



**Information and Privacy  
Commissioner/Ontario**

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

# **INTERIM ORDER MO-2451-I**

**Appeal MA08-146-3**

**City of Toronto**



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## **NATURE OF THE APPEAL:**

The requester submitted an access request to the City of Toronto (the City), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the Act). The request was submitted in February 2008 and was for the following information pertaining to the Emery Village Business Improvement Association (the EVBIA):

Minutes to the [EVBIA] from July 2007 to the present, along with all sub-committee minutes and minutes to the approved Annual General Meeting of November 28, 2006.

In April 2008, the requester (now the appellant) filed an appeal with this office, advising that he had not received a decision from the City in response to his request. The City of Toronto subsequently issued a decision to the appellant on April 28, 2008, and that appeal was closed.

Pursuant to its decision, the City granted full access to information responsive to the appellant's request. In its decision, the City states as follows:

We asked staff of the Economic Development, Culture and Tourism Division to search for records responsive to your request. This decision reflects the results of their search and we have confirmed with [a named representative] of the [EVBIA] that all minutes for the period have been provided.

The City also provided the following statement regarding future requests of this nature:

Please note that, because of changes in the *City of Toronto Act*, Business Improvement Area Boards are now considered to be separate institutions under the *Municipal Freedom of Information and Protection of Privacy Act*. Any future requests for records should be directed to the BIA Board.

The appellant appealed the City decision to this office, contending that additional records exist and disputing the EVBIA's status as a separate institution under the Act.

In his appeal letter, the appellant confirmed receipt of the following records:

- Agenda to the 2007 Annual General Meeting of the EVBIA dated October 25, 2007
- Treasurer's Report including financial statements, Capital Cost-sharing request with the City of Toronto, 2008 Budget Summary and Capital Projects schedule
- Streetscape Committee Minutes of August 13, 2007
- Streetscape Committee Minutes of November 29, 2007
- Streetscape Meeting Minutes of January 9, 2007

The appellant also indicated that pages 5-10 had been omitted from the records package released to him. In addition, he asserted that the following records should exist:

- Minutes of the following board meetings:

- EVBIA Board of Management Meeting of January 31, 2008
- EVBIA Board of Management Meeting of October 6, 2007
- Annual General Meeting of November 28, 2008 (approved in the 2007 Annual General Meeting minutes)
- Signed copy of the EVBIA Capital Cost Share Request
- Minutes of the following sub-committees (and notes if quorum not met):
  - Treasury
  - Streetscape
  - New Transportation
  - Transportation
  - Security
  - Arts & Heritage
  - Diversity

The appellant also contends that business improvement associations (BIAs) should not be considered separate institutions under the *Act* since they are wholly dependent on the City, both legislatively and financially.

During the mediation stage of the appeal process, further searches were conducted and additional records were located. The City released additional records to the appellant and provided some explanation as to why certain records do not exist. The appellant remains of the view that additional records should exist. Details regarding the City's further search efforts and additional disclosure are set out below:

- The City located and released pages 5-10 to the appellant. Pages 5-10 are the Minutes for the Annual General Meeting of the EVBIA held on November 28, 2006.
- The City issued a supplementary decision to the appellant, dated July 31, 2008, advising that searches were conducted by its Economic Development, Culture and Tourism Division and the EVBIA. As a result, the following additional records had been located and were being released to the appellant:
  - Minutes of the EVBIA Board of Management Meeting held October 6, 2007
  - Minutes of the January 31, 2008 EVBIA Board of Management Meeting
  - Signed EVBIA Capital Cost Share Request
  - Streetscape Sub-committee – January 31, 2008
- The City stated that the lawyer for the EVBIA had advised the City that the applicable minutes of the Streetscape Sub-committee had already been provided to the appellant.

