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

ORDER MO-2363

Appeal MA07-341 and MA07-343

City of Ottawa

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NATURE OF THE APPEAL:

The City of Ottawa (the City) received two separate requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the same requester.

The first request was for access to any contacts in 2006 or 2007 between the City of Ottawa or the Mayor and [a named individual] or [a named company]. The request resulted in a decision letter issued by the City which granted partial access to the records. According to the City, the requested documents were severed in accordance with sections 11(c), (d), (g), 14(1) and 14(3) of the *Act*. The requester, now the appellant, appealed the decision.

During the course of mediating this appeal, the City issued a revised decision letter and released two further pages of the requested record. In light of the fact that section 11(g) was only claimed for those two pages, it is no longer an issue in this appeal.

Remaining at issue in the first appeal are severances on each of the first two pages of a six page document.

A few weeks after the first request, the same requester filed a second request with the City under the *Act*. The second request was for access to invoices paid to the same named individual or the named company in 2006 and 2007. The request resulted in a decision letter issued by the City which granted partial access to the records. The City severed several of the documents and withheld 5 pages, citing sections 11(c) and (d), 14(1) and 14(3)(f) of the *Act*.

The requester, now the appellant, appealed the decision. Mediation was not successful. Remaining at issue in the second appeal are severances to 4 pages of invoices as well as 5 pages in their entirety.

This appeal was transferred to the adjudication stage of the appeal process. I decided to deal with the appeals together, and address the issues in one order, due to the similarity of parties and issues. Accordingly, this order disposes of both appeals. I began my inquiry by sending a Notice of Inquiry to the City and to an affected party, the individual named in the requests and the records. I received representations from the City, but did not receive representations from the affected party.

The City is relying on sections 14(1), 14(3)(f), 11(c) and 11(d) in denying access to the records at issue.

I then sent a Notice of Inquiry, along with the non-confidential portions of the City's representations to the appellant. I subsequently received representations from the appellant.

RECORDS:

For ease of reference, I have decided to describe the requested documentation as three distinct records, as follows:

Record 1: Record 1 consists of a professional services agreement and an addendum to that agreement. The information severed comprises the financial terms of the professional services agreement, including the per diem to be paid and the number of days of service to be performed pursuant to the agreement.

Record 2: Record 2 consists of severances to four pages of invoices. The information severed includes the number of days for which the affected party is billing the City and the per diem charged for those days.

Record 3: Record 3 consists of five pages of work diaries in their entirety. This record sets out the date worked, and the hours worked on that date, by the affected party which was subsequently billed to the City.

DISCUSSION:

PERSONAL INFORMATION

The City claims that the disclosure of the per diem charged by the affected party, and the details of the days and hours worked pursuant to his agreement with the City, would constitute an unjustified invasion of his personal privacy and is severable from the records pursuant to section 14(1) of the *Act*.

In order to determine if section 14(1) is applicable, it is necessary to determine whether the record contains personal information and, if so, to whom it belongs. That term 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;

In order for a record to qualify for exemption under section 14(1), a record must contain "personal information", as defined in section 2(1) of the *Act*. Under this definition, "personal information" includes recorded information about an identifiable individual including information relating to "employment history" or "financial transactions" (paragraph (b), above).

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].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Representations

In its representations, the City states as follows to support its position that the records at issue contain "personal information":

> The invoices have been signed by [a named individual], the principal of the consulting firm [a named company]. The City submits that the invoices contain personal information as they state both the individual's name and personal financial information about that person, namely his fee rate per day. As such,

> disclosure of this information would reveal personal information about [a named individual's] employment history with the City…

As set out above, previous decisions of this office have drawn a distinction between information relating to an individual in a *personal capacity* and information relating to an individual in *a professional or official government capacity*. As a general rule, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

The City addresses this distinction in its representations:

> …[T]he invoices, accompanying Work Diaries and Addendum Letter, relate to financial transactions affecting only one individual…as he is the sole proprietor of [a named company]. Consequently, disclosure of this information would reveal the financial transactions of [a named individual] with the City of Ottawa.
>
> Since the City has previously released the total financial impact of this contract with the City to the Appellant, should the number of days and fee rate per day be released, the Appellant would be able to reverse-calculate and determine each and every financial transaction concerning [a named individual]. The City submits that this information about payments made by the City and received by a named individual constitutes personal information.

Having taken the position that the name of the principal of the consulting firm, together with his fees and work hours describe the individual's financial activities, the City submits that this information falls under the definition of personal information set out in section 2(1) of the *Act*.

