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program;
- (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;

- (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
- (k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of an exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if the record is more than twenty years old.

Findings

Section 4 of each of the VARs consists of staff and consultant recommendations to the senior management team of the City with respect to emergency planning. Therefore, the disclosure of this information would reveal the recommendations of persons employed by the City and of consultants retained by the City.

I have considered whether any of the exceptions to the exemption found in sections 7(2) and (3) apply. The only subsections that require consideration are section 7(2)(e) and (i). Although the VARs contain some analysis of the City's capacity to respond to certain events, they are planning documents and are not primarily intended to measure or evaluate past performance or efficiency. Therefore, they do not fall within subsection (e). As the VARs were prepared by a consultant retained by the City, they are not the reports of a committee or similar body within the City, although a working group and steering committee containing City representatives contributed to the study. Therefore, subsection (i) does not apply.

As section 4 of the two VARs consists of recommendations and is not subject to an exception to the exemption, I find that section 4 in both VARs is exempt from disclosure under section 7(1). Accordingly, I will uphold the City's decision to withhold this information and will not consider it further in the discussion of the remaining exemptions.

LAW ENFORCEMENT

Issue B: Do the discretionary exemptions at section 8(1)(e), (i) and (l) apply to the records?

The City originally claimed that the discretionary exemptions at section 8(1)(e), (i), and (l) apply to all the information in each of the records. However, in its representations, the City stated that it is now claiming the exemption in section 8(1)(i) only for the information in certain Hazard

Data Collection Forms appended to the full VAR, which it describes in confidence at page 11 of its representations. It continues to rely on sections 8(1)(e) and (l) for all the information.

General principles

Sections 8(1) states, in part:

- (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
- (e) endanger the life or physical safety of a law enforcement officer or any other person;
 - (i) 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;
 - (l) facilitate the commission of an unlawful act or hamper the control of crime.

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.)].

In the case of section 8(1)(l), to demonstrate that the specified harm “could reasonably be expected” to occur, 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. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

In the case of section 8(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate 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.)].

Similarly, in the case of “health and safety” related exemptions such as sections 8(1)(i) and 13, which use the words “could reasonably be expected to”, the standard of proof is that the institution 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 [Order MO-1832].

In regard to section 8(1)(e), a person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

The term "person" in section 8(1)(e) is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Representations, analysis and findings

The City made extensive representations as to why disclosure of the withheld information could reasonably be expected to lead to the harms set out above. The City states that these representations also apply to the harms described in section 13 of the *Act* and section 2.1(4) of the *Emergency Management Act*. These representations may be summarized as follows:

1. Disclosure of the vulnerabilities, risks and hazards that the City has identified would allow an individual to know all of the City's weaknesses. This would allow an individual to plan attacks on public and private facilities and infrastructure.
2. Information about certain kinds of vulnerabilities, namely emergencies arising from terrorist or criminal activities, would prejudice the detection, prevention and suppression of sabotage and terrorism. The City alleges that the mere confirmation that an event has been identified as a real possibility would assist individuals to plan and execute acts of terrorism or sabotage.
3. Identifying the consequences of an emergency event would interfere with the ability of public authorities to prevent and suppress acts of terrorism because this would enable terrorists and other criminals to determine which kinds of actions will result in the greatest harm.
4. Disclosure of the response capabilities of law enforcement officials and other public authorities such as hospitals and fire departments would permit wrong-doers take advantage of the weaknesses in these capacities to cause damage.
5. Disclosure of the possible consequences of an emergency event, for example, how quickly a type of consequence or damage will occur, how long it will last, and the extent of the damage that may result, would interfere with the ability of public authorities to prevent and suppress acts of terrorism because this would allow terrorists and other criminals to determine which kinds of actions will result in the greatest harm.

6. In relation to natural or accidental events, knowledge of consequences would reveal the types of infrastructure and facilities that may be affected, the consequences of the emergency, and weaknesses in response capability. This would enable a person to whom this information is disclosed to plan acts of terrorism and sabotage following such an event.