- The City stated that the lawyer for the EVBIA had advised the City that the Treasury Sub-committee does not exist.
- The City stated that the lawyer for the EVBIA had advised the City that the New Transportation Sub-committee does not exist.
- The City stated that the lawyer for the EVBIA had advised that no meetings were held from 2007 to the present of the Security, Arts and Heritage and Diversity Sub-Committees, as issues normally discussed by these sub-committees were discussed by the Board directly.
- The City advised that with respect to the written recommendations from the Historical Name Selection Report for the park naming at 115 Torbarrie, the lawyer for the EVBIA had advised that no written recommendations exist.
- The City wrote to the appellant regarding the activities of the Transportation Sub-Committee, indicating that the Executive Director of the EVBIA had advised that the last meeting of this sub-committee was held on March 7, 2007 and that on that basis the City concludes that no responsive records exist.

The appellant advised the mediator that he was not satisfied with the results of the City's further search efforts and that he wishes to proceed to adjudication on both the question of whether the EVBIA is an institution under the *Act* and the reasonable search issue. With regard to the reasonable search issue, the appellant believes that minutes exist for the following City sub-committees: Treasury, Security, Transportation, New Transportation, Heritage, Arts and Diversity and Streetscape. He believes that these sub-committees have met and that minutes were taken. In addition, the appellant maintains that there are written recommendations regarding the historical name selection and, in support of his position, asserts that they are referenced in the City Council records.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the City and the EVBIA on the question of whether the EVBIA is an institution under the *Act* and on the reasonable search issue. Both the City and the EVBIA submitted representations in response and agreed to share them in their entirety with the appellant.

I then sought representations from the appellant and included with my Notice of Inquiry complete copies of both the City's and the EVBIA's representations. The appellant submitted representations in response. The appellant indicated in his representations that he consents to the sharing of his representations in their entirety with the City, but that he does not consent to the sharing of any portions of his representations with the EVBIA.

In this interim order, I address the EVBIA's status as an institution under the *Act* and the sharing issues that have arisen from the appellant's representations.

## **DISCUSSION:**

### **IS THE EVBIA AN “INSTITUTION” UNDER THE ACT?**

#### **Introduction**

Section 4(1) of the *Act* creates a right of access to records under the custody or control of an “institution,” a term that is defined in section 2(1) of the *Act* as follows:

- (a) a municipality,
- (b) a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts,
- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations;

In my view, it is clear that paragraphs (a) and (c) of the definition of institution, found in section 2(1), do not apply in this case. Accordingly, I will restrict my discussion to paragraph (b) of the definition of institution.

In the event I find that the EVBIA is an institution, or part of an institution, under the *Act*, then the EVBIA is subject to the *Act* and must respond to the appellant’s request in accordance with the access provisions of the *Act* (sections 19, 21, 22 and 23). If I find that the EVBIA is not an institution, or part of an institution, under the *Act*, then I must decide whether the EVBIA’s records are otherwise in the custody or under the control of the City based on the relationship between the two entities.

#### **EVBIA’s representations**

The EVBIA provided representations in the form of an affidavit sworn by its Executive Director, which was supported by copies of the City of Toronto’s *Municipal Code* (the *Municipal Code*) and the City By-Law No. 265-2003 (By-Law No. 265-2003).

The Executive Director submits that the EVBIA was created by City Council (the Council) on April 16, 2003, through the enactment of By-Law No. 265-2003, in response to a request by a group of business owners situated within a north-west part of Toronto.

The Executive Director makes reference to several sections of Chapter 19 of the *Municipal Code*, as the document that governs the creation and management of BIAs. The Executive Director states that the approval process for the creation of BIAs is set out in Section 19.4 of Chapter 19 of the *Municipal Code*. She submits that the EVBIA is “governed by a volunteer Board of Management that is defined as a ‘City board’ pursuant to Section 19.20 of Chapter 19 of [the *Municipal Code*].” The Executive Director states that the board of management is composed of the local city councillor and other persons selected by the EVBIA’s membership. She provides that the process for the selection of board of management members is set out at Section 19.20 of Chapter 19 and that its purpose is set out at Section 19.3 of Chapter 19. The Executive Director states that the EVBIA’s membership is composed of business, commercial and industrial property owners located within its geographic boundaries, with membership criteria described in Section 19.5 of Chapter 19. She states that the EVBIA’s operating budget is self-financed by way of a special charge levied on all commercial and industrial properties located within its geographic boundaries. The special charge is collected by the City, and then provided to the EVBIA’s board of management, in accordance with Article VI of Chapter 19. The board of management prepares an annual proposed budget, which is then discussed and approved by the EVBIA’s membership. Once approved by its membership, the proposed budget is then submitted to City Council for approval. The procedure for the creation and approval of the budget is described in Article V of Chapter 19. The Executive Director states that pursuant to Section 19.25 of Chapter 19, the EVBIA’s board of management keeps minutes its meetings and forwards copies of the minutes to the City’s Business Improvement Office.