The appellant submits that:

> The City…is confusing "personal information" with public business information. Contracts between contractors and city governments and invoices paid by city governments, are not personal documents and they would almost certainly never have personal information. They contain business information; dates of work, fees paid, address of business, names of those doing work. These pieces of information are essential to understanding the work performed and assessing whether taxpayers received fair value.
>
> The City notes that [a named individual] is the only employee in the company hired and therefore this discloses how much he is paid, which the City considers personal information. But a company and its owner should not be able to elude public scrutiny in dealing with government simply by virtue of having only one employee.

Analysis and Findings

The distinction drawn by previous decisions of this office between information relating to an individual in a personal capacity and information relating to an individual in a professional or official government capacity has been noted above. In determining whether information relating to a named individual is "personal information", the appropriate approach is to look at the *capacity* in which the individual is acting and the *context* in which their name appears. This was enunciated in Order PO-2225 where Assistant Commissioner Tom Mitchinson considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. Specifically, the Assistant Commissioner posed two questions that help to illuminate this distinction:

> Based on the principles expressed in these [previously referenced] orders, the first question to ask in a case such as this is: *"in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ...
>
> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

I applied Assistant Commissioner Mitchinson's analysis in my previous Order PO-2435, which dealt with consulting service agreements and consultants' per diem charges, among other information. I also adopt it for purposes of this appeal.

The Agreement and addendum making up Record 1 refer to the affected party by name, and to the company of which he is the principal. Record 2 refers only to the company, although the invoices appear to be signed by the affected party. The work diaries comprising Record 3 refer to the affected party and his position with the company.

Having reviewed the records, I am satisfied that they refer to the affected party in his professional, rather than his personal, capacity. The context in which the name, per diem and number of hours worked appear is not inherently personal, but is one that relates exclusively to the professional responsibilities and activities of the affected party, and the professional services that he rendered to the City. As evidenced by the contents of the records themselves, the individual is acting as a consultant in a professional business capacity. For example, on the face of Records 1 and 2, the individual is identified as a consultant to the City. Similarly, although not determinative of this issue, the addendum in Record 1 is entitled, "*Addendum to PROFESSIONAL SERVICES AGREEMENT dated 10th May 2007*".

Similar to the business context present in Orders PO-2225 and PO-2435, the professional context in which the individual's name appears here removes it from the personal sphere. In addition, there is nothing about the name, per diem or hours worked that, if disclosed, would reveal something of a personal nature about this consultant.

I find, therefore, in the current case, the information contained in the records does not meet the definition of personal information under section 2(1) of the *Act*.

However, even if I accept the City's position that the name of the consultant, together with the per diem and hours worked, is personal information, I am satisfied that this information is still not exempt under section 14(1). The City has submitted that it is prohibited from disclosing the records at issue to the appellant on the basis of sections 14(1) and 14 (3)(d) and (f). For the sake of completeness, I will now go on to analyze this position.

PERSONAL PRIVACY

Section 14(1) of the *Act* states that "A head shall refuse to disclose personal information to any person other than the individual to whom the information relates…" unless one of the exceptions at section 14(1)(a) to(f) applies.

Section 14(1)(f) appears to be the only exception that could be applicable to the facts of this appeal. That section provides that the exemption will not apply "if the disclosure does not constitute an unjustified invasion of personal privacy." Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates.

Representations

With respect to the City's position that the disclosure of the information at issue would constitute a presumed invasion of privacy, the City submits:

> …[S]ection 14(3) of (the *Act*) provides guidance to the City as to the type of personal information that **would** result in an unjustified invasion of personal privacy. Two of the criteria, "employment history" in paragraph (d) and "describes an individual's **finances**, **income**…financial history or activities…" in paragraph (f) are relevant to this appeal.
>
> In addition to section 14(3), the criteria in section 14(2) provides guidance to the head of the legislation for the City, to determine whether the disclosure of personal information would constitute an unjustified invasion of personal privacy…the City has already provided the bottom line cost of this agreement, thereby promoting public access to information regarding the City's purchase of goods and services.

Analysis and Findings

Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

In particular, section 14(4)(b) of the *Act* identifies a specific type of information, the disclosure of which does not constitute an unjustified invasion of personal privacy. Section 14(4)(b) of the *Act* reads as follows:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (b) discloses financial or other details of a contract for personal services between an individual and an institution; or

The City did not make representations with regard to section 14(4).

