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

ORDER MO-2159

Appeal MA-060058-1

City of Toronto

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NATURE OF THE APPEAL:

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

> I am requesting information concerning the agreement between the City of Toronto and a [named] Corporation regarding publication boxes or publication dispensing units; permits issued by the City of Toronto to a [named] Corporation for the placement and/or installation of publication boxes or publication dispensing units.

The terms, "publication boxes" and "publication dispensing units", refer to street boxes to be used for the sale or distribution of newspapers and other print media.

In its initial decision, the City informed the requester that "Staff of Transportation Services has advised that the City has not issued any location permits at this time. Access …cannot be granted to those records, as the records you have requested do not exist".

The City also informed the requester that because disclosure of an agreement between the City and the named Corporation may affect the Corporation's interests, it would be given an opportunity to make representations concerning disclosure under section 21(1) of the *Act*.

The requester (now the appellant) appealed the City's decision with respect to the non-existence of location permits, without prejudice to her right to appeal the forthcoming access decision regarding the agreement.

The City subsequently issued a decision in which it granted partial access to a Settlement Agreement (the Agreement) between the City and the Corporation (the affected party) regarding publication boxes or publication dispensing units. The City applied the exemptions found in sections 10(1) (third party information) and 11 (economic and other interests) of the *Act* to deny access to some of the information contained in the Agreement.

The appellant advised this office that she wished to add the denial of access to portions of the Agreement as an issue in the appeal that she had filed, in addition to the issue of whether the City conducted a reasonable search for location permits.

During mediation, the City confirmed that the specific exemptions applied to deny access to portions of the Agreement are sections 10(1)(a) and (c) and 11 (c) and (d) of the *Act*.

The appellant clarified that her request for permits includes any records reflecting approval from the City for the affected party to place publication boxes or publication dispensing units on the streets.

The City conducted an additional search for records reflecting approval for the affected party to place boxes or dispensing units on the streets. This search was not successful in locating responsive records. The City issued a further letter indicating that no location permits had been

issued as the City is still in the process of fulfilling the requirements of the Settlement Agreement which requires that permits be issued for any new boxes to be placed on City streets. As no new boxes have been placed under this requirement, the City maintains that no permits have been issued. The appellant maintains her position that records concerning location permits and/or approval to place publication boxes or publication dispensing units on the streets should exist.

As further mediation was not possible, the file was moved to the adjudication stage of the appeal process. I sought and received the representations of the City on all of the issues and the affected party with respect to section 10(1) only, initially. I sent a complete copy of the representations of the affected party and the non-confidential portions of the representations of the City to the appellant, along with a Notice of Inquiry setting out the facts and issues, seeking her representations. I received representations from the appellant in response. I shared these representations with the City and received submissions by way of reply.

RECORD:

The record at issue consists of those portions of the Settlement Agreement between the City and the affected party to which access has been denied.

DISCUSSION:

THIRD PARTY INFORMATION

The City has claimed the application of sections 10(1)(a) and (c) to the severances contained in paragraphs 5, 7, 8, 10 and 13 of the Agreement.

Sections 10(1)(a) and (c) state:

> 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, if 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;
>
> (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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1)

serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The City and the affected party submit that the information in the record meets the definition of commercial and financial information. These types of information as listed in section 10(1) have been defined as follows in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The City states that:

> The information at issue includes the amount of the full application for the permit application relevant to the original boxes on the list as well as amount of the reimbursement due by the [affected party] to the City for services rendered by the City as well as information about the blended formula of the content of the [affected party's] publication.

The affected party submits that the Agreement clearly constitutes or contains "commercial" and "financial" information.