### **City’s representations**

The City states that with the enactment of the *City of Toronto Act, 2006* (the *City of Toronto Act*), the status of BIAs has become clear. The City submits that section 429 of the *City of Toronto Act* clearly establishes a BIA as a “local board” subject to sections 204 to 215 of the *Municipal Act, 2001* (the *Municipal Act*), until such time as the City dissolves the BIA in question. The City states further that section 141 of the *City of Toronto Act* permits the City to establish “city boards,” which are deemed to be “local boards” of the City for all purposes. With the City now permitted to establish city boards, it passed By-Law No. 636-2007. According to the City, By-Law No. 636-2007 amended Chapter 19 of its *Municipal Code*, which regulates BIAs, and re-established all of the City’s BIAs as city boards under section 141 of the *City of Toronto Act*.

The City submits that prior to the enactment of the *City of Toronto Act*, it was commonly understood that a BIA constituted a local board of the municipality to which it was related, at least for some purposes, but that the “question of the exact nature of the status of BIAs was not free from doubt or debate.” The City states that several previous provisions of municipal legislation dealt with operations issues (such as, authority, dissolution, membership and composition) and, in so doing, appeared to establish BIAs as local boards, but that other provisions (for example, those dealing with financial reporting requirements, dissolution, and distribution of assets and liabilities upon dissolution) were set out separately from the provisions dealing with local boards. The City acknowledges that the previous legislative structure,

combined with an absence of clear legislative language on the issue, raised uncertainty surrounding the status of BIAs as local boards.

The City submits that the relevant provisions of the *City of Toronto Act*, *Municipal Act* and City by-laws clearly establish BIAs as local boards and, subsequently, city boards and that, accordingly, BIAs meet the definition of “institution” under section 2(1)(b) of the *Act*.

### **Appellant’s representations**

The appellant states that it is “irrelevant” whether BIAs are local boards or city boards. BIAs are “created and operate solely for the benefit of the City (and funded through business levies and City revenues).” In the appellant’s view, the City must “therefore take responsibility and manage any and all [freedom of information (FOI)] requests for the BIA.” To do otherwise, would in the appellant’s view be “confusing to anyone making a request, the City department handling FOI requests and the BIAs themselves who do not understand what they must do in terms of releasing information.”

The appellant also asserts that the City has the “resources, the expertise and the administrative support to handle [these FOI requests, while the] BIAs do not.” The appellant notes that BIAs are required to meet quarterly and normally have a small office staff to meet the needs of its members. As a result, if a requester makes an FOI request of a BIA, such as, the EVBIA, the BIA in question would not be able to respond to the request within the required 30-day period owing to its limited decision-making and staff resources. In contrast, the City has an office dedicated to addressing FOI matters in accordance with the timelines established under the *Act*.

The appellant adds that BIAs are formed through City by-law, must be approved by Council and are financially dependent on the City. The appellant asserts that BIAs therefore “cannot function as a going concern or operate in [their] present form without the City.”

Finally, the appellant calls for “consistency” in the way in which BIAs and other institutions are handled under the *Act*. The appellant cites, as an example, the Toronto Zoo, which is designated as an institution under the *Act*, but processes all FOI requests it receives through the City. The appellant claims that it is “hypocritical” for the City to ask him to make all future requests relating to the EVBIA directly to its Board, while a request to another institution, such as the Toronto Zoo, is submitted through the City.

