



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

# **ORDER MO-2548**

**Appeal MA08-211-2**

**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 the following:

All records, including draft versions if final not complete, created since Sept. 28, 2006 that assess, analyze, examine or review the future of the Gardiner Expressway in relation to waterfront revitalization.

The City initially responded to the request by issuing a time extension decision, and the requester (now the appellant) appealed that decision (Appeal MA08-211). In the course of resolving that appeal, the appellant narrowed the scope of her request to include only records “relating specifically to the dismantling of the Gardiner Expressway.” Also during mediation of that appeal, the City advised that it was processing the request in three “batches” as follows:

Batch 1 – records of Strategic Corporate Communications;  
Batch 2 – records of the Waterfront Project Director; and  
Batch 3 – records of the Waterfront Project and Transportation Serv. Dept. Managers.

The City also proposed a schedule for issuing final access decisions in response to the narrowed request for each of the three batches of records. As a result, Appeal MA08-211 was closed.

The City subsequently issued three access decisions corresponding to the three batches of records. In these decisions, which dealt with batches 1, 2 and 3 respectively, the City granted partial access to responsive records, and denied access to the remainder on the basis of a number of identified exemptions under the *Act*.

The appellant appealed the City’s access decisions, and this appeal (MA08-211-2) was opened.

During mediation the appellant identified that she was not pursuing access to certain records, and those records and the exemptions relating to them are no longer at issue in this appeal. However, the appellant advised that she was pursuing access to the following records:

Batch 2 records– pages 78-79, 215-219, 240; and  
Batch 3 records– pages 136-177.

Access to these remaining records was denied on the basis of the exemptions in sections 7(1) (advice or recommendations), 11(e) (economic and other interests) and 11(g) (proposed plans of an institution) of the *Act*. In addition, the appellant took the position that there is a compelling public interest in disclosure of the records. As a result, section 16 of the *Act* was raised as an issue in this appeal.

Mediation did not resolve the remaining issues, and this appeal was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry to the City, and received representations in response. Issues regarding the sharing of portions of the City’s representations were then addressed and

eventually resolved, and I sent the Notice of Inquiry, along with the non-confidential representations of the City, to the appellant, who provided brief representations in response.

Upon further review of the records, I noted that three individuals were identified by name in some of the records at issue. As a result, I sought representations from them (the affected parties) on the issue of whether or not the records contain their personal information and, if so, whether disclosure would be an unjustified invasion of privacy. One of the affected parties contacted this office and advised that he had no objection to the disclosure of the information at issue. I did not receive representations from the other two individuals.

## **RECORDS:**

The records remaining at issue consist of emails, correspondence and documents pertaining to the Gardiner Expressway, and they are identified as Batch 2 records (pages 78-79, 215-219 and 240) and Batch 3 records (pages 136-177).

## **DISCUSSION:**

### **PRELIMINARY MATTER**

As a preliminary matter, I note that the City has requested the following in its representations:

If the IPC makes a determination that any portion of the abovementioned documents should be released to the appellant, the City reserves its right to make further submission on the applicability of severances in this respect.

By this statement, the City seems to believe that it is entitled to further opportunities to provide representations on the issues, particularly if an exemption applies to portions of the records, and not other portions. I reject this submission. The City was specifically requested to provide representations on the application of the exemptions to the records at issue, including whether any severances applied. The City chose to provide its representations in the manner it did, and my findings in this order are based on those representations.

## **ADVICE OR RECOMMENDATIONS**

### **Introduction**

The City takes the position that a number of records or portions of records qualify for exemption under section 7(1) of the *Act*, which reads:

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 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.)].

Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681].

“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 Order PO-1993, upheld on judicial review in *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)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-

2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

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.

## **Representations**

The City refers to the purpose of the section 7(1) exemption, and to some of the previous orders which have applied this exemption. The City then refers to the records which it claims fall within this exemption (pages 78, 79 of Batch #2 and pages 143-177 of Batch #3), and states:

The records, for which access has been withheld under section 7 set out more than a mere description of facts; they contain a suggested course of conduct. As a result, access to [the identified records] is denied.

The nature of the documents for which section 7 has been claimed, results in “advice” being spread throughout their content. As illustrative examples, we provide the following information:

Pages 78, 79 of Batch #2 contain several parcels of advice from [the] Manager of Infrastructure Planning of the City’s Transportation Division to other staff members of the City (for example, [a named member] of the City’s Planning Department). For example, see Page 78 where [the manager] details the issues to be considered in determining [certain information] ...

The City also provides detailed, confidential representations which identify the information on pages 78 and 79 that the City claims to be the advice provided. In referring to the information, the City states:

This is clearly a suggestion in relation to a “course of action” by a City staff member that was either accepted or rejected by others involved.

