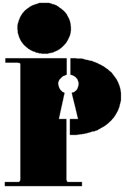

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2441

Appeal MA08-242

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to "all records, including draft versions if final not complete, created since Feb. 22, 2008 that assess, analyze or examine how to implement the recommendations of the Fiscal Review Panel headed by [named Chair]."

The City issued a decision denying access to the responsive records pursuant to sections 7(1) (advice or recommendations) and 11(c), (d), (e), (f) (economic and other interests), and (g) (proposed plans of an institution) of the *Act*. In its decision letter, the City provided a detailed description of the withheld records.

The requester (now the appellant) appealed the City's decision.

During mediation, the City confirmed that the responsive records include a number of duplicate pages. Specifically, the City identified pages 40 to 52 as duplicates of pages 1 to 13, and pages 37 to 39 as duplicates of pages 14 to 16. The City also confirmed that a news clipping article, inadvertently included in the responsive records, was not responsive to the request.

The appellant advised that he does not seek access to the duplicate records and the news clipping article. Accordingly, they are not at issue in this appeal. The appellant confirmed, however, that he wishes to appeal the City's decision to deny access to the remaining responsive records. The appellant also advised that he believes a public interest exists in the disclosure of the records. Accordingly, the possible application of the public interest override provision at section 16 of the *Act* was added to the scope of the appeal.

As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I began my inquiry into this appeal by sending a Notice of Inquiry to the City, initially. The City responded with representations. I then sent a copy of the Notice of Inquiry to the appellant, together with the non-confidential portions of the City's representations. The appellant provided representations in response. As the appellant's representations raised issues to which I believed the City should have an opportunity to reply, I sent a copy of the appellant's representations to the City seeking reply representations. The City submitted reply representations in response.

RECORDS:

There are 36 memoranda of records remaining at issue comprising 5 records. They consist of correspondence, reports and a discussion paper:

- Record 1 (pages 1-13) – Memorandum and attachment from City Manager to Mayor regarding the Fiscal Review Panel's recommendations
- Record 2 (pages 14-16) – Letter from Mayor to City Manager regarding the Fiscal Review Panel's recommendations
- Record 3 (pages 17-27) – Fiscal Review Panel recommendations chart regarding further action to be taken

- Record 4 (pages 28-29) – E-mails between City of Toronto staff and the Toronto Economic Development Corporation (TEDCO) regarding a discussion paper
- Record 5 (pages 30 to 36) – TEDCO discussion paper

DISCUSSION:

ADVICE TO GOVERNMENT

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Factual and background information has been found not to qualify as advice or recommendations. [See, for example, Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Sections 7(2) and (3): exceptions to the exemption

Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. From my review, only section 7(2) (a) might be relevant in this appeal. That section reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:
>
> > factual material;

Representations

The City submits that section 7(1) applies to all of the records at issue as they contain information that qualifies as "advice". The City submits that the records set out more than a mere description of facts as they all contain a suggested course of action. The City makes detailed submissions with respect to each record.

The City submits that Record 1 (pages 1-13) contains advice from the City Manager to the Mayor. The City points to page 1 of the record where the City Manager makes a suggestion in relation to a specific course of action that was to be either accepted or rejected by the Mayor. The City also submits that the bulk of the record (pages 2-13) lists the recommendations of the Fiscal Review Panel, as well the City Manager's advice on how best to implement those recommendations. The information includes the City Manager's opinion as to what city official or body should direct the implementation of each of the recommendations and the manner in which they should be adopted. The City submits that this implementation advice of the City Manager was put before the Mayor and he has the authority to accept all or none of her recommendations for the suggested implementation plan.

The City submits that Record 2 (pages 14-16), contains the opinion of the Mayor concerning Fiscal Review Panel suggestions on the approach the City should take with respect to certain issues. The City submits that the City Manager, as an officer of the City, has the authority under the City of Toronto Municipal Code to accept or reject the Mayor's advice where it relates to matters within her authority. Additionally, the City submits that if the information contained in pages 14-16 was disclosed, combined with information that is already available to the public regarding the Fiscal Review Panel, it would permit one to accurately infer the advice or recommendations previously given to the Mayor by the City Manager.