The appellant states that:

> From what the appellant is able to discern from the partially disclosed Agreement, the City has obliterated four types of information: the amount of the application fee (paragraph 5); the amount of the insurance certificate (paragraph 7); the amount of [the affected party's] reimbursement to the City (paragraph 8); and the amount of recycled fibre in the paper material placed in the boxes (paragraph 10). The nature of the information in paragraphs 6 and 13 of the Agreement is unknown to, and cannot be determined by, the appellant as those paragraphs have been completely obliterated in the copy of the Agreement that was produced…
>
> The appellant submits that neither the amount of the application fee nor the recycled fibre content is "commercial information." The amount of the application fee (paragraph 5 of the Agreement) and the recycled fibre content (paragraph 10 of the Agreement) do not relate to the buying, selling or exchange of merchandise or services. Rather, both are prescribed by the by-laws contained in the *Municipal Code*. The application fees for publication box permits were set out in Schedule A to section 313-44 of *Municipal Code* Chapter 313 ("Section 313-44"), which was in force until December 7, 2005. The current permit application fees are set out in section 743-3 of *Municipal Code* Chapter 743 ("Section 743-3"), paragraph 1. Similarly, Section 31344.B(7) sets out the previous recycled fibre requirement and Section 7433.G(19) provides the current requirement… The type of information that falls within the definition of "financial information" includes such things as accounting methods, pricing practices, profit and loss data and overhead and operating costs. [Order PO-2010] The application fee and recycled fibre content are not that type of information. For the purposes of this submission only, the appellant accepts that the amount of the reimbursement to the City for services provided by the City (paragraph 8 of the Agreement) and the amount of the insurance certificate (paragraph 7 of the Agreement) is information that relates to the exchange of services and may be commercial information. However, the appellant submits that, as discussed below, this information is not exempted from disclosure under the other two parts of the test.

Analysis/Findings

The City has claimed section 10(1) of the *Act* for all of the severances except paragraph 6. Upon my review of the record, along with the submissions of the parties, I find that all of the severances for which section 10(1) has been claimed, except for paragraph 13, contain commercial information. These severances, at paragraphs 5, 7, 8 and 10, contain information that relates solely to the buying, selling or exchange of services, namely the commercial terms for the provision of the City's approval of the affected party's permit applications for publication boxes. I do not agree with the appellant that the amount of the application fee in paragraph 5 is

not commercial information. Regardless of how it is calculated, it pertains to the buying and selling of services and therefore qualifies as commercial information.

However, I do not find that paragraph 13 contains either commercial or financial information, or any other type of information mentioned in the preamble of section 10.

Paragraph 13 contains a term which addresses the disposition of the judicial review application brought by the affected party against the City as a result of the City and the affected party entering into the Agreement. The preamble to the Agreement, which has already been disclosed, states that the Agreement was entered into to settle this judicial review application. This information does not relate to the buying and selling of anything, nor is it of a financial nature, and I find that it does not meet part 1 of the test.

In conclusion, I find that paragraph 13 does not meet the requirements of part 1 of the test under section 10(1). Since all three parts of the section 10(1) test must be met, it is not necessary for me to address the "supplied in confidence" component in part 2 and the "harms" component in part 3 of the test. Accordingly, I conclude that this paragraph is not exempt under section 10(1). As sections 11(c) and (d) have also been claimed for paragraph 13, I will consider below whether this paragraph is exempt under those sections of the *Act*.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

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

In Confidence

In order to satisfy the "in confidence" component of part 2, 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]

Representations

The City submits that:

> Although normally the contents of an agreement will not qualify as having been supplied for the purposes of 10(1) but rather as mutually generated, the City submits that the financial/commercial information in paragraph 5 of the Agreement was not negotiated or mutually generated but instead was the [actual] amount [the affected party] had already paid or "supplied" to the City. Similarly, the other financial amounts in paragraphs 7 and 8 were not negotiated but were set requirements by the City. In addition, the amount of the fibre content in paragraph 10 was also not "negotiated" but rather was to be calculated using the set "blended formula".
>
> The City submits that what was negotiated or mutually generated were such terms of settlement as the "provision of a certificate of insurance", "written confirmation" of a proper calculation, etc.
>
> The City submits, therefore, that the information at issue was either "supplied" by [the affected party] or was the set requirements by the City that were not negotiated or mutually generated. The City further submits that there was a reasonable expectation on the part of the [the affected party] that this information would remain confidential. The [affected] party states that the "information was explicitly provided in confidence" and refers to the confidential clause in the Agreement.

