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

ORDER MO-2209

Appeal MA-060127-2

City of Toronto

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/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

In 2004, the City held a competition to appoint members to its Licensing Tribunal. As part of the application process, candidates completed an examination that included an assessment of their skills and understanding of the requirements of the position. The test was administered by City staff and was anonymously marked by senior civil servants working for the City. After the test was completed, the tests were scored and a list of four recommended candidates was provided to City Council. City Council considered the recommendations during in camera sessions in October 2004.

This appeal deals with a request under the *Act* for information related to the examination. The requester was one of the candidates who took the test.

NATURE OF THE APPEAL:

The request, dated February 9, 2006, sought access to:

> … a copy of the test I took in seeking nomination for an appointment to the Toronto Licensing Tribunal.
>
> I also request the marking scheme, marking key for the test, as well as the basis for assigning those [marks] to my test.

On April 6, 2006, this office received a deemed refusal appeal from the appellant. The appellant claimed that the City failed to make a decision within 30 days of receipt of his request as required under the *Act*.

This office subsequently contacted the City and was advised that on March 10, 2006, the City had issued a decision letter to the appellant. It appears that the appellant had not received this letter when he filed his deemed refusal appeal on April 6, 2006. Because the City had issued a decision, the deemed refusal appeal was closed.

The City's decision letter granted the appellant partial access to a copy of the transcript of his verbal response to the written test and other test scores, with category descriptions and assessment key. The City withheld portions of the records pursuant to section 14(1) of the *Act*. In addition, it took the position that other portions were non-responsive to the appellant's request. The remaining record, a copy of the test administered by the City, was withheld pursuant to section 11(h) of the *Act*.

The requester (now the appellant) appealed the City's decision. During the mediation process, the appellant advised he was no longer seeking access to the information withheld by the City pursuant to section 14(1) of the *Act*. The appellant also indicated that he was not interested in the portions of the records the City determined were non-responsive. Accordingly, the only record remaining in dispute is the test administered by the City.

Before mediation concluded, the City issued a revised decision letter and raised the application of sections 11(c) and 11(d), in addition to section 11(h) of the *Act* to deny access to the test. The Confirmation of Appeal sent by this office to the City, however, had indicated that the City was

not permitted to claim any new discretionary exemptions, since the appeal was of a decision arising from a deemed refusal situation.

I note, however that the City's decision dated March 10, 2006 was made within 30 days of their receipt of the appellant's request, and there was, in fact, no deemed refusal. Accordingly, the normal rule in section 11.01 of this office's *Code of Procedure*, which addresses the raising of further discretionary exemptions during an appeal that is not a deemed refusal, must be considered. I added the City's late-raising of the discretionary exemptions at 11(c) and 11(d) as an issue in this appeal and I sent a Notice of Inquiry to the City.

The City submitted representations in response and advised that it was no longer relying on section 11(c) of the *Act*. I reviewed the City's representations and decided that I required further representations from the City before seeking the appellant's representations. The City subsequently submitted supplemental representations and copies of the City's initial and supplemental representations were provided to the appellant. The appellant's representative submitted representations in response, which were provided in full to the City with an invitation for the City to provide reply representations, which it did.

RECORDS:

The record consists of a test administered by the City in relation to the appellant's application for appointment to the Toronto Licensing Tribunal. The record is 20 pages in length.

DISCUSSION:

LATE RAISING OF A DISCRETIONARY EXEMPTION

Section 11.01 of this office's *Code of Procedure* states, in part:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. … If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

As noted above, the City's revised decision letter dated August 1, 2006 marks the first time the City claimed the discretionary exemption at section 11(d) to deny access to the record at issue.

In Order PO-2113, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in section 11.01 of the *Code of Procedure*:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the

> exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
>
> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

The City's representations submit that the appellant is not prejudiced by its late raising of section 11(d) of the *Act* as the appellant was aware of the City's decision to claim the discretionary exemption during mediation. The appellant did not provide representations on this specific issue.