Addressing Record 3 (pages 17-27), the City submits that this record contains detailed information regarding the City Manager's suggestions with respect to the implementation of the Fiscal Review Panel recommendations. The City submits that if this information was disclosed, the differences between the contents of this record and the information available to the public would reveal the specific advice given to, yet rejected by, the responsible city officials.

With respect to Record 4 (pages 28-29), the City submits that the e-mails "constitute correspondence concerning the use and discussions to be held concerning a document prepared by TEDCO." The City states that as a result of the Court of Appeal decision in *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, TEDCO must be considered as part of the institution of the City for the purposes of the *Act*. Accordingly, the City submits that disclosure of Record 4, the e-mails provided by TEDCO to City Officials will reveal advice provided to the City Manager by staff of TEDCO, as well as revealing recommendations provided to the City Manager from other members of city staff.

Finally, the City submits that Record 5 (pages 30-36) is a discussion paper which sets out detailed advice from staff of TEDCO to two officers of the City. The City submits that the officers were free to accept or reject all or some of the suggested advice concerning TEDCO's role in relation to the implementation of one of the Fiscal Review Panel recommendations.

Summarising its position on the application of section 7(1) to the records, the City submits:

> [T]hese documents contain specific advice, or would permit the inferring of advice, by comparing suggestions as to actions with the publicly available information which discloses the actions actually taken. The documents were in all cases received by an officer of the institution and provided in all circumstances by an officer of the institution…The public disclosure of the City's officers' advice as to how to best approach the [Fiscal Review Panel] recommendations would inhibit the free flow of advice or recommendations of the City's officials. None of the documents are captured by any of the exceptions to the section 7(1) exemption.
>
> It is the City's submission that, on the whole, these documents constitute advice and that any portions that would not be so characterised are either otherwise exempted from disclosure or would, outside of the exempted material, leave only a series of disconnected words or phrases with no coherent meaning or value…It is the City's submission that pages 1-13, 14-16, 17-27, 28-29 and 30-36 clearly put forth recommendations or advice that properly falls within the exemption under section 7(1) of the *Act* and are not captured by any of the exceptions to the exemptions contained in sections 7(2) or 7(3).

The appellant submits:

> The Fiscal Review Panel consisted of Toronto residents who were hand-picked by the Mayor, to examine the City's finances and to determine how they can be better managed – that is, the public's assets and money. The report was delivered in February, 2008, and the details made public.
>
> …
>
> Immediately following the release of the report, city officials, most notably then City Manager [named individual], began compiling a response to that report and action plan for the mayor. Surely, analysis and how the report could be implemented should be available to the public – it involves the public assets and how they should be managed.

Analysis and findings

As noted above, in order for me to find that the information contained in the records at issue qualifies as "advice or recommendations", I must determine whether it reveals, either directly or by inference, a course of action that will ultimately be accepted or rejected by the person or decision-maker being advised.

In Order PO-2400, Adjudicator John Swaigen made the following comments about section 13(1) of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of section 7(1) of the *Act*:

> [F]or the purposes of the section 13(1) analysis, what is important is whether the information actually "advises" the decision-maker on a suggested course of action, or allows one to accurately infer such advice, and determining this requires a careful review of the content of the information and an assessment of the content in light of the context.
>
> …[A] moderate degree of discussion, assessment, comparison or evaluation of options or alternatives does not necessarily constitute "advice." There is a fine line between description and prescription. Whether discussion of options crosses that line and becomes a blueprint or road map directing the decision-maker to a preferred option may depend to some extent on matters such as whether the number of options identified is large or small, the tone of the language used to describe and discuss each of them, the strength of the views expressed, and whether the discussion is balanced or skewed.

I adopt Adjudicator Swaigen's reasoning for the purposes of this appeal.

Following a careful review of the records, I find that when examined in context, the majority of the records, with the exception of Record 4 and portions of Record 5, contain information that advises a decision-maker on a suggested course of action that can ultimately be accepted or rejected or that allows one to infer such advice. I further find that the disclosure of this advice or recommendations could reasonably be expected to inhibit the free flow of advice or recommendation to the City.

Specifically, Record 1 lists the recommendations of the City Manager to the Mayor on how best to practically implement each of the recommendations of the Fiscal Review Board Panel and who should be involved in that implementation. In my view, this information clearly presents a suggested course of action that can either be accepted or rejected by the Mayor.