### **Analysis and findings**

I have carefully reviewed the parties’ representations and the relevant provisions of the *City of Toronto Act*, the *Municipal Act*, Chapter 19 of the City’s *Municipal Code* and City By-Law No. 636-2007, all of which have been referred to in the parties’ representations. In my view, it is clear that a BIA meets the definition of “institution” under section 2(1)(b) of the *Act*.

Section 2(1)(b) of the *Act* defines an institution as

a city board...established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts.

Section 204(1) of the *Municipal Act* empowers a municipality to

designate an area as an improvement area and [...] establish a board of management,

- (a) to oversee the improvement, beautification and maintenance of municipally-owned land, buildings and structures in the area beyond that provided at the expense of the municipality generally; and
- (b) to promote the area as a business or shopping area.

Section 204(2.1) confirms the status of a BIA's "board of management" as "a local board of the municipality for all purposes."

Sections 204 through 215 of the *Municipal Act* set out provisions regarding the activities of BIAs, including the creation of BIAs and the establishment, composition, powers and governance of boards of management.

The *City of Toronto Act* defines a local board as a city board [see section 3(1) of the *City of Toronto Act*] and states that "[a] city board is a local board of the City for all purposes." [see section 142(3) of the *City of Toronto Act*]

I concur with the City's view that section 429 is a transitional provision, which provides that every board of management for a BIA that existed prior to the passage of the *City of Toronto Act* is continued as a local board of the City and deemed to be a local board of the City for all purposes. [see sections 429(1) and (2) of the *City of Toronto Act*]

I have also reviewed City By-Law No. 636-2007, enacted by Council on June 11, 2007, which provides that the intended purpose of this by-law is

[t]o amend Municipal Code Chapter 19, Business Improvement Areas, and to re-establish the current business improvement area boards of management as city boards under section 141 of the *City of Toronto Act, 2006*.

Read together, the above provisions clearly confirm that BIAs, whether created prior to the coming into force of the *City of Toronto Act*, as is the case with the EVBIA, which was established on April 16, 2003, qualify as city boards and, accordingly, meet the definition of institution under section 2(1)(b) of the *Act*.



While I acknowledge the appellant's concerns regarding the abilities of BIAs to discharge their obligations under the *Act*, due to possible resource limitations and inexperience in the processing of FOI requests, these concerns are irrelevant. Having determined that BIAs meet the definition of an institution under section 2(1)(b), a requester is required to submit their request for access to information in the hands of a BIA to the relevant BIA, and it is up to that BIA to process it in accordance with the provisions of the *Act*.

Accordingly, turning to the specific circumstances of this case, I find that the EVBIA qualifies as an institution under section 2(1)(b) of the *Act*. As a consequence, it is not necessary for me to consider whether the EVBIA is "part of" the City under section 2(3) of the *Act*, nor whether the City has conducted a reasonable search for responsive records or has custody or control of records responsive to the appellant's request.

Having reached this conclusion, the next step would normally involve ordering the EVBIA to respond to the appellant's request, treating the date of this order as the date of the request, in accordance with sections 19, 21, 22 and/or 23 of the *Act*, as applicable. However, in this case, the EVBIA has already responded to the appellant's request, by way of its Executive Director's affidavit, which sets out the EVBIA's position regarding its efforts to respond to the request, including its search for records responsive to the request. Accordingly, I will not order the EVBIA to issue an access decision at this time.

I will address the reasonable search issue in a subsequent order, after first giving the EVBIA an opportunity to respond to the representations submitted by the appellant on the reasonable search issue and, if I consider it appropriate, providing first the appellant and then the EVBIA with a further opportunity to submit representations in reply. Since the appellant has objected to the sharing of any portions of his representations with the EVBIA, I will address the sharing of the appellant's representations on the search issue with the EVBIA in this order.