The affected party did not make representations on the issue of whether the information in the Agreement was "supplied". Its representations focused on its concern that disclosure of the severed portions of the Agreement would reveal the location and number of the affected party's

publication boxes. However, upon review of the entire Agreement, I find that neither the severed or unsevered portions of the Agreement contain this information.

The appellant states that:

> …as the preamble to the Agreement reflects, [the Agreement] was a negotiated settlement of litigation. The Agreement and the content therein were not "supplied" to the City and, therefore, the information does not qualify for an exemption under section 10(1) of the *Act*.
>
> In its submissions, the City asserts that the redacted information at issue was not mutually generated, but was either the amount actually paid by [the affected party], the set requirements of the City or the results of a calculation using a blended formula. None of these assertions suggest that the information was "supplied" to the City for the purposes of section 10(1) of the *Act*. Whether [the affected party] submitted payment to the City does not change the fact that the information in the Agreement was not "supplied" to the City. Nor can requirements that are set by the City qualify as information "supplied" to the City. [Order PO-1911] That the negotiations were limited or that the information may have originated with one party are also not sufficient to displace the conclusion that the Agreement, being a contract entered into by the City, was not "supplied" to the City. [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 OR (3d) 464 (C.A)]

Analysis/Findings

In Order MO-1706, Adjudicator Bernard Morrow considered the meaning of "supplied" in section 10(1). In that order, Adjudicator Morrow states:

> … [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which this office departed from the usual conclusion that the terms of a negotiated contract were not "supplied", namely the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying *non-negotiated* confidential information supplied by the

affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

Having reviewed the Agreement and the submissions of the parties, I find that the undisclosed information in paragraphs 7, 8 and 10, is not information that is immutable or not susceptible to change. I find that the information in these paragraphs was not information that was supplied by the affected party to the City. As stated by the City in its representations:

> [T]he other financial amounts in paragraphs 7 and 8 were not negotiated but were set requirements by the City. In addition, the amount of the fibre content in paragraph 10 was also not "negotiated" but rather was to be calculated using the set "blended formula".

I further find that the undisclosed information in paragraph 5 of the Agreement is a term in a contract between the City and the affected party that was subject to negotiation. This paragraph in the Agreement came into existence as part of the City's and the affected party's negotiation of, and ultimate agreement to, the terms under which the judicial review application brought by the affected party against the City was to be resolved [Order PO-2435].

The undisclosed information in paragraphs 5, 7, 8 and 10 does not satisfy the "supplied" component of part 2 of the test under section 10(1). Accordingly, it is not necessary for me to address the "in confidence" component of part 2 of section 10(1) or the "harms" component in part 3 for these paragraphs of the Agreement. The information in paragraphs 5, 7, 8 and 10 do not qualify for exemption under section 10(1) as all three parts of the test must be satisfied. As sections 11(c) and (d) have been claimed for paragraphs 5, 7, 8 and 10 along with paragraph 13, I will also consider whether these paragraphs are exempt under those sections of the *Act*.

ECONOMIC AND OTHER INTERESTS

The City has claimed the application of sections 11(c) and (d) to all of the information severed from the Agreement. These sections state:

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

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.

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

The City submits that disclosure of the severed portions of the Agreement could reasonably be expected to prejudice the economic interests of the City or be injurious to its financial interests. In the non-confidential portions of its representations, the City states that:

> In Order PO-1639, Adjudicator Mumtaz Jiwan found in support of the Ontario Casino Corporation's contention that the disclosure of a settlement record could affect its ability to negotiate agreements with other third parties.
>
> As indicated in the background of these representations, there is currently a moratorium on permit applications for new or additional publication boxes... The City is of the view that the disclosure of the severed details contained in the Agreement could reasonably be expected to prejudice its ability in setting the requirements for approval for additional or new publication boxes for the various newspaper publications and subsequent agreements, once the moratorium is over. In particular, the financial information such as the amount of the reimbursement for the applications and the actual cost for work done by the City's inspectors, clerks, etc. could be used by other newspaper publishers in gaining leverage in their dealings with the City… In addition, …[t]his would increase the administration and enforcements cost to the City to later ensure compliance...