The City gives several examples of specific information which it alleges, if disclosed, could reasonably be expected to result in the claimed harms.

Because it is impossible to anticipate the myriad ways in which individuals with criminal intent can cause certain types of emergencies and take advantage of others, it is necessary to be cautious about what information is disclosed in the context of emergency planning processes. As already noted, the Divisional Court has stated that, 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.)].

Nevertheless, this does not relieve an institution claiming these exemptions from its onus to establish a reasonable basis for believing that endangerment will result from disclosure. What must be protected to prevent the claimed section 8 harms is information that can be reasonably expected to either facilitate creation of the risks or hazards, facilitate the commission of crimes after an emergency has occurred, or impede the ability of law enforcement and other officials to respond to the emergency.

Not all the information that the City wishes to withhold falls within these categories. For example, information about the methodology used to determine the kinds of hazard to which the City is vulnerable; the types of natural and human-made events that may occur; and many of the consequences of these events, is largely innocuous or would be obvious to anyone who reads a newspaper, listens to the news, or watches television programs and movies. For example, the City argues that even disclosure of the types of events that may occur is problematic. However, the possibility of earthquakes, ice storms, floods, toxic spills, train derailments, bomb threats, and other hazards and risks, as well as many of their consequences, are public knowledge. For example, see the paper found at tab 9 of the full VAR, which the City argues must be kept confidential, but which is available on a Government of Canada website, and see the paper prepared by Mark Freiman supplied to me by the City, both of which outline these hazards and acknowledge well-known “gaps in preparedness”. Moreover, the City has already disclosed much of this information to the appellant in other documents (for example, page 4 of the Five Year Emergency Response Program Action Plan).

On the other hand, other information such as the ranking of hazards, specific facilities at risk, the specific manner in which a human-created event may be expected to happen, and weaknesses in the response capacity of public agencies, for example, could reasonably be expected to facilitate the harms contemplated by sections 8(1)(e), (i) and (l) in some cases. However, in other cases, the City has provided no evidence that the particular harm could reasonably be expected to result from disclosure of this information. For example, the hazard discussed in section 3.1 on pages 7

and 8 of the VARs is one that has been widely publicized, as have its potential consequences and the limitations in the capabilities of public authorities to deal with it. No evidence is provided that disclosure of this information could in any way cause this hazard or impede its control.

Many of the City's statements are generalizations which it applies to all the information in question without distinguishing between those parts of the information which, if disclosed, could reasonably be expected to result in harms and those parts that are innocuous and/or already available or well known to the public.

I accept the City's arguments that information found both in the condensed VAR and in the full VAR to the end of Appendix B could reasonably be expected to result in one or more of the section 8(1) harms claimed, and is therefore exempt, with the following exceptions. In my view, the City has not established a reasonable basis for believing disclosure of the following information could reasonably be expected to result in the harms referred to in section 8(1)(e), (i) or (l): in the two VARs: pages i, ii, and iii, page 1, page 2 and 3 (except highlighted portions), pages 4, 5 and 6, pages 7 and 8, pages 9 to 11 (except highlighted portions), page 14; in Appendix A of the full VAR: cover page and contents, pages 3, 4, and 5, pages 8 to 10, page 12, page 16 (except highlighted portions), pages 20 to 22, page 24, pages 27 and 28 (except highlighted portions), pages 32 to 37, 39, 40 to 42, 45, 49, 53, 56, and 58. For greater certainty, the "Comprehensive Vulnerability Matrix of Results", which is found between page 14 and Appendix A in the condensed VAR, and which is Appendix B in the full VAR, is exempt under section 8(1)(l).