## **SHARING APPELLANT'S REPRESENTATIONS ON REASONABLE SEARCH WITH THE EVBIA**

As indicated above, the appellant has asked that I not share any portions of his representations with the EVBIA. In his submissions, the appellant cites three reasons for not wishing to share his representations with the EVBIA. The appellant's reasons focus on his desire to remain anonymous. In the interests of protecting the appellant's anonymity, I will not reveal in this order the specific reasons for his request for confidentiality. However, I will consider the appellant's reasons in determining the sharing issue in this case.

### **Sharing rules**

During adjudication, procedural fairness requires some degree of mutual disclosure of the arguments and evidence of all parties. The Information and Privacy Commissioner/Ontario (the IPC) has established a process for sharing representations that balances the requirement that parties be given an opportunity to respond to the arguments and evidence of the other parties,

with the recognition that it may be appropriate to withhold portions of a party's representations in limited and specific circumstances.

*IPC Practice Direction 7* provides a detailed description of the relevant procedure with regard to the sharing of representations. Sections 5 and 6 provide the criteria for withholding representations:

5. The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of the record claimed to be exempt;
- (b) the information would be exempt if contained in a record subject to the *Act*; and
- (c) the information should not be disclosed to the other party for another reason.

6. For the purpose of section 5(c), the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party;
- (ii) confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party;
- (iii) the relation is one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information is greater than the benefit gained for the correct disposal of the appeal.

Issue A in the Notice of Inquiry that was sent to the appellant clearly stated that, "I may share your representations with the City and/or the Emery Village BIA." Moreover, in the cover letter that was sent to the appellant along with the Notice of Inquiry, I stated the following:

Your representations may be shared with the other parties to this appeal, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The document, *Inquiry Procedure at the Adjudication Stage*, incorporates sections 3, 4, 5 and 6 of *Practice Direction Number 7*.

### **Analysis and findings**

In my view, the rules surrounding procedural fairness require that the EVBIA be given an opportunity to respond to the arguments submitted in the appellant's representations.

I have thoroughly reviewed the contents of the appellant's representations on the reasonable search issue and carefully considered the appellant's objections to sharing them with the EVBIA. I conclude that significant portions of the appellant's representations do not fall within the IPC's confidentiality criteria. In my view, much of the information contained in the appellant's representations on the reasonable search issue is relevant and responsive to that issue, and should, therefore, be shared in order to give the EVBIA a fair opportunity to respond to the appellant's views on that issue. In addition, many of the appellant's submissions reference meetings conducted on specific dates by the EVBIA, its board of management and/or various committees associated with the affairs of the EVBIA. Under the circumstances, the EVBIA should be aware of these meetings and should be in a position to respond to whether records responsive to them exist. However, in my view, if I am precluded from sharing this information with the EVBIA, then it may not be in a position to reasonably respond to the appellant's views on the search issue and my ability to fully and fairly adjudicate this issue would be compromised. In addition, if I am prevented from sharing this information, it stands to reason that I would, in turn, be precluded from referring to it in any order that I ultimately issue after the conclusion of my inquiry. Such a scenario would be untenable.

I am satisfied that I can share the substantive portions of the appellant's representations on the reasonable search issue, while at the same time not disclosing information that is irrelevant or would reveal the identity of the appellant.

In order to ensure that such sharing complies with IPC criteria, I will provide the appellant with a copy of the severed version of his representations that I intend to share with the EVBIA for review. After 14 days from the date of this order I intend to share the appellant's severed representations with the EVBIA.

### **ORDER:**

1. I find that the EVBIA is an institution under the *Act*.
2. I order the sharing of the appellant's representations on the reasonable search issue with the EVBIA, in accordance with the severed version of the appellant's representations included with his copy of this interim order. For the sake of clarity, I have highlighted those portions of the appellant's representations that I propose to sever. I will share this severed version of the appellant's representations with the EVBIA after **September 8, 2009**.

3. I remain seized of this appeal to address any issues arising from this interim order as well as to determine whether the EVBIA has conducted a reasonable search for records responsive to the appellant's request.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

\_\_\_\_\_ August 25, 2009