The appellant relies on Orders MO-1184 and MO-2040 and submits that the exemptions in sections 11(c) and (d) of the *Act* do not apply to the information in the Agreement. The appellant states:

> The City has not provided detailed and convincing evidence that disclosure of the information in the Agreement can reasonably be expected to prejudice the economic interests of the City or the competitive interests of the City. The information in the Agreement does not relate in any way to the City's ability to earn money in the market place or to compete for business with other private or public sector entities. The information relates to the City's regulation of publication boxes. The stated purposes of the City's publication box strategy are: (1) to harmonize the rules and develop one set of common by-laws; and (2) to contribute to the Beautiful City agenda. [Staff Report to City Council entitled, "Publication Box Strategy - Beautiful City Initiative"; …City's submissions, page 2, paragraph 3]. It is not a way for the City to be engaged in business in the market place. Moreover, no entity competes with the City in the regulation of publication boxes or for the application fees submitted to the City as part of that regulatory regime. Disclosure of the information could not prejudice a "competitive" position of the City.
>
> The City suggests that disclosure of the contents of the Agreement could affect its ability to negotiate agreements with other third parties. In addition to the fact that this suggestion is merely speculative (and, therefore, not evidence of a reasonable expectation of harm), the appellant submits that the suggested outcome is unlikely for a number of reasons. First, the Agreement relates to a settlement of litigation between [the affected party] and the City in November 2003, almost three years ago. It is not clear how it would affect the City's ability to negotiate agreements today, especially since the actions that were to have been taken pursuant to the Agreement should have all been completed. Second, Section 743-3 sets out the requirements that must be met by publications seeking new permits. Third, Section 743-3.B provides that "all previous agreements pertaining to the placement, installation and maintenance of installations entered into prior to the date that this section is enacted are deemed to be null and void effective October 1, 2006, and all persons holding a permit for an installation shall enter into a new agreement as required under this section by that date." Since the date for entering into new agreements has now passed, disclosure of the information will not affect the City's ability to enter into them.

Analysis/Findings

As most of the Agreement has been released to the appellant, I will now review each paragraph for which sections 11(c) and (d) have been applied, along with the representations of the parties (including the confidential representations of the City), to determine whether the severances are subject to the claimed exemptions.

Paragraph 5

The City has severed from this paragraph a global figure for the affected party's publication boxes permit application fee. The Agreement does not indicate the number of publication boxes that this fee applies to. There is no way to ascertain from the Agreement the application fee per publication box charged to the affected party. The City has agreed that this global fee is comprised of the cheques received up to the date of the Agreement on November 27, 2003.

By the terms of paragraphs 9 and 11 of the Agreement, the City and the affected party have agreed that a permit would have to be applied for in order for the affected party to place additional boxes on City property. I therefore do not agree with the City that disclosure of the agreed upon application fee would "prejudice its ability in setting the requirements for approval for additional or new publication boxes". Other publication publishers would not "gain leverage" in their dealings with the City, as disclosure of this global figure is meaningless without these publishers being able to ascertain the permit fee per box. Even if these publishers could ascertain this information, I find that City has not provided me with the type of "detailed and convincing" evidence to establish a "reasonable expectation of harm" under section 11(c) or (d) (*i.e.*, prejudice to the City's economic interests or competitive position, or injury to its financial interests) as a result of disclosing the amount charged by the City over three years ago for permits for publication boxes. Therefore, I find that sections 11(c) and (d) do not apply to the severance in paragraph 5 and I will order this disclosed.

