



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2219

Appeal MA06-369

The Corporation of the City of London



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The City of London (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records that relate to a particular construction project:

Records that came into the City's possession between June 1, 2005 and August 16, 2006 relating to the watermain break that occurred during [a named road widening construction] project and records relating to any resulting damage.

The City located responsive records and denied access to portions of them pursuant to sections 11(d) and (e) (economic and other interests) and 14(1) (invasion of privacy) of the *Act*.

The requester, now the appellant, appealed the City's decision.

Mediation was not possible and the file was moved to the adjudication stage of the appeal process. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the City and four persons whose interests may be affected by the disclosure of the records (the affected persons), seeking their representations, initially. I received representations from the City only. I sent a copy of the City's representations to the appellant, along with a Notice of Inquiry. Portions of the City's representations were withheld due to confidentiality concerns. I received representations from the appellant. I then sent a copy of the appellant's representations to the City, seeking its reply representations to issues raised by the appellant. I received reply representations from the City.

RECORDS:

The records at issue in this appeal consist of correspondence and e-mail communications, as described in the following chart:

Record Number	Date	Record Description	Exemption Claimed by City	Number of Pages
1(a)(b)	2006-01-19	Letter from insurers for [name] – [address] to [contractor's insurance company].	Sec 14	2
2	2005-08-08	Letter from insurers for [name] – [address] to City of London Risk Management re sewer back up claim of [name] – [address], London	Sec 14	1
3	2005-06-10	Letter from insurers for [name] – [address] to City of London Environmental & Engineering Services re sewer back up claim of [name] – [address], London	Sec 14	1
4	2006-04-21	Note to file from City of London Risk Management re sewer back up claim of	Sec 14	1

Record Number	Date	Record Description	Exemption Claimed by City	Number of Pages
		[name]		
5	2005-06-09	Letter from City of London Risk Management to insurers for [name] – [address] re sewer back up claim of [name] – [address], London	Sec 14	1
7(a)(b)	2005-08-04	Staff e-mails regarding sewer back up at [address]	Sec 11 (d)(e)	2
8	2005-07-25 2005-07-26	Staff e-mails regarding sewer back up at [address]	Sec 11 (d)(e)	1
9	2005-06-24	Staff e-mails regarding sewer back up at [address],	Sec 11 (d)(e)	1
10	2005-07-25 2005-07-26 2005-07-28	Staff e-mails regarding sewer back up at [address]	Sec 11 (d)(e)	1
11 (a)(b)	2005-06-24	Staff e-mail regarding sewer back up at [address]	Sec 11 (d)(e)	2
12(a)(b)(c)	2005-08-04	Staff e-mails regarding sewer back up at [address]	Sec 11 (d)(e)	3
A-13 (a)(b)(c)	2005-08-04	Staff e-mails regarding sewer back up at [address]	Sec 11 (d)(e)	3
14	2005-08-05	Staff e-mail regarding sewer back up at [address]	Sec 11 (d)(e)	1
15	2005-08-05	Note to file from City of London Risk Management re sewer back up at [address]	Sec 11 (d)(e)	1
16	2005-06-23	Note to file from City of London Risk Management re sewer back up at [address]	Sec 11 (d)(e)	1
26	2005-06-09	Letter from City of London Risk Management to insurers for [name] – [address] re claims for [address], - no disclosure	Sec 14	1

DISCUSSION:

BACKGROUND

The City describes the events surrounding the creation of the records as follows:

On May 20, 2005 a water main line break occurred while a contractor hired by the City was working on a road project. Several homes in the area suffered flooded

basement damage from water and sanitary sewer backup. The position taken by the City is that any financial loss suffered by the homeowners is the responsibility of the contractor and its insurer, [contractor's insurance company]. The matter of liability for these homeowner's claims has not yet been resolved. Negotiations between the City, [the contractor's insurance company] and the contractor's insurance adjuster are still ongoing.