The full VAR also has information provided to the City by external public and private sources that are also concerned in one way or another with a particular hazard or risk found at tabs 4 to 17. The information at these tabs was used to assist in identifying and assessing the hazards and risks facing the City for the purposes of the *EMA* planning process. Some of this information was obtained from public sources and some is not available to the public. The City submits that:

Disclosure of those records would lead to the identification of all or several of the risks and hazards contained in the VAR documents themselves, or lead the reader to infer correctly what the hazards and risks are. The City further submits that disclosure of the information in the tabs could lead to the identification of some of the consequences of such emergencies occurring [in several confidential examples].

The City claims that disclosure of this information could reasonably be expected to result in the section 8(1) harms. While I agree that disclosure of some of this information would assist in identifying some of the hazards and risks facing the City and, in some cases, consequences of emergency events, it does not necessarily follow that disclosure of the information could reasonably be expected to result in the claimed harms. As I have indicated above, the types of emergencies addressed in the information, and the types of facilities and infrastructure at risk are well-known. Some of the information itself is already well-known to the public, and some of the material at these tabs has clearly been published and can be accessed by anyone seeking

information of this kind. In many cases, the material itself states where it can be found in print or on the Internet.

Below, I discuss which information at tabs 4 to 17 is exempt under the claimed section 8(1) exemptions, and which is not.

As mentioned earlier, I received representations from two of the five entities that supplied information at these tabs. Both objected to disclosure of the information they provided, but neither identified any specific information of concern in the material provided, or addressed how disclosure of any particular information could reasonably be expected to cause harm.

One of these affected parties provided a single page, found at tab 4. I am satisfied that this record is exempt under section 8(1)(l).

The information provided by the other affected party is at tab 6 and consists of three pages of reproductions of slides. These slides do not contain the type of information that the entity seeks in its letter to protect. In particular, the City identifies the content of slide 12 on page 4 as sensitive. However, it is apparent from reading slide 4 that this is information intended to be conveyed to the public to assist the business community in planning for emergencies. I find no evidence that this information could reasonably be expected to result in any of the claimed section 8 harms. Therefore, it is not exempt under section 8(1).

The City submits that the records at tab 5 provide information about the potential impact of a particular kind of incident on the Ottawa area and provide information about such incidents caused in the past by the facility in question. The City states that this identifies the particular risk and this could lead to “acts of sabotage or terrorism, or other unlawful acts”.

I have reviewed the information and find nothing that could reasonably be expected to result in any of the harms claimed by the City. I agree that the material identifies a risk; however, the existence of the facility in question and the potential for its operations to result in the kind of incidents identified in the records is well-known to the public. As indicated in the City’s representations, such incidents have occurred in the past. They are already known to the public. The information is not exempt under section 8(1).

The material at tab 7 consists of a one-page letter in response to the City’s request for information about a utility’s vulnerabilities. The letter provides no such information, except for the second sentence of this letter, which contains very limited information about this, which conceivably could be used by saboteurs. I uphold the City’s decision to withhold this sentence pursuant to section 8(1)(l). The rest of this letter is not exempt.

The material at Tab 8 is a one-page letter from the operator of a facility. Neither the representations nor the contents of the letter provide evidence to support a finding that disclosure of any of the content of this letter could reasonably be expected to result in the claimed harms. I find that it is not exempt under section 8(1).

The material at tab 9 consists of: a one-page e-mail, a 59-page paper on threats to critical infrastructure produced by an emergency planning agency of the Government of Canada, and a one-page discussion of critical infrastructure protection. Except for the e-mail, these documents are public documents available on the Government's website. The e-mail itself is a response to a request from the City to provide information about its work, and contains no information of the type that the City is concerned about. I am not satisfied that any of this information could reasonably be expected to result in the claimed harms. I find that it is not exempt under section 8(1).

The City states that “[t]ab 10 contains information received in confidence from [a named operator]”. However, it is clear on the face of much of this information, for example, newspaper clippings, a press release, and promotional material, that it is public. In regard to the harms claimed under section 8(1), the City addresses only pages 2 and 3 of these records.