Paragraph 6

The entire paragraph has been severed. I have considered the complete representations of the City, including the confidential portions. The severed paragraph deals with a compliance issue related to publication boxes.

The appellant cites the application of certain by-laws contained in the *Municipal Code*. She submits that:

> Section 743-3 [part of Chapter 743 of the *Municipal Code*, also referred to as by-law 743] sets out the requirements that must be met by publications seeking new permits. …Section 743-3.B provides that "all previous agreements pertaining to the placement, installation and maintenance of installations entered into prior to the date that this section is enacted are deemed to be null and void effective October 1, 2006, and all persons holding a permit for an installation shall enter into a new agreement as required under this section by that date."

The information revealed in paragraph 6 of the Agreement, which is dated November 27, 2003, is no longer applicable based on the above-noted by-law. Furthermore the compliance issue identified in paragraph 6 of the Agreement has also been publicly revealed in the Staff Report to City Council entitled, "Publication Box Strategy - Beautiful City Initiative", dated August 26, 2004, which was referred to in both the City's and the appellant's representations.

The City has not provided me with "detailed and convincing" evidence to establish a reasonable expectation of the harms in either section 11(c) or (d) as a result of disclosing the information in paragraph 6 of the Agreement. I therefore find that sections 11(c) and (d) do not apply to the severance of paragraph 6 and I will order this disclosed.

Paragraph 7

This paragraph deals with the global dollar amount of liability insurance the affected party was required to obtain for any claims made with respect to the affected party's publication boxes. Only the amount of this insurance coverage has been severed. I accept the appellant's argument that the amount of liability insurance agreed to by the City in November 2003 is not relevant to the amount of liability insurance now required to be undertaken by other publishers who have publication boxes on City property. I have not been provided with evidence that the amount of liability insurance a publisher would be required to post with the City today is determined by the amount of insurance required by the City over three years ago. Furthermore, the number of publication boxes covered by this insurance is not specified. Even if the amount of liability insurance required in 2003 for placement of publication boxes on City property was relevant today, disclosure of this global figure is meaningless without other publishers being able to ascertain the insurance fee per box.

I conclude that the City has not provided me with "detailed and convincing" evidence to establish a reasonable expectation of the harms in either section 11(c) or (d) as a result of disclosing the severed information in paragraph 7 of the Agreement. I therefore find that sections 11(c) and (d) do not apply to the severance in paragraph 7 and I will order this disclosed. In making this finding, I have considered the entire representations of the City, including the confidential portions.

Paragraph 8

The City has severed from this paragraph the hourly overtime rate for certain types of City employees who could be involved in expediting the approval of the affected party's publication boxes' permit application, along with the administration charge rate and the total amount that the City can charge the affected party to expedite this application. The City states in its representations that:

> …the actual cost for work done by the City's inspectors, clerks, etc. could be used by other newspaper publishers in gaining leverage in their dealings with the City.

I do not agree with the City's submission concerning the disclosure of the November 2003 hourly overtime rate, administration charge rate and the upper limit to be charged for the City's staff to expedite the affected party's publication boxes' permit application. I find that the City has not tendered the requisite "detailed and convincing" evidence that disclosure could reasonably be expected to either prejudice the economic interests or the competitive position of the City or be injurious to the financial interests of the City. I do not find it reasonable that, more than three years after the severed amounts were agreed to be charged by the City to the affected

party, any new applicant for an expedited permit would be able to rely on the severed figures in paragraph 8 to the detriment of the City. Upon review of by-law 743 referred to above, along with the representations of the parties, I also do not have any evidence before me that the City would or could now expedite these types of permit applications.

As stated by the appellant in her representations: "…no entity competes with the City in the regulation of publication boxes or for the application fees submitted to the City as part of that regulatory regime".

I find that sections 11(c) and (d) do not apply to the severances in paragraph 8 and I will order this information disclosed. In making this finding, I have considered the entire representations of the City, including the confidential portions.