The City also provides representations regarding the portions of Batch #3 which it claims qualify for exemption under section 7(1). It states that pages 143-177 of Batch #3 are “also a series of documents containing advice,” and then refers in its confidential representations to specific examples of information which it claims contain a “recommended course of action.” The City also states:

[The email on page 144] concludes with a request for others to review and provide comments on whether the suggested “course of action” is appropriate. [Page 151] is a document setting out an outline of a “briefing” of the City’s Mayor with individuals such as [a named individual]. This document outlines the various recommendations, proposed courses of action and similar comments provided to the Mayor, which he was free to consider, accept, or reject.

Pages 152-171 of Batch #3 are a series of documents that illustrate City staff's opinions and recommendations of various options concerning the redevelopment of the Gardiner Expressway. These documents discuss the positives and negatives of various options for redevelopment, provide opinions on the various options, provide recommendations, and provide the factual basis upon which the City's employees, officers, etc. formed the various opinions and recommendations on the various options. Upon receipt of these documents, City officials were obviously free to reject all or some of every portion of the contents. In fact,...it would be necessary for decision makers to reject some of the suggested recommendations, and courses of action.

Pages 144-150 of Batch #3 is a document which outlines the recommendations of [a named individual] concerning the issues, which in his opinion, should be considered from a planning perspective concerning [an identified matter]. This document is the advice of a City employee on what issues are relevant considerations in coming to a conclusion on one of many options available to the eventual decision makers. The City Officials and employees who received the information in Pages 144-150 of Batch #3 were free to accept or reject all or part of the advice ... concerning which factors should be considered in reaching a decision about one of many larger issues concerning the redevelopment of the Gardiner Expressway.

The City also states that page 240 of Batch #2 is a document which outlines advice as to how to analyze certain [confidential information] "...to be suggested to be used in making recommendations in relation to the larger decision making process."

The City then states:

As mentioned above, these documents contain specific advice, or would permit the inferring of advice by comparing suggestions as to actions with the publicly available information, which reveals the actions actually taken. The documents were in all cases received by an officer or employee of the institution and provided in all circumstances by an officer or employee of the institution. It cannot be reasonably disputed that the public disclosure of the internal advice as to how to best approach matters relating to [making] decisions about the removal of the Gardiner Expressway would not inhibit the free flow of advice of the City's employees and officials.

The City submits that none of the documents are captured by any of the exceptions to the section 7(1) exemption. The documents do contain factual information. The City submits, however, that the factual information is such that to disclose these portions would disclose the advice provided. For example, the disclosure of the maps, land areas by-law references, etc. on pages 144-150 of Batch #3 would reveal the planning issues which [the named individual] believed were relevant considerations.

Generally, the City submits that the portions of the documents, which are not direct advice as to how staff would approach various priorities and concerns raised by redevelopment of the Gardiner Expressway, would, nevertheless, reveal the advice provided. In particular, the City submits that revelation of the factual information in these documents, if compared to the information available to the public, would reveal advice given to, yet rejected by, the responsible City Officials.

The City summarizes by stating:

It is the City's submission that pages 78, 79 [and 240] of Batch #2 and pages 136-177 ... of Batch #3 clearly put forth recommendations or advice that properly falls within the exemption under section 7(1) of the *Act* which are not captured by any of the exceptions to the exemptions contained in sections 7(2) or (3).

I note that this final paragraph contains the only reference to pages 136-142 of Batch #3 Records.

The appellant's representations do not address the section 7(1) claim.

### ***Findings***

#### *Batch #2 - pages 78 and 79*

These pages consist of an email exchange between the Director, Waterfront Secretariat and a City manager regarding the work on the Gardiner Expressway. In this email, a recommended course of action and further work are referred to, with questions asked about timing and dates. In the responding email, answers to the questions are given, and the response also includes recommended courses of action.

In the circumstances, I am satisfied that this email string contains and identifies recommended courses of action for the purpose of section 7(1), and that these two pages qualify for exemption under the *Act*.

#### *Batch #2 - page 240*

This document contains an email string which, as identified by the City, contains information describing how to analyze certain data. Although I accept the City's position that it contains information "to be suggested to be used in making recommendations in relation to the larger decision making process," I find that this information is more in the nature of factual information about the referenced data, and does not contain "advice or recommendations"; nor could any such information be inferred from this information. As a result, I find that page 240 does not qualify for exemption under section 7(1).

*Batch #3 - pages 136-142*

These records consist of copies of certain undertakings. On my review of these records, and in the absence of representations in support of the position that these records contain “advice or recommendations” I find that they do not qualify for exemption under section 7(1).

*Batch #3 - page 143*

This is a one-page email sent to a number of individuals, identifying certain steps in the decision-making process. I find that this document contains only action items, and in the absence of representations identifying any advice or recommendations which may be contained in this document, I find that it does not contain any such advice or recommendations for the purpose of section 7(1).