ECONOMIC AND OTHER INTERESTS

I will first determine whether the discretionary exemptions at sections 11(d) and (e) apply to Records 7 to 16.

Sections 11(d) and (e) state:

A head may refuse to disclose a record that contains,

- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf 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.

Section 11(d): injury to financial interests

Representations

The City provided both confidential and non-confidential representations concerning whether the discretionary exemption at section 11(d) applies to Records 7 to 16. The City claims that these records:

...contain internal City correspondence where employees are discussing possible approaches relating to its position on liability for this incident and relating to

homeowner restitution. The discussion includes courses of action or ways of proceeding with the homeowner claims...

The City's Risk Management Division receives almost 3 new individual claims each working day (745 in 2006). To provide the public with any specific insight into its claims decision making process would place the City at a financial disadvantage.

The appellant submits that:

The exemption at section 11(d) does not apply, as the City has not shown that disclosure of the records can reasonably be expected to injure the financial interests of the City. The City has not provided detailed and convincing evidence to establish a reasonable expectation of harm.

In reply, the City submits that:

To provide the public with any specific insight into its claims decision making process would place the City at a financial disadvantage for any future claims negotiations or for any ongoing litigation. This expectation is not fanciful, imaginary or contrived, but rather partly evidenced by the appellant's disclosure in her representations of her client's ongoing litigation against the City and her expectation that these records may be used against the City. The City's intent in refusing disclosure to these records is to minimize any financial losses from future claims or litigation. To disclose the City's negotiating positions and plans would weaken the City's negotiating position in any future claims.

Analysis/Findings

For sections 11(d) to apply, the City 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.)].

I find that the City has not provided the kind of "detailed and convincing" evidence required to demonstrate that the disclosure of the course of action or way of proceeding with the specific individual homeowner claim reflected in Records 7 to 16 could reasonably be expected to be injurious to the financial interests of the City. I find that the manner in which the City dealt with this homeowner's claim was unusual due to specific exenuating circumstances. The City has not provided me with sufficiently "detailed and convincing" evidence that the information in the records is relevant to, or related to, the appellant's ongoing litigation or with any other homeowner claim against the City.

Therefore, I find that disclosure of the information in Records 7 to 16 cannot reasonably be expected to be injurious to the financial interests of the City and that section 11(d) does not apply to exempt these records from disclosure.

Section 11(e): positions, plans, procedures, criteria or instructions

Representations

The City submits that the discretionary exemption at section 11(e) applies to Records 7 to 16, as:

...disclosure of this information [in the records] would interfere with the ongoing negotiations between the City, the insurance company and the contractor's insurance adjuster. Disclosure of the information would provide inside knowledge of the City's position to the opposing parties.

The appellant submits that:

The exemption at 11(e) does not apply, as the records in question do not constitute positions, plans, procedures, criteria, or instructions to be applied to negotiations carried on by the City.

In reply, the City states that:

The matter of liability for these homeowner's claims has not yet been resolved. Negotiations between the City, [the contractor's insurance company], the homeowners' insurance companies and agents and the contractor's insurance adjuster are still ongoing. These records contain references to the City's plans and instructions related to these negotiations. To disclose these positions and plans before the resolution of these negotiations would weaken the City's negotiating position.

Analysis/Findings

In order for section 11(e) to apply, the City must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution.
[Order PO-2064]

Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

The terms “positions, plans, procedures, criteria or instructions” are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

I find that the records describe the completed negotiations relating to the resolution of the claim made against the City by this particular homeowner. I adopt the findings of former Commissioner Sidney B. Linden in Order P-87, who reviewed the application of section 18(1)(e) (of the provincial *Act* the equivalent provision to section 11(e) of the municipal *Act*) to completed negotiations and stated that:

Turning to the exemption claim under subsection 18(1)(e), this subsection refers to “positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario” (emphasis added). In my view, the exemption is not available to prevent the release of these types of records in situations where they have been applied to negotiations between the government and third parties (emphasis added). Furthermore, to interpret the phrase “or to be carried on by or on behalf of an institution of the Government of Ontario” to mean any possible future negotiations including those that have not been presently commenced or even contemplated, is in my view, too wide. My conclusion is therefore that in the circumstances of this appeal, negotiations between the institution and Toyota have been completed and any positions, plans, procedures, criteria or instructions applied to these negotiations are no longer exempt from disclosure under subsection 18(1)(e).