Paragraph 10

As indicated above, paragraph 10 contains the recycled fibre requirement for the affected party's publication placed in the publication boxes. The recycled fibre content is now prescribed by by-law 743 of December 7, 2005. This by-law applies to all permits for publication boxes on City property. In these circumstances, I find that the City has failed to establish a reasonable expectation that disclosure of the amount of the recycled fibre requirement agreed to by the City in November 2003, as contained in the Agreement, could lead to the harms anticipated in sections 11(c) and (d) of the *Act*. I will therefore order the undisclosed portion of paragraph 10 disclosed.

Paragraph 13

Paragraph 13 contains the term which addresses the disposition of the judicial review application brought by the affected party against the City as a result of their entering into the Agreement. I do not have any evidence that disclosure of this term "could reasonably be expected to" lead to the results specified in sections 11(c) and (d). I will therefore order this information disclosed.

Confidentiality Clause and Disclosure of the Agreement

In making my findings under section 11(c) and (d), I have considered the City's representations regarding the application of the confidentiality clause in the Agreement, along with the alleged harms anticipated by the City in both the confidential and non-confidential portions of its representations.

The confidentiality clause is contained in the previously disclosed paragraph 12 and states:

> This agreement and the terms of settlement described herein shall be confidential and not disclosed to anyone other than the parties other than as required by law.

Former Assistant Commissioner Tom Mitchinson considered the effect of a confidentiality clause in a settlement agreement in Order MO-1184 and made the following finding:

> However, in my view, the presence of a confidentiality clause in and of itself is not sufficient to bring the record within the scope of sections 11 (c) and (d); this or any other term of a settlement agreement, such as the one at issue in this appeal, cannot take precedence over the statutory right of access provided in the *Act*.

As stated above, most of the Agreement was disclosed by the City to the appellant with the City's March 28, 2006 decision letter. I do not accept that disclosure of the entire Agreement could reasonably be expected to cause any of the harms anticipated by sections 11(c) and (d) of the *Act*.

As of October 1, 2006, all persons holding a permit for an installation of publication boxes were required by by-law 743 to enter into a new agreement for these boxes in accordance with the terms of this by-law. I do not find that the situation in Order PO-1639, relied upon by the City, is persuasive in this appeal. In Order PO-1639, Adjudicator Jiwan agreed with the institution that, should the settlement agreement be disclosed, this would lead third parties to use this settlement as leverage in seeking to obtain compensation where it was not justified. Based on the provisions of by-law 743, I am not satisfied that disclosure of the Agreement in this appeal could reasonably be expected to result in the harm anticipated in Order PO-1639. On November 16, 2006, I wrote to the City seeking, among other things, its reply representations on the appellant's submission concerning the applicability of by-law 743 to the issues in this appeal. The City did not provide me with reply representations concerning the applicability of this by-law.

Because I have not found that any of the exemptions claimed by the City are applicable to the severed information in the Agreement, I will order the entire Agreement to be disclosed to the appellant.

SEARCH FOR RESPONSIVE RECORDS

The appellant submits that the City has not conducted a reasonable search for records responsive to her request. In particular, the appellant submits that the City should be in possession of permits and approvals for the affected party to place publication boxes or publication dispensing units on City streets.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The City was asked to provide a written summary of all steps taken in response to the request. In particular, the City was asked to respond to the following:

1. Did the institution contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the institution did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The City provided both confidential and non-confidential representations on the issue of the search it conducted for responsive records. The City submits that it conducted searches both at the request stage and at the mediation stage of the appeal. The City states that:

> Original and subsequent searches were conducted by the Director of Transportation Services, South District for both the Settlement Agreement and information about any approvals for permits relating to the [affected party] publication boxes. The Director also canvassed all relevant staff in his area as well as the lawyer in the City's legal department who had carriage of the litigation file for responsive records.
>
> Their searches located only copies of the Agreement (both an unsigned and signed copy) but no permits or records reflecting approval for permits.