Record 2 reflects the Mayor's recommendations to the City Manager regarding priorities with respect to the implementation of the Fiscal Review Panel's recommendations. I accept the City's submissions that the City Manager has the authority to accept or reject the Mayor's recommendations with respect to this information, and conclude therefore that it qualifies as advice or recommendations within the meaning of section 7(1). Additionally, even if I found that the City Manager does not have the authority to accept or reject the Mayor's suggestions, I accept that the disclosure of the information contained in this record would allow inferences to be made with respect to advice previously provided by the City Manager to the Mayor in Record 1.

Record 3 is similar to Record 1 in the sense that it contains information regarding the City Manager's suggestions with respect to the implementation of the Fiscal Review Panels recommendations but it is an updated, more detailed and thorough description of her recommendations. I accept that disclosure of this record would allow inferences to be made with respect to the recommendation made by the City Manager to the Mayor.

As for Record 4, in my view, the e-mails between a staff member of TEDCO and the City Manager, as well as other city staff, do not reveal a suggested course of action, nor would their disclosure allow one to infer any advice or recommendations given. These e-mails simply address the fact that the discussion paper which is Record 5 has been received and will be considered by the City. The e-mails do not identify any recommendations listed in Record 5, nor do they reveal any advice of the City Manager or other city staff with respect to TEDCO's recommendations outlined in Record 5 or any other matter. Accordingly, I find that section 7(1) does not apply to Record 4.

Finally, I find that only a portion of Record 5 qualifies for exemption under section 7(1). Records 5 is a discussion paper prepared by staff of TEDCO addressing how it can assist the City in implementing one of the recommendations of the Fiscal Review Panel. Pages 30 to 34 of Record 5 contain factual and background information relating to TEDCO and its suitability to respond to the particular recommendation of the Fiscal Review Panel. In my view, none of this information amounts to advice or recommendations nor would its disclosure reveal advice or recommendations. However, I find that the disclosure of pages 35 and 36 of Record 5 would

reveal advice provided to the City Manager and other city officials from the staff of TEDCO on how to address the Fiscal Review Panel's recommendation upon which the discussion paper is based.

Accordingly, I find that Records 1, 2, 3 and portions of Record 5 (pages 35 and 36) are exempt from disclosure pursuant to section 7(1) of the *Act*. In addition, I have reviewed the exceptions in sections 7(2) or (3) and find that none of them apply to this information.

As I have found that Records 1, 2, 3 and pages 35 and 36 of Record 5 qualify as "advice or recommendations" and are exempt under section 7(1), it is not necessary for me to consider whether they are also exempt under section 11 of the *Act*. However, as I have found that section 7(1) does not apply to Record 4 and pages 30 to 34 of Record 5, I will now determine whether they are exempt from disclosure under section 11 of the *Act*.

ECONOMIC AND OTHER INTERESTS

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), (d) or (g) 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 City does not claim that sections 11(c) or (d) apply to Record 4, but it does submit that they apply to Record 5. The City submits that sections 11(e), (f) and (g), apply to both Record 4 and Record 5. As noted above, the portions of Record 5 that remain at issue are pages 30 to 34.

Section 11(c): prejudice to economic interests and Section 11(d): injurious to financial interests

Sections 11(c) and (d) 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(c) is to protect the ability of institutions to earn money in the marketplace. Section 11(c) 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 purpose of section 11(d) is similar, providing an institution with the discretion to refuse access to records containing information that could reasonably be expected to be injurious to its financial interest [MO-1474 and MO-2349].

The City submits:

> Since the documents are advice as to how to implement recommendations of a panel dedicated to finding ways in which the City may improve its financial and economic health, they naturally address issues of financial interests and economic interest of the City or the competitive position of the City.
>
> [A]lthough generally detailed and convincing evidence is required to establish a reasonable expectation of harm to such interests, it is a matter of common-sense and can be accepted as fact that knowledge of what the City's financial objective is and the manner in which it would be pursued could prejudice the City's financial position. As an example, the City submits that the following pieces of information would, if released, prejudice the City's economic and financial interests, and would result in undue losses to the City or others.