I have decided to allow the City's late raising of section 11(d) of the *Act* as I am satisfied that the appellant has not been prejudiced in responding to the City's claim. The appellant was notified of the application of section 11(d) during mediation and before I sought his representations. Accordingly, I will go on to consider whether section 11(d) and/or section 11(h) applies to the records at issue.

ECONOMIC AND OTHER INTERESTS

Section 11of the *Act* states, in part:

> 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;
>
> (h) questions that are to be used in an examination or test for an educational purpose;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams

Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 11(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.)].

Section 11(d): injury to financial interests

The City's initial representations submit that disclosure of the test would render it useless in any future competitions and would require the City to develop a new test, "with corresponding costs". After I reviewed the City's representations, I wrote to the City and asked it to respond to specific questions and to explain what "corresponding costs" entail.

The City replied that the test in question had been administered twice and is generally administered once per council term and more often if there is a vacancy and there are no qualified alternatives. The City advised that a candidate is given only one opportunity to write the test during the recruitment process and that the test in question has never been changed or varied.

The City submits that if the test in question is disclosed to the appellant, it may be necessary to create a completely new test with a different case study and set of questions which may not be as useful as the current test. The City estimates that it would take eight staff members investing a total of eight days of work to prepare the similar test using the same methodology. The City indicates that it intends to use the test in question in future competitions for tribunal members. The City advises that "corresponding costs" refers to the costs associated with developing not only the test in question, but also tests for other citizens' appointments and includes staff salaries. The City submits that it is difficult to estimate the cost to recreate the test in question and other tests for citizens' appointments.

After having an opportunity to review the City's representations and responses to my questions, the appellant submitted representations in reply. The appellant's representations questioned the City's claim that it takes a group of eight staff members to create a test similar to the one he wrote. The appellant also submits that the test at question is similar to the type of test the City has to create on an ongoing basis to assess candidates for employment or promotion opportunities with the City. Finally, the appellant notes that candidates who have taken the test

once cannot be prevented from discussing the contents with individuals who will be writing the test for the first time. As a result, if the City is truly concerned with protecting the integrity of the test, it should be developing new questions for each new test.

The City's reply representations state that members of the Licensing Tribunal are appointed for one term and need not re-write the test to sit for a second term. The City submits that each term is four years and in its opinion it would be difficult for previously unsuccessful candidates to remember the specifics of a test taken four years ago. The City's representations also addressed the appellant's position that the test in question is similar to type of test the City administers to its employees. In this regard, the City submits that it does not routinely create new tests for recruitment purposes but rather has used the same or slightly amended test materials for many years.

Analysis and Findings

As noted above, for 11(d) to apply, the City must demonstrate that disclosure of the record "could reasonably be expected to be injurious" to its financial interests. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm".

The City takes the position that, by disclosing the test to the appellant, it will be required to create a new test for the next competition. Creating the new test will involve a cost to the City and this amounts to the harm contemplated by section 11(d).

I have carefully reviewed the representations provided by the City with regard to the cost of creating a new test. In its original representations, the City states that it will be required to design "new material and questions for all examinations relating to citizens' appointments each and every time there is a vacancy, with corresponding costs to the City to create new materials and ultimately the cost would be passed onto its taxpayers." The City did not provide any specific detail as to the amount of the cost. When asked to provide greater detail on the cost of preparing a new test, the City said:

> There were 8 staff members working on the development of the test for varying lengths of time. It is estimated that 8 full staff days were needed.

I have carefully examined the test in question. It is comprised of a case study based on a real case that came before the Licensing Tribunal. The candidate is asked to prepare a decision based on materials that are provided, including the applicable legislation and documents that would be found in a typical tribunal file, such as an application form and staff report. Personal identifiers have been removed from the material in order to anonymize the case study.