I accept the City's representations in regard to pages 2 and 3 at tab 10 and find that they are exempt under section 8(1)(l) as they contain detailed information about the transportation of specified hazardous materials. In the absence of any explanation of how the rest of this information could reasonably be expected to result in section 8(1) harms and the fact that most of it appears to be published, I find that the City has not established that it is exempt under section 8(1).

Tab 11 consists of a two-page e-mail exchange and a cover letter. The City has provided a persuasive explanation of how this information could be used to facilitate the commission of an unlawful act. I find that this information is exempt under section 8(1)(l).

Tabs 12 to 17 contain published materials, including an article published in a national newspaper and information published by the Government of Canada. This material appears to be readily available to anyone with access to a reference library or the Internet. The City has provided no reasonable basis for concluding that disclosure could reasonably be expected to result in any of the claimed section 8(1) harms. I find that this information is not exempt under section 8(1).

The City has withheld slide 12, which is one of a series of slides in a record called “Duty Officer Briefing”. The City states that this slide provides confidential information regarding the criteria used for the assessment and categorization of emergencies affecting essential lifelines. I am not satisfied by the representations of the City or my review of the records that disclosure of this information alone could reasonably be expected to result in any of the claimed section 8(1) harms. Nor has the City identified other information not already exempted about particular risks, hazards and vulnerabilities which could, in combination with this information, result in harm, and my review of the records does not reveal any such information. I find that slide 12 is not exempt under section 8(1).

The City has withheld page 6 of the Five Year Emergency Response Program Action Plan. This is a set of emergency scenarios with the expected consequences and the operational objectives

(proposed responses) associated with them. I am satisfied that the City has provided a reasonable basis for its belief that disclosure of this information could reasonably be expected to facilitate the commission of unlawful acts. I find that it is exempt under section 8(1)(l).

ECONOMIC AND OTHER INTERESTS

Do the discretionary exemptions at sections 11(f) and (g) apply to the records?

The City claims that the discretionary exemptions at sections 11(f) and (g) apply to the records.

General principles

Section 11 states, in part:

A head may refuse to disclose a record that contains,

- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
- (g) 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;

Section 11(f): plans relating to the management of personnel

In order for section 11(f) to apply, the institution must show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
 - (i) the management of personnel, or
 - (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public
[Order PO-2071]

Previous orders have defined “plan” as “. . . a formulated and especially detailed method by which a thing is to be done; a design or scheme” [Order P-348].

Section 11(g): proposed plans, policies or projects

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].

Representations, analysis and findings

In regard to section 11(f), the City submits:

[T]he VARs contain detailed plans regarding the management and administration of various City departments and personnel in the face of the identified risks and hazards. The VARs contain specific information regarding how various City departments and staff would perform and be deployed in the particular type of emergency as well as the roles that they would play, particularly in the Alert Level Criteria, and the Emergency Functions Matrix.

In regard to section 11(g), the City submits:

[T]he VARs as well as the two other records at issue reveal proposed plans of the City with respect to its emergency response and planning.

The City elaborates on this in confidential representations that follow this submission.

It is unnecessary to consider whether information that I have found to be exempt under section 8(1) qualifies for exemption under these provisions. I will consider the application of section 11(f) and (g) to the remaining information.

For the purpose of this analysis, I adopt the definition of “plan” set out above. In regard to both subsections (f) and (g), as is clear from page 1 of the two VARs, these documents are not plans or proposed plans, but documentation of a step taken in the process of developing a plan. The plan to which this information contributed is identified at page 1 of the VARs and this plan has

already been disclosed to the appellant, except for page 6, which I have found to be exempt under section 8(1)(l).

In relation to section 11(g), I am unable to ascertain from the representations or the records themselves any pending policy decision that would be disclosed by disclosing any of the information not previously found to be exempt.