> As indicated in the background to these representations, there were no permits issued for the [the affected party] publication boxes that were listed as a result of the Agreement by [the affected party]. Further, there was and continues to be a moratorium on applications for permits for any new or additional boxes. Consequently, there have been no permits and therefore no records reflecting approvals for the [the affected party] to place either new or existing publication boxes…
>
> In the circumstances of this appeal, no permit records have been created because there have been no approvals for either the publication boxes that are currently in place or for any new or additional boxes. The City submits that therefore in the circumstances of this appeal, reasonable searches have been conducted by knowledgeable staff.

The appellant was asked to comment on the City's representations as to the search it conducted. The appellant's request is dated Dec 19, 2005. She submits that:

> …permits or records approving the placement of publication boxes or publication dispensing units by [the affected party] should exist. This is because publications are required to have permits for each box that is installed and maintained on the City's sidewalks and streets.
>
> Both Section 313-44, which was in force until December 7, 2005, and Section 743-3, which replaced Section 313-44 and is currently in force, require that a person must hold a permit before any publication box may be placed or maintained on City streets or sidewalks. Specifically, By-law 313-44 provided as follows:
>
> > "A. No person shall place or maintain or allow or cause to be placed or maintained any publication vending box or kiosk on any highway under the jurisdiction of the City unless:
> >
> > (1) The person holds a permit issued by the City..." [Emphasis added.]
>
> Similarly, Section 743-3 provides:
>
> > "A. No person shall place, install or maintain an installation on, along or in a City street unless the person has:
> >
> > (1) complied with the requirements of this section;
> >
> > (2) obtained all applicable permits required by the City;

> (3) paid all applicable fees as required by the City;
>
> (4) submitted applicable evidence of required insurance; and
>
> (5) entered into and is in compliance with an agreement." [Emphasis added.]

In addition, the Agreement itself, which is the only record that the City has produced in response to the appellant's request, contemplates [the affected party] holding a permit for each location where it has placed [a] publication box. The Agreement provides as follows:

> "2. [The affected party] will provide to the City within fourteen days of the date of this agreement a municipal address for each box location listed on [the affected party's] November 3, 2003 application for authorization for the …newspaper boxes (the "Permit Applications"), plus the number of [the affected party] boxes ("Box") at each such location.
>
> 3. The City and [the affected party] shall together inspect all of the Boxes currently placed in the City of Toronto. ... If, pursuant to this paragraph, the City determines a specific Box is compliant with the By-law (including after it is brought into compliance under this paragraph), that Box can remain in that specific approved location pending completion of processing under the relevant By-law. A permit or permits as may be appropriate shall be provided by the City in due course covering such Box. If pursuant to this paragraph, a specific Box cannot readily be brought into compliance with the placement requirements of the By-law, that Box shall be removed by [the affected party] within 48 hours of the inspection of that Box." [Emphasis added.]

The City was asked to reply to the appellant's submission that records of permits should exist due to the requirement for permits contained in both Section 313-44, which was in force until December 7, 2005, and by-law 743, which replaced Section 313-44, and was in force at the time of the request.

In response, the City referred me to certain portions of its confidential representations and to pages 7 and 8 of its non-confidential representations.

Analysis/Findings

The *Act* does not require the City to prove with absolute certainty that further records do not exist. However, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

I find that the City has provided a comprehensive description of the steps it undertook to locate records responsive to the appellant's request, along with providing representations that satisfy me as to why additional responsive records are unlikely to exist. As well, in my view, the appellant has not provided a reasonable basis for concluding that additional records exist. Based on the representations of the City, both confidential and non-confidential, and the representations of the appellant, I am satisfied that the City conducted a reasonable search for records responsive to the appellant's request and I dismiss that part of the appeal.

ORDER:

1 I uphold the City's search for responsive records.

2. I order the City to disclose the entire record, the Settlement Agreement, to the appellant by **March 22, 2007** but not before **March 16, 2007**.

3. In order to verify compliance with provision 2 of this Order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant.

Original Signed by: February 15, 2007
Diane Smith
Adjudicator