In its examples, the City did not specifically address Record 4, however, regarding Record 5 it states:

> Individuals with the knowledge of the issues facing the City and its relationship with TEDCO would then be aware of potential studies and services sought by

> TEDCO…As a result, from reading this information, persons would then be able to directly attack the City's financial interests.

As noted above, for section 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.

In my view, the City's submissions amounts to a vague reference to a speculative harm should the information at issue be disclosed to the appellant. I find that the suggestion of harm put forward by the City is not sufficiently detailed and convincing to meet the requirements of sections 11(c) or (d). Additionally, from my review of the specific information contained in pages 30 to 34 of Record 5, I do not accept that disclosure would reveal information that could reasonably be expected to prejudice the City's economic interests, competitive position or be injurious to its financial interests. Accordingly, I find that the City has not provided sufficient evidence to establish that either of sections 11(c) or (d) apply to exempt pages 30 to 34 of Record 5 from disclosure.

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

Section 11(e) states:

> A head may refuse to disclose a record that contains,
>
>> 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;

In order for section 11(e) to apply, the institution 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].

The City submits:

> [T]he various documents contain information which would reveal pre-determined ways or courses of action that the City was to undertake in relation to negotiations, and as a result, section 11(e) would apply.

Having reviewed the information contained in Record 4 and pages 30 to 34 of Record 5, I do not accept that it reveals a pre-determined course of action that is intended to be applied to negotiations that are either being carried on currently or will be carried on in the future. The City has not identified the pre-determined course of action; nor has it identified the negotiations to which this course of action is to be applied. From my review, neither a course of action or the negotiations to which it is to be applied is apparent on the face of the information at issue. Accordingly, I find that section 11(e) does not apply in the circumstances of this appeal.

Section 11(f): plans relating to the management of personnel

Section 11(f) states:

> A head may refuse to disclose a record that contains,
>
> > plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

In order for section 11(f) to apply, the institution must show that:

1. the record contains a plan or plans, and
2. the plan or plans relate to:
   (i) the management of personnel, or
   (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Order P-348].

The City submits that "the documents contain exactly such a detailed method for staff to be managed to address specific matters." It submits in particular that page 29 contains such a detailed method that amounts to a plan as to specific responsibilities that are not yet made public or put into operation. The City also submits that these plans are not hypothetical plans but reflect the actual plan at the time the document was created.

Having reviewed the information contained in Record 4 and pages 30 to 34 of Record 5, I do not accept that it reveals a formulated or especially detailed method by which a thing is to be done. Additionally, I do not accept that it relates to the management of personal or the administration of the City. Accordingly, I find that section 11(e) does not apply in the circumstances of this appeal.

Section 11(g): proposed plans, policies, or projects

Section 11(g) states:

> A head may refuse to disclose a record that contains,
>
> > information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

In order for section 11(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and
2. disclosure of the record could reasonably be expected to result in:
   (i) premature disclosure of a pending policy decision, or
   (ii) undue financial benefit or loss to a person.

> [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

The City submits:

> While portions of the documents contain a proposed plan, policy or project, these portions reflect the nature of these documents, being created in the midst of various issues which affect their content, rather than a suggestion that these documents contain "hypothetical" scenarios. The City submits that these documents contain "pending policy decision" which have not yet been disclosed, for example, "high priority" items which were not in the public documents which the City released. As a result, the City respectfully submits that, as exemplified above, the various documents contain proposed plans, policies or projects or a pending policy decision. Based on the City's previous submissions, there is a reasonable expectation of undue gains or losses to persons. Therefore, the City submits that the documents are exempt from disclosure under section 11(g).

In the circumstances, I am not satisfied that the portions of the records remaining at issue qualify for exemption under sections 11(g). In my view, neither the e-mails, nor the portions of the discussion paper prepared by TEDCO that remain at issue, can be said to amount to proposed plans, policies or projects of the City. Additionally, I have not been provided with sufficiently detailed and convincing evidence to satisfy me that the disclosure of Record 4 and pages 30 to 34 of Record 5 could reasonably be expected to lead to the premature disclosure of a pending policy decision or undue financial benefit or loss to a person. Accordingly, I find that section 11(g) of the *Act* does not apply in the circumstances of this appeal.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion, and, if so, to determine whether it erred in doing so.