The City expresses particular concern about disclosure of the “Alert Level Criteria” and the “Emergency Functions Matrix” in the VARs. In its representations, it states that the VARs contain “a table of Alert Level Criteria which list the alert levels assigned to different types of emergencies, the planned reactions of affected departments and areas of the City, and the weaknesses that the City faces in each emergency (i.e. column entitled ‘Uncertainty associated with event’)”.

I am unable to find any table that fits this description in the VARs. There is a table at page 4 that “presents the criteria developed to assess consequences”; however, it does not match the above description. There is also a section called “Alert Levels Decision Factors and Criteria” in The City of Ottawa Emergency Plan, December 2004; however, this document has been disclosed to the appellant.

In its representations, the City states that the “draft Emergency Functions Matrix...depicts the roles that City services and departments as well as external institutions and services will have with respect to different aspects of providing response or support for particular areas that are significant in emergencies”. There is a document at Appendix B of the VARs entitled “Comprehensive Vulnerability Matrix of Results”. However, it also does not match the City’s description.

I have reviewed the information in the records at issue relating to alert levels, planned reactions, response and support functions, and weaknesses in the City’s capacity as well as the City’s representations. Apart from information that I have found to be exempt, I find no reasonable basis for believing that any of the claimed harms will result from disclosure of this information. In this regard, I note that I have already found the Comprehensive Vulnerability Matrix of Results to be exempt under section 8(1)(l).

The City also expresses concern in its representations about the disclosure of a portion of the VARs which it refers to as a draft Emergency Management Structure for the City to be deployed in an emergency event. The City does not indicate what pages of the VARs contain this information. I am also unable to locate this document in the VAR. However, page 9 of the Duty Officer Briefing matches this description. The City has disclosed this to the appellant, which appears inconsistent with its representations about the impact of disclosure of this document.

There is some very limited information in the full VAR in the Hazard Data Collection Forms about the activities that various authorities can be expected to take in the event of various emergencies. However, this information is scanty and cannot reasonably be described as plans

or proposed plans. Moreover, it describes the City's capabilities before a plan was developed to enhance them, rather than anticipated future responses as a result of the planning process. I am unable to find information matching the City's description of the information that it considers to be exempt under sections 11(f) and (g). Having carefully reviewed the VARs and representations, I find that the VARs contain no "Emergency Management Structure for the City to be deployed in an emergency event" or any similar information that falls within sections 11(f) or (g) and should not be disclosed for this reason.

Slide 12 in the Duty Officer Briefing is part of a record that relates to the management of personnel and the administration of the City. The City states that this plan has not yet been "publicly revealed or deployed". I accept the City's representation, and find that it qualifies for exemption under section 11(f).

Accordingly, I find that none of the information for which the City claims the sections 11(f) and (g) is exempt under those sections, with the exception of slide 12 in the Duty Officer Briefing.

EMERGENCY MANAGEMENT PROGRAMS

Issue D: Does the discretionary exemption in section 2.1(4) of the *Emergency Management Act* apply to the records?

The City relies upon the discretionary exemption in section 2.1(4) of the *Emergency Management Act*.

Section 2.1 of the *Emergency Management Act* provides, in part:

2.1 (1) Every municipality shall develop and implement an emergency management program and the council of the municipality shall by by-law adopt the emergency management program.

(2) The emergency management program shall consist of,

- (a) an emergency plan as required by section 3;
- (b) training programs and exercises for employees of the municipality and other persons with respect to the provision of necessary services and the procedures to be followed in emergency response and recovery activities;
- (c) public education on risks to public safety and on public preparedness for emergencies; and
- (d) any other element required by the standards for emergency

management programs set under section 14.

(3) In developing its emergency management program, every municipality shall identify and assess the various hazards and risks to public safety that could give rise to emergencies and identify the facilities and other elements of the infrastructure that are at risk of being affected by emergencies.

(4) Subject to subsection (5), a head of an institution, as defined in the *Municipal Freedom of Information and Protection of Privacy Act*, may refuse under that Act to disclose a record if,

- (a) the record contains information required for the identification and assessment activities under subsection (3); and
- (b) its disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada or be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism.