Having reviewed the test, I find that the City has not demonstrated that its disclosure could reasonably be expected to be injurious to its financial interests. I find its estimate of the cost of creating a new test for future competitions to be highly speculative at best. The test appears to be standard and unremarkable in all aspects. Creating a new test would not require a large expenditure of time or resources. Staff would need to select another case that had come before

the Licensing Tribunal, a relatively simple task. Then, the documents from that case would need to be anonymized. In the case study at issue, this process of anonymization involved removing personal identifiers from approximately 13 pages of material. This would be easily and quickly accomplished. I have no evidence before me to substantiate the City's claim that eight full staff days would be needed to create a new test. In fact, based on my review of the file, this estimate is greatly exaggerated. As a result, the financial expense of developing new testing materials every four years would, in my view, have an extremely limited impact on the financial interests of a large municipality.

The City submits that it generally administers the test once every four years and uses the same test so that it does not have to create a new test for each competition. On this point, the appellant observed in his representations:

> This type of test, to qualify or identify eligibility of nominees, is similar to tests developed routinely to assess employee eligibility for hire or promotion. These types of tests are regularly re-written to deal with candidates who reapply for positions, after having been previously unsuccessful.

I find the appellant's position on this issue to be persuasive. I note that institutions, when running job competitions, routinely create new test materials and competition questions for each new competition. Given my finding with regard to the time and effort required to create a new test, and the fact that the test is only administered once every four years, I am satisfied that disclosure of this record could not reasonably be expected to be injurious to the financial interests of the City.

Finally, the City has argued that if it is required to disclose this test to the appellant, it will be required to disclose the tests for all other "citizens' appointments". The City provides no detail as to what is meant by other "citizens' appointments". However, I note that this appeal deals strictly with a request for access to a test administered to candidates of the Licensing Tribunal. Tests administered by other City departments for other posts may have different considerations. The fact that I am ordering this test to be disclosed is based on the specific circumstances of this case. It does not mean that the City is automatically required to disclose all tests for any job or tribunal competitions. Disclosure decisions for those tests will be contingent on the facts of those cases.

In summary, I am satisfied that disclosure of the record cannot reasonably be expected to be injurious to the financial interests of the City and is therefore not exempt under section 11(d) of the *Act*.

Section 11(h): examination questions

The City submitted that the test is comprised of questions that are to be used in an examination or test for an educational purpose and that section 11(h) of the *Act* is applicable. The City acknowledged that the records do not appear to contain questions that are to be used for an

"educational purpose". However, the City states:

> …a review of the material and questions indicates that they do serve to further "educate" the candidate on what the Tribunal does and the relevant knowledge and understanding required for the position. Moreover, similar to any examinations for an educational purpose, the test serves to determine who "passes or fails to make the grade". As with such an examination, the disclosure of this information would "educate" and allow any future candidate to better prepare him/herself in providing the best possible answers in order to pass the examinations and hence the necessity for new materials/questions to be created whenever there is a competition for nominations to the Tribunal.

The appellant did not provide representations on the applicability of section 11(h) to the record.

Analysis and Findings

The City has taken the position that the process to select members for the Licensing Tribunal had an 'educational purpose". I reject this argument. The City's representations do not refer to any jurisprudence, including orders of this office, to support the novel position that job competitions have an "educational purpose". The wording of section 11(h) is clear and unambiguous. The purpose of the test in question was to help select members for the tribunal. This cannot be said to be an "educational purpose" as that expression is understood. This was a job competition, not a test administered by a high school or post-secondary institution to assess a student's knowledge.

I am satisfied that the record is not comprised of questions that are to be used in an examination or test for an educational purpose and that the record is therefore not exempt under section 11(h) of the *Act*.

ORDER:

1. I order the City to disclose the record to the appellant by **July 31, 2007.**

2. In order to verify compliance with this order I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1, upon my request.

Original signed by: June 29, 2007
Brian Beamish
Assistant Commissioner