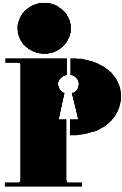
Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2105

Appeal MA-060171-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> We understand that among other things, a traffic study prepared by [a named company] has been submitted to the City of Toronto in connection with [an identified mall] proposal. The findings of that study are of direct concern to our client. Accordingly, we request to be provided with a copy of that study and with any other materials in the City's files which are of concern to our client.

The City located the responsive records, which consisted of a traffic study in connection with the [identified mall] Rezoning and Site Plan Application, along with related correspondence. The City issued a decision in which it stated that it would grant full access to the records. The City further advised the requester that a third party had been given 30 days to appeal the City's decision to grant access to the records in accordance with section 21 of the *Act*.

The third party (now the appellant) appealed the Ministry's decision to grant access to the records claiming that the request was frivolous or vexatious because it was made in bad faith. The appellant also asserted that the records should be withheld under section 10(1) of the *Act*. Throughout mediation and adjudication, the appellant was represented by counsel. For ease of reference, in this order, I will refer only to "the appellant".

During mediation, the City advised that it had consulted with the Transportation Services Division, which comments on planning applications when transportation impacts were an issue. This Division advised the City, who in turn advised the Mediator, that the traffic study and related correspondence at issue in the present appeal are available for public viewing in accordance with a City procedure. The City further advised that when viewing the documents, the public could take notes from the documents but could not photocopy entire documents.

The Mediator advised the original requester and the appellant of the above. The original requester explained that she remains interested in receiving a hard copy of the requested documents. The appellant maintained his position that no records at issue should be released.

Mediation did not resolve the appeal and it was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the appellant and received representations in response. I decided that it was not necessary to seek representations from the City or the original requester before issuing this order.

RECORDS AND ISSUES:

The records consist of:

- 75 pages of memorandum and other correspondence
- Power point presentation pages 76 to 87
- Transportation Impact Assessment – pages 88 to 253

- Addendum Report – Transportation Impact Assessment – pages 254 -390

The issues are whether the above-noted records are exempt from disclosure under section 10(1) (third party information) and whether the request is frivolous or vexatious within the meaning of section 4(1), of the *Act*.

DISCUSSION:

IS THE REQUEST FRIVOLOUS OR VEXATIOUS?

The provisions to be considered in determining whether a request is frivolous or vexatious are sections 4(1)(b) and 20.1(1) of the *Act* and section 5.1 of Regulation 823 made under the *Act*.

Section 4(1)(b) of the *Act* specifies that every person has a right of access to a record or part of a record in the custody or under the control of an institution unless the head of an institution is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

Sections 20.1(1)(a) and (b) of the *Act* go on to indicate that a head who refuses to provide access to a record because the request is frivolous or vexatious must state this position in his or her decision letter and provide reasons to support the opinion.

Sections 5.1(a) and (b) of Regulation 823 provide guidelines for determining whether a request is frivolous or vexatious. They prescribe that a head shall conclude that a request for a record or personal information is frivolous or vexatious if:

> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

Based on my reading of sections 4(1)(b) and 20.1(1) of the *Act* and section 5.1 of Regulation 823 made under the *Act*, the issue of whether a request is frivolous or vexatious is one that can only be raised by an institution and not by an affected party. Because the City did not raise the application of these sections as an issue, I find that the request cannot be found to be frivolous or vexatious. I will now turn to the remaining issue in the appeal.

THIRD PARTY INFORMATION

The appellant also objected to disclosure of the records on the basis of the mandatory exemption under section 10(1) of the *Act*. The appellant continued to maintain that the records ought to be

withheld even though the City advised that the records were available for public viewing. Because section 10(1) is designed to protect the **confidential** "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], I asked the appellant to respond to the following question, in addition to the rest of the information and questions provided in the Notice of Inquiry:

> **The City has advised that the records are available for public viewing. Accordingly, can the mandatory exemption at section 10 apply to the records?** [emphasis in original]

The appellant did not provide any representations to support his position that the records should be exempt from disclosure under section 10(1) of the *Act*. The only harm described by the appellant are those which may arise from the on-going disputes between himself and the named company, and are entirely unrelated to the factors under section 10(1) that I am bound to consider. I find it surprising, to say the least, that the appellant would make this claim and then provide no representations to support it.

In the absence of persuasive representations, I see no reason to disturb the City's decision.

ORDER:

I uphold the City's decision to disclose the records.

Original signed by: October 19, 2006
Beverley Caddigan
Adjudicator