(5) A head of an institution, as defined in the *Municipal Freedom of Information and Protection of Privacy Act*, shall not disclose a record described in subsection (4)

- (a) if the institution is a municipality and the head of the institution is not the council of the municipality, without the prior approval of the council of the municipality;
- (b) if the institution is a board, commission or body of a municipality, without the prior approval of the council of the municipality or, if it is a board, commission or body of two or more municipalities, without the prior approval of the councils of those municipalities.

(8) Nothing in this section affects a person's right of appeal under section 39 of the *Municipal Freedom of Information and Protection of Privacy Act* with respect to a record described in this section.

Representations, analysis and findings

Section 2.1(4) of the *Emergency Management Act* creates a new discretionary exemption from the right in the *Act* to disclosure of information in the custody or under the control of an institution.

To qualify for this exemption, a record must:

- contain information required for the identification and assessment of the various hazards and risks to public safety that could give rise to emergencies, *or*
- identify the facilities and other elements of the infrastructure that are at risk of being affected by emergencies, *and*
 - its disclosure could reasonably be expected to prejudice the defence of Canada or of any foreign state allied or associated with Canada, *or*
 - its disclosure could reasonably be expected to be injurious to the detection, prevention or suppression of espionage, sabotage or terrorism.

Section 2.1(4) of the *EMA* creates a “health and safety” related exemption under the *Act*, like sections 8(1)(e) and (i) and 13 of the *Act*. Like these other sections, which also use the words “could reasonably be expected to”, in my view, the appropriate standard of proof under section 2.1(4) of the *EMA* is that the institution 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.

It is not necessary to consider whether information that I have found to be exempt under sections 7, 8(1)(i) and (l) and 11(f) also qualifies under the *EMA*. Therefore, I will restrict my consideration to information not subject to those exemptions.

I am satisfied, from my review of the records at issue and the City’s representations, that all of them meet the first two requirements to qualify for the exemption; namely, that the records contain information required to identify and assess hazards and risks that could give rise to emergencies or identify facilities and infrastructure that are at risk from emergencies.

As portions of the City’s representations on section 2.1(4) harms are confidential, I do not refer to them here. However, for the same reasons that I gave in relation to section 8(1), I am not satisfied that disclosure of the information that I have not previously found to be exempt meets the section 2.1(4) harms tests. The City has not provided a reasonable basis for belief that disclosure of this particular information could reasonably be expected to result in the harms described above. As I stated in the discussion of section 8(1), this kind of information is readily available to the public. Although the City claims that its disclosure could reasonably be expected to increase the risk of the harms described, in my view, its claims are exaggerated. For example, the City argues that “the mere disclosure that events are confirmed ‘real risks’ and hazards for Ottawa would be injurious to public safety since it would in effect single out and present to the reader in a user-friendly format with the greatest of detail which areas [are] most vulnerable”.

This disregards the fact that the hazards and risks that I have found not to be exempt are well-known generally, and every city is potentially subject to them. It is very easy to find out whether Ottawa is vulnerable to hazards and risks of the type mentioned in the non-exempt portions of the records without any recourse to these records. Indeed, since Ottawa has already been subject to many of these risks, its vulnerability to them is public knowledge. I do not agree with the City that the information I have found not to be exempt provides “the greatest of detail” as to which areas are the most vulnerable. This information provides no more detail than is readily available through other sources.

I find that none of the information not found exempt under the sections of the *Act* previously considered is exempt under section 2.1(4) of the *EMA*.

THREAT TO SAFETY OR HEALTH

Does the discretionary exemption at section 13 apply to the records?

Section 13 states:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption 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 evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate 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.)].

An individual’s subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

The term “individual” is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization [Order PO-1817-R].