*Batch #3- pages 144-150*

The City states that this document outlines the recommendations of a senior planner about issues which, in his opinion, should be considered from a planning perspective concerning an identified matter. On my review of this record, I am not satisfied that it contains any “advice or recommendations” for the purpose of section 7(1). This document appears to identify only the nature of certain information and issues that ought be considered in proceeding with an identified plan. In the circumstances, I am not satisfied that it qualifies for exemption under section 7(1).

*Batch #3 – page 151*

The City states that this document outlines various recommendations, proposed courses of action, and similar comments which the decision-maker was free to accept or reject. Although this record, which is an outline of a briefing, does refer to options and findings, in my view the information in this record is of a very general nature, and I find that disclosure would not reveal any “advice or recommendations” for the purpose of section 7(1).

*Batch #3 – pages 152-177*

The City states that these records are a series of documents that illustrate City staff’s opinions and recommendations of various options concerning the redevelopment of the Gardiner Expressway. These documents discuss the positives and negatives of various options for redevelopment, and provide opinions on the various options, recommendations, and the factual basis upon which opinions and recommendations were formed.

I have carefully reviewed these pages of records, which can be categorized as follows:

- pages 152-153 - review of options
- pages 154-175 - a document prepared by an identified group
- pages 176-177 - draft tables re: options



Pages 152-153 and 176-177 identify and review various options. Former Assistant Commissioner Mitchinson commented on the approach to records which contain options in Order PO-2028, where he reviewed previous orders and stated:

What is clear from these cases is that the format of a particular record, while frequently helpful in determining whether it contains “advice” for the purposes of [section 7(1)], is not determinative of the issue. Rather, the content must be carefully reviewed and assessed in light of the context in which the record was created and communicated to the decision maker. In circumstances involving options that do not include specific advisory language or an explicit recommendation, careful consideration must be given to determine what portions of a record including options contain “mere information” and what, if any, contain information that actually “advises” the decision maker on a suggested course of action, or allows one to accurately infer such advice. If disclosure of any portions of a record would reveal actual advice, as opposed to disclosing “mere information,” then [section 7(1)] applies.

He went on to make the following finding:

In my view, the description of each option itself is “mere information.” The description simply states the various factual components of the option broken down into various pre-determined categories. It contains no information that could be said to “advise” [the decision-maker] in making its decision on funding, nor, in my view, would disclosure allow one to accurately infer any advice given. The “pros and cons” description that accompanies each option also do not contain any explicit advice. There is no statement recommending that [the decision-maker] chose a particular option and no explicit indication as to which option is preferred by the authors of the Evaluation Report.

I adopt the approach taken by the former Assistant Commissioner, and apply it to the records at issue. In my view, pages 152-153 and 176-177 simply identify possible options regarding possible actions on various matters. Although the records identify the pros and cons for a number of the options, I find that they do not contain a recommended course of action, nor can any advice or recommendations be inferred from the disclosure of these records. Accordingly, I find that they do not qualify for exemption under section 7(1).

With respect to pages 154-175, these pages consist of a document prepared by an identified group regarding certain options and processes. This document includes background information, a review of various options, some details about the various options, and a specific page entitled “Recommendations.” In my view, the page entitled “Recommendations” (page 174) qualifies for exemption under section 7(1), as it contains recommendations for the purpose of that section. However, the other pages of this document do not contain “advice or recommendations,” nor could any such information be inferred from those pages. As a result, I find that the remaining portions of pages 154-175 do not qualify for exemption.

## **Summary**

In summary, I have found that pages 78-79 of Batch #2 and page 174 of Batch #3 qualify for exemption under section 7(1), and that the remaining records do not qualify for exemption under this section.

## **ECONOMIC OR OTHER INTERESTS**

### **Section 11(g) - proposed plans, policies or projects of an institution**

The City takes the position that section 11(g) applies to the records. That section reads:

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;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

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

For section 11(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.)].

Furthermore, 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.)]

***Undue financial benefit or loss***

I will first examine whether the records remaining at issue contain information including proposed plans, policies or projects of an institution, the disclosure of which could reasonably be expected to result in undue financial benefit or loss to a person.

The City's representations on this issue read:

The City submits that a review of the documents reveals that these documents contain the City's financial valuation of the results of the various decisions, and as a result, it is *prima facie* established that disclosure of these documents would lead to a reasonable expectation of harm to such interests. Disclosure of these documents would prejudice the manner in which the City would proceed to attempt to seek to obtain the greatest return for the City and, resultantly, the public at large. This disclosure would lead to prejudice the City's financial position. As an example, the City submits that the following pieces of information would, if released prejudice the economic and financial interests of the City, and would result in undue losses to the City or others:

As an example, all of the documents [remaining at issue in Batch #2] - see for example, Page 218 - would permit individuals who own property in the downtown area to be able to determine the specific locations of potential development and the manner in which the City would proceed to develop land. Therefore, for example, individuals and organizations would increase the amount of which they would charge the City for lands in the area .... This will result in increased returns on land investors in the affected areas and decreased returns for the public at large.