Because section 7(1) is a discretionary exemption and I have found that the City has properly applied it to exempt Records 1, 2, 3 and portions of Record 5 from disclosure, I must review the City's exercise of discretion in deciding to deny access to those records or portions of records.

I may find that the City erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant consideration
- it fails to take into account relevant considerations

In either case, this office may send the matter back to the City for an exercise of discretion based on proper consideration [Order MO-1573].

The City submits that it exercised its discretion in good faith and took into account all of the relevant considerations including the following:

- the purposes of the *Act,*
- the wording of the relevant exemptions and the crucial and important interests the exemptions seek to protect,
- the fact that the information the appellant is seeking is not considered to be the appellant's "own personal information",
- the fact that there is no sympathetic or compelling need for the appellant to receive the information,

- the issue that while the knowledge of the information itself would likely increase public confidence in the operation of the City, as it would reveal the logical and prudent approach taken to difficult and wide reaching issues, the decision to disclose this information would decrease public confidence in the operation of the City as the release of the information would have disastrous results on the City's financial and economic interests,

- the nature of the information and the extent to which it is significant and/or sensitive to the City while not so significant or sensitive to the appellant,

- the relative recent age of the information,

- the historic practice of the City in relation to the requested materials, and

- the availability of information on the Fiscal Review Panel's finding on the City's website.

I have reviewed records for which I have found section 7(1) applies. In the circumstances of this appeal and given the nature and sensitivity of the information, I am satisfied that the City has properly taken relevant factors, and not irrelevant ones, into consideration in exercising its discretion to withhold the information at issue.

Accordingly, I conclude that the City properly exercised its discretion in deciding to withhold the information at issue from the appellant and find that it is exempt under section 7(1).

PUBLIC INTEREST OVERRIDE

The appellant submits that even if the records or the portions of record are found to be exempt under either of sections 7(1) of the *Act*, the public interest override at section 16 applies to allow disclosure. 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.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act*, which are equivalent to sections 8 and 12 of the *Act,* are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege

> exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

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.

Compelling public interest

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].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

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.)].

Purpose of the exemption

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 City submits that any public interest in the disclosure of the records that exists is not compelling. It also submits that if any public interest exists, it would be in the Fiscal Review Panel's report itself, which it has made available to the public, or at most, in the fact that the City is responding to the content of the Fiscal Review Panel Report. It submits:

> [A]lthough specific details of all of the internal communications concerning the strategy involved in determining how to respond to the [Fiscal Review Panel] Report may not be a matter of public record, the City is approaching its mandate as to how the [report] is being adopted in a generally open manner.

The City explains that it has disclosed a considerable amount of information to the public as to how the City is applying the contents of the report. It specifies that in addition to making the actual report is available on the City's website, other documents and reports that provide comments as to how City activities relate to the Fiscal Review Panel Report are routinely disclosed and publicly available on the internet. The City provided internet links to examples of such documents.

The appellant submits that there is a compelling public interest in the disclosure of the records at issue. She does not make any specific submissions on the nature of the compelling public interest but, as noted above, she submits:

> Surely, analysis and how the report could be implemented should be available to the public – it involves the public assets and how they should be managed.

In its reply representations, the City states that there is no evidence that an analysis conducted by City officials of management procedures concerning of City assets should always be available to the public. It argues that there is evidence to demonstrate that premature disclosure of such an analysis might ultimately frustrate the general public interest and benefit individuals who have conflicting private interests.

The City also states that "it is not self-evident – as alleged by the appellant – that advice on how to manage implementations of recommended improvements concerning City assets would serve a public interest."

The City further submits:

> Simply because a request is made by a member of the media is not necessarily indicative of a public interest in the subject matter of the request [see orders M-773, M-1074]. The City states that the appellant has not established any evidence that any interest by the public at large exists at all with respect to the City's internal communications on the implementation of recommendations of the Financial Review Panel. The City submits that the appellant has provided no evidence that any public interest, if it did exist, would be compelling [see Order P-982]. The City submits that the appellant has provided no factors in the context of the present request to even support the suggestion of a compelling public interest in the disclosure of the City's internal communications on the implementation of recommendations of the Financial Review Panel [see Order PO-2041-I].