I have carefully reviewed the submissions of the parties and the records. If I accept that the records contain the personal information of the affected party, I am of the view that the records disclose financial or other details which clearly derive from a contract for personal services between the affected party and the City, and therefore fall squarely within the parameters of section 14(4)(b). Therefore, the disclosure of these records would not constitute an unjustified invasion of the affected party's privacy, and for that reason, I find that the exception to the exemption at section 14(1)(f) applies. As a result, even if the records contain the personal information of the affected party, I find that they are not exempt under section 14(1) of the Act.

ECONOMIC AND OTHER INTERESTS

The City has relied on sections 11(c) and (d) to exempt the details of the financial relationship between the affected party and/or his company, and the City. 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.

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.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 11(c): prejudice to economic interests

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].

The City states that the disclosure of the record could injure the City's financial interests. In particular, the City wishes to preserve its access to competitive rates, such as those charged by the affected party, with local consulting firms. The City submits that if these rates were generally known to the public and released in the media, the City would have the "undesirable prospect of facing higher daily rates on other service agreements," therefore injuring the City's economic interests and its competitive position.

The appellant submits that:

> The City is suggesting that if people see what high rates it is paying for this consultant, the City will face higher daily fees with other contractors, thereby harming the City's economic interests.
>
> In fact, it is only by making public such fees that pressure will be brought to bear to cease such hirings, if in fact they are overly expensive.

Section 11(d): injury to financial interests

For section 11(d) to apply, the City must demonstrate that disclosure of the records "could reasonably be expected to be injurious" to its financial interests. As with section 11(c) above, to meet this test, the City must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." It is arguable that section 11(d) is broader in scope than section 11(c), however, both sections take into consideration the consequences that would result to an institution if a record was released (Order MO-1474).

In support of its position, the City states:

> If the information in the records at issue is disclosed to the appellant, the City has no assurances whatsoever that the appellant will not provide this information to another professional consultant service provider, which would prejudice ongoing discussions, possibly to the City's financial detriment. In addition, this information may cause the City to needlessly expend time and money on countering negative public opinion and media coverage.

The appellant states that if the City is "spending too much public money on consultants, the public should know about it."

Analysis and Findings with Respect to Section 11(c) and (d)

Having carefully reviewed the contents of the records, I am not persuaded that disclosing this information could reasonably be expected to result in any of the harms outlined in section 11(c) and (d) of the *Act*.

The City made very general submissions about the sections 11(c) and (d) harms and provided no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms.

As noted in Order PO-2435, lack of particularity in describing how harms identified in the subsections of section 11 could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

While disclosure of hours worked or per diem rates paid by a government institution to a consultant may, in some rare and limited circumstances, result in the harms set out in section 11(c) and (d), this is not such a case. Simply put, I find that the City has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 11(c) and (d)

harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.

Specifically, I do not accept the City's position that the disclosure of this information to the affected party's competitors might lead to those competitors charging higher daily rates in the future. The City's position in this regard seems to demonstrate a lack of understanding of how a competitive marketplace operates. The City has taken the position that the affected party is charging a very competitive rate in comparison to other consultants and that the City does not want to risk its ability to access this rate. I am unable to understand how disclosure of this rate will result in an increase in the rates charged by other consultants. On the contrary, it is more probable that the disclosure of low consulting rates will force other consultants to lower their rates in order to be competitive. Rather than prejudicing the competitive position of the City or injuring its financial interests, this would represent an economic benefit. The fact that a consultant working for the City may be subject to a more competitive bidding process for future contracts does not prejudice the City's economic interests, competitive position or financial interests.

In addition, the City has not provided "detailed and convincing" evidence that potential negative media coverage and public opinion created by the disclosure of the records would be financially injurious to the City. This submission contradicts the City's statement that it enjoys competitive rates in comparison to other consultants, and therefore lacks credibility. Moreover, and in any event, public commentary on the financial arrangements entered into by government institutions is consistent with open and accountable government and does not represent the type of financial injury contemplated by section 11 of the *Act*.

In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the City over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11. This principle, enunciated by the Commissioner in Order MO-1947, which I applied

in Order PO-2435, is equally applicable to this appeal. Without access to the financial details contained in contracts related to this consultant, there would be no meaningful way to subject the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. Consultants, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

Therefore, in these circumstances, I find that the exemptions in section 11(c) and (d) do not apply to the records at issue.

Given that I have found that the records are not exempt under section 11(c) and (d), it is not necessary to determine whether the City properly exercised its discretion in claiming this exemption.

ORDER:

I order the City to disclose all of the records in their entirety to the appellant no later than **December 31, 2008** but not before **December 22, 2008**.

November 20, 2008

Brian Beamish
Assistant Commissioner