The harms described in section 13 are similar in nature to those described in sections 8(1)(e), (i) and (l) and section 2.1(4) of the *EMA* (especially section 8(1)(e) of the *Act*), and the City makes similar arguments, some of which are confidential. My reasons for finding that certain information is not exempt under those provisions apply also to section 13. I find that the information I have found not to be exempt under sections 8(1) of the *Act* and 2.1(4) of the *EMA* is also not exempt under section 13 of the *Act*.

EXERCISE OF DISCRETION

Did the City exercise its discretion under sections 7, 8, and 13 of the *Act* and section 2.1(4) of the *Emergency Management Act*? If so, should this office uphold the exercise of discretion?

General principles

The section 7, 8, 13 and 2.1(4) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

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

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

In explaining its exercise of discretion, the City states in its representations, submitted in March, 2005, in addition to some confidential representations:

1. The City has disclosed as much information as possible regarding its emergency plan and program to the requester, and will continue to do so once other information becomes public. For example, the City's emergency plan is currently in translation and it is anticipated that it will be publicly available in mid-May.
2. The information at issue is not personal information and more specifically is not the personal information of the appellant. Rather, the records are confidential corporate records which involve issues of public safety for City of Ottawa residents and staff, law enforcement agencies in Ottawa, government entities in Ottawa and private sector businesses in Ottawa. This weighs in favour of non-disclosure.
3. The requirement[s] in the EMA to produce the vulnerability analyses are mandatory for the City and other municipalities in Ontario. These requirements are new; in fact, these are the first such documents that the

City has produced and this is likely the case for other municipalities in Ontario. The City must therefore weigh the possibility of creating a precedent for disclosure of the records against the appellant's right of access to the records. Given the overwhelming public safety issues that are connected with the disclosure of the records, the City has chosen to refuse disclosure.

4. The City has carefully considered the fact that the Legislature saw fit to create an exemption to disclosure in s. 2.1(4) of the EMA which specifically addresses the types of records that are at issue in this appeal. This is in contrast to other records such as the emergency plan, which the City must also produce under the EMA but is considered a public document.
5. The City has carefully considered the fact that other private and public entities would be affected by the disclosure of these records, and that disclosure of the records would reasonably be expected to lead to prejudice or injury to their interests.

I note that the City did, in fact, provide the emergency plan referred to in its representations to the appellant in April, 2005.

In my view, the City's submissions suggest that the City erred in exercising its discretion. In my opinion, the fact that preparing the VARs is mandatory and "the possibility of creating a precedent for disclosure" are both irrelevant to the issue of whether it is appropriate to disclose the information found to be exempt.

However, despite these errors, the City has also taken into account relevant factors that support its decision in relation to the information I have found to be exempt, and in view of the other determinations I have made in this order and the information I am ordering disclosed, I am satisfied that requiring the City to re-exercise its discretion would serve no useful purpose.

ORDER:

1. I uphold the decision of the City not to disclose the information it has withheld, with the exception of the information set out in provision 2.

2. I order the City to disclose to the appellant by sending a copy by **January 30, 2006** but no earlier than **January 23, 2006** the following information: in the two VARs: pages i, ii, and iii, page 1, pages 2 and 3 (except portions that I have highlighted on a copy of these pages

provided with this order), pages 4, 5 and 6, pages 7 and 8, pages 9 to 11 (except highlighted portions), page 14; in Appendix A of the full VAR: cover page and contents, pages 3 , 4, and 5, pages 8 to 10, page 12, page 16 (except highlighted portions), pages 20 to 22, page 24, pages 27 and 28 (except highlighted portions), pages 32 to 37, 39, 40 to 42, 45, 49, 53, 56, and 58. In the tabs of the full VAR: the information at tabs 5 and 6, tab 7 (except the second sentence), tabs 8 and 9, tab 10 (except pages 2 and 3) and tabs 12 to 17.

3. To verify compliance with this order, I reserve the right to require the City to provide to this office a copy of the records disclosed to the requester.

Original signed by: _____
John Swaigen
Adjudicator

December 20, 2005 _____