In my view, the City has failed to demonstrate that the completed negotiations which are reflected in Records 7 to 16 contain “positions, plans, procedures, criteria or instructions”. Therefore, I conclude that parts one and two of the test under section 11(e) have not been met. Accordingly, I find that section 11(e) does not exempt the records at issue from disclosure.

In conclusion, I find that the information in Records 7 to 16 is not exempt from disclosure by reason of sections 11(d) and (e). I will now determine whether these records, as well as the remaining records, contain personal information and are exempt from disclosure by reason of section 14(1) (personal privacy) of the *Act*.

PERSONAL INFORMATION

The City claims that Records 1 to 5 and 26 contain personal information. Upon review of Records 7 to 16 it also appears that these records may contain personal information. I will now determine whether all the records contain personal information and, if so, to whom it relates.

The term “personal information” is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

The City submits that:

The records contain correspondence to and from homeowners who are individual natural persons and correspondence with insurance companies acting as the agents of the homeowners and internal City correspondence discussing the insurance claims made by the individual homeowners. Their homes and contents were damaged by the flooding and required reconstruction and repairs, the costs for which are being claimed. The records contain names and addresses of the individual homeowners and the records indicate whether or not these homeowners have personal home insurance...

The records contain the names and addresses of individual natural persons (the homeowners), their insurance policy numbers and file numbers and the dollar amount of damages suffered. Several of the records are letters from the homeowners' insurance companies acting on behalf of their insured. All of this information fits the definition of personal information including the fact that individual homeowners have suffered financial losses and have submitted claims for financial restitution.

The appellant submits that the records do not contain personal information.

Analysis/Findings

I agree with the City that certain portions of all of the records contain the personal information of the affected person; namely, information relating to financial transactions in which they have been involved; an identifying number assigned to them; their addresses and telephone numbers; and their names where their names appear with other personal information about them [paragraphs (b), (c), (d) and (h) of the definition of "personal information"]. The records do not include any personal information relating to the appellant.

PERSONAL PRIVACY

I will now determine whether the mandatory exemption at section 14(1) applies to the personal information at issue in the records.

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. In the circumstances, it appears that the only exception that could apply is paragraph (f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f).

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14.

The City relies on paragraph (f) of section 14(3), which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The City states in its representations that:

Record numbers 1 to 5 and 26 all relate to the claims for financial restitution made by individual natural persons and section 14(3)(f) indicates that the disclosure of an individual's finances or financial activities does constitute an unjustified invasion of personal information, therefore, as required by the mandatory exemption [in] section 14(1), the records must not be disclosed to any person other than the individual to whom the information relates.

The appellant states that:

[D]isclosure of the records would not constitute an unjustified invasion of personal privacy... The presumptions contained in sub-section 14(3) do not apply. It is the appellant's position that the records in question should be disclosed in their entirety or, in the alternative, should be partially disclosed with personal information severed.

Analysis/Findings

Based on my review of the records, I agree with the City that portions of all the records describe the affected persons' financial activities within the meaning of section 14(3)(f). These portions of the records contain the personal information of the affected persons; namely, information relating to financial transactions in which these individuals have been involved, an identifying number assigned to these individuals, the addresses and telephone numbers of these individuals, and their names. I am making this finding with respect to all of the records, Records 1 to 5 and 26, along with the records where the City has not claimed the application of the mandatory exemption in section 14(1), Records 7 to 16. Although the City did obtain the consent of the affected person referred to in Records 7 to 16 to disclose his personal information contained in other records, I do not have evidence to demonstrate that the affected person consented to the release of personal information in Records 7 to 16. Records 7 to 16 only contain the personal information of this one affected person.