> Furthermore, as the City has previously established, the City is publicly disclosing its actions and how they relate to the recommendations of the Financial Review Panel as implementation of these recommendations are commenced. For example, the very reports discussing the restructuring of the TEDCO portfolio begin as follows:
>
> > The *Prosperity Agenda* and the *Blueprint for Fiscal Stability and Economic Prosperity* both indicated a need for substantive change in how the city attracts new investment and uses its under-utilized real estate holdings to regenerate Toronto.
>
> The City submits, therefore, that the City has released, and continues to release a significant amount of information to adequately address any public interest that may exist in the City's approach to the Financial Review Panel's recommendations. The City submits that the appellant's submissions are devoid of any basis to suggest that a compelling public interest exists which clearly outweighs the purpose of the exemptions claimed by the City. The City submits that the appellant has provided no evidence in support of any element to establish the application of section 16.

Analysis and finding

In Order P-1190 former Assistant Commissioner Tom Mitchinson made the following comment on section 23 of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent of section 16 of the *Act*:

> The *Act* is silent as to who bears the burden of proof in respect of section 23. The burden of proof in law generally is that a person who asserts a position must establish it. However, where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the requested record before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, I have reviewed the records with a view to determining whether there is a compelling public interest in disclosure which clearly outweighs the purpose of the section 18(1)(c) exemption.

I agree with former Assistant Commissioner Mitchinson's reasoning and adopt it for the purpose of the current appeal.

Based on my review of the parties' representations, the records themselves, and considering the circumstances of this appeal, I am not satisfied that a compelling public interest that outweighs

the purpose of the exemption at section 7(1) exists in the disclosure of the specific information at issue.

I agree with the appellant that the City should be accountable for the way in which it manages public assets and that disclosure of such information would help to inform the public about the activities of the City. I also acknowledge that, despite the appellant's lack of evidence to support her argument, there may well be a public interest in the disclosure of information about how the City manages public assets and that such an interest may be compelling. However, the nature of the specific information at issue reflects recommendations and advice that may or may not be taken, rather than final plans or courses of action regarding the management of such assets. In my view, the disclosure of the specific information at issue would not further any public interest, compelling or otherwise, in reviewing the way in which the City manages public assets.

Additionally, I accept that there has already been a significant amount of disclosure regarding information related to the City's implementation of the Financial Review Panel's recommendations and that more information about the City's approach will be disclosed as different initiatives are implemented or completed. In my view, this disclosure serves to address any public interest consideration that may exist in this type of information. Accordingly, I am not satisfied that the appellant has provided sufficient evidence to that there is a *compelling* public interest in the disclosure of the *specific* information contained in the records at issue in this appeal.

Moreover, even if I were to find that a compelling public interest in disclosure of the specific information exists, in order for me to find that section 16 of the *Act* applies to override the application of the exemption at section 7(1), I must be satisfied that the compelling public interest *clearly outweighs* the purpose of that exemption. As noted above, the purpose of section 7(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The records at issue consist of the recommendations and advice of various City officials regarding how best to implement the recommendations of the Fiscal Review Panel. However, I note that they do not reflect any final decisions on specific courses of action. In my view, the appellant has not provided sufficient evidence to demonstrate, nor is it self-evident from a review of the records, that even if there were a compelling public interest in the disclosure of the particular information at issue, that interest clearly outweighs the purpose of the section 7(1) exemption.

In sum, I find that the no compelling public interest exists in the disclosure of the information contained in the records remaining at issue in this appeal, and, even if a compelling public interest could be said to exist, that interest would not outweigh the purpose of the exemption at section 7(1). Accordingly, I find that the public interest override at section 16 does not apply.

ORDER:

1. I uphold the City's decision to withhold Records 1, 2, 3 and pages 35 and 36 of Record 5 from disclosure.

2. I order the City to disclose Record 4 and pages 30 to 34 of Record 5 to the appellant before **September 1, 2009** but not before **August 27, 2009**.

3. The City is currently involved in a strike by many of its employees, which may impair its ability to respond to this order. In the event that this is the case, the City may contact me for further directions and/or ask that I vary the time within which it is required to comply with this order.

4. 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 pursuant to order provision 2 above.

Original Signed by: July 27, 2009
Catherine Corban
Adjudicator