Having found that the section 14(3)(f) presumption applies to the personal information in the records, I am precluded from considering whether any of the factors weighing for or against disclosure under section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767] in relation to the personal information in the records. Accordingly, I find that the disclosure of the personal information at issue would be an unjustified invasion of the personal privacy of individuals other than the appellant under section 14(1). The section 14(3)(f) presumption can be overcome, however, if the personal information at issue falls within the ambit of section 14(4) or if the "compelling public interest" override provision at section 16 applies [*John Doe*, cited above]. Section 14(4) is not applicable in the circumstances of this case. The personal information at issue in this appeal is therefore exempt under section 14(1), subject to my determination regarding the application of the of the public interest override.

Section 4(2) of the *Act* obliges the City to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Pursuant to sections 4(2), 43(1) and 43(3) of the *Act*, I may order the disclosure of any portions of records which are not found to be subject to an exemption. Subject to my determination as to whether the public interest override applies to the personal information in the records, the balance of the records, which do not contain personal information, is not exempt and should be shared with the appellant.

PUBLIC INTEREST OVERRIDE

Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]
- the integrity of the criminal justice system has been called into question [Order P-1779]
- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]
- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province’s ability to prepare for a nuclear emergency [Order P-901]
- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

Representations

The appellant raised the issue of the public interest override in her representations. The appellant states that:

Disclosure of the records is desirable for the purpose of subjecting the actions of the City to public scrutiny. The records are also relevant to a fair determination of rights affecting our Client in the context of ongoing litigation in the Superior Court of Justice...

[T]here is a compelling public interest in disclosing the records in question, as they are relevant to a Court action in which our Client is involved with the City. While this is a private action by our Client against the City, there is still a public interest in encouraging full disclosure in the context of any Court action,

In reply, the City submits that:

[S]ection 16 does not apply to the information contained in any of the records listed in the attached index of records. Since the initial press coverage of the water main break in May of 2005 there has been no recent public interest in this event, compelling or otherwise, and none has been expressed for access to the information contained in these specific records under appeal. In her representations the appellant indicates that her client has a personal need for the records in order to pursue [a] private action against the City of London. The Information and Privacy Commission has ordered in the past that this section cannot be used to assert private interests (Orders P-12, P-270, P-282, P-347, P-1439). The appellant has not fully explained her client's private interests nor has

she shown how her client's private interests could possibly outweigh the expectation of confidentiality provided by the mandatory 14(1) exemption.

Analysis/Findings

I agree with the reply submission made by the City that the interests being advanced by the appellant are essentially private in nature. Therefore, I find that the privacy interest protected by section 14(1), which exists in those portions of the records that I have found to be subject to the section 14(1) exemption, cannot be overcome in this case by the “public interest override” in section 16. [*John Doe*, cited above]. There is no compelling public interest in the disclosure of the personal information in this case as the appellant is requesting the information for a predominantly personal reason [Order M-319].

ORDER:

1. I uphold the City’s decision to deny access to those portions of all of the records that I have found to be exempt from disclosure by reason of section 14(1) of the *Act*. For ease of reference I will highlight those portions of the records that I have found to be not subject to disclosure. For greater certainty, the information **not** to be disclosed is the information that is highlighted in colour on a copy of the records provided to the City with this order.
2. I order the City to disclose to the appellant the non-highlighted information in the records by sending the appellant a copy of this information **by September 25, 2007 but not earlier than September 19, 2007.**
3. In order to verify compliance with this order I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, upon my request.

Original signed By: _____

August 28, 2007 _____

Diane Smith
Adjudicator