Pages 152-171 of Batch #3 set out the criteria which are to be used in determining the financial decisions to be made in relation to general policy goals. Release of these documents would allow private individuals to exploit the pending policy decisions of the City in the redevelopment of the Gardiner and to shift their investments to real estate. For example, individuals with the resources and disposition could maximize their returns - at the expense of the City and public at large - by using this information to optimize their short, mid and long term "squatting" strategies.

Releasing these documents would provide information for individuals to use to profit at the public's expense in relation to every financial, commercial, labour, international, or intergovernmental negotiations concerning the decisions to redevelop the Gardiner Expressway.

The City submits the disclosure of the documents in question will result in a widespread transfer of financial benefits to individuals able to target their investments in real estate in response to the redevelopment of the downtown area at the expense of the City, and ultimately, since the expenses of the City are related to the taxpayer's purse, the public at large.

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).

The appellant does not address the issue of the application of section 11(g) to the records.

### ***Findings***

On my review of the records remaining at issue, I find that a number of records qualify for exemption under section 11(g) of the *Act*, on the basis that they contain the type of information described therein, and that disclosure could reasonably be expected to result in undue financial benefit or loss to a person. Other records do not qualify for exemption under section 11(g).

#### *Batch 2 records (pages 215-219 and 240)*

Pages 215-219 and 240 of Batch #2 contain specific information about the location and/or valuation of particular pieces of property in identified areas that are being considered by the City as part of its planning around the future of the Gardiner Expressway. I accept the representations of the City regarding the manner in which investors or others could use this specific information to their benefit, and at the expense of the City. Accordingly I find that these records qualify for exemption under section 11(g).

#### *Batch 3 records (pages 139-177)*

I have carefully reviewed the Batch 3 records remaining at issue, and the representations of the City. Certain portions of pages 144-150, 152-153 and 158-173 of these records contain specific information about the location and/or valuation of particular pieces of property in identified areas. Other portions of these pages specifically identify properties which are being considered for development by the City, or contain information which, though more general in nature, could reveal properties or valuations. In my view, disclosure of these records, which specifically identify land or valuations of land, or contain material which could indirectly reveal such information, could reasonably be expected to result in undue financial benefit or loss to a person. Accordingly, I find that these pages qualify for exemption under section 11(g).

However, other portions of the Batch 3 records remaining at issue contain more general information relating to the process of decision-making (page 151), the background documents relating to the process (pages 136 to 142), general information about the options and/or the decision-making process (page 143), and other records which do not contain site-specific or cost-specific information (154-157, 175-177). In my view, these portions of the Batch 3 records do not qualify for exemption under section 11(g).

Accordingly, I find that pages 144-150, 152-153 and 158-173 contain specific information which qualifies for exemption under section 11(g). However, pages 136-143, 151, 154-157 and 175-177 do not contain this type of information, and disclosure would not result in undue financial benefit or loss to a person.

***Premature disclosure of a pending policy decision***

I will now examine whether the records remaining at issue (pages 136-143, 151, 154-157 and 175-177) contain information including proposed plans, policies or projects of an institution, and whether disclosure could reasonably be expected to result in premature disclosure of a pending policy decision.

For information to be considered a “pending policy decision,” there must exist a policy decision that the institution has already made [Order P-726].

The City’s representations on this section state:

While portions of the documents contain proposed plans, policies, or projects, 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 decisions” which have not yet been disclosed, for example, “high priority” items that were not included in the public documents that the City released. As a result, the City respectfully submits, as exemplified above, that the various documents contain proposed plans, policies or projects or a pending policy decision....

As identified above, the records remaining at issue contain information which can be categorized as general information relating to the process of decision-making, general information about the options and/or the decision-making process, and records which do not contain site-specific or cost-specific information. I find that none of these remaining documents contain information which, if disclosed, could reasonably be expected to result in the premature disclosure of a pending policy decision. Many of these remaining records relate primarily to the decision-making process. With respect to records which contain more detailed information about options (for example, pages 176-177), I have not been provided with sufficient evidence to satisfy me that these records contain policy decisions that the institution has already made. Accordingly, I find that these records do not qualify for exemption under section 11(g).

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

The City takes the position that section 11(e) applies to the records. That section reads:

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 [Orders PO-2064 and PO-2536].

The terms “positions, plans, procedures, criteria or instructions” are referable to pre-determined courses of action or ways of proceeding [Orders PO-2034 and PO-2598].

Previous orders have defined “plan” as “... a formulated and especially detailed method by which a thing is to be done; a design or scheme” [Orders P-348 and PO-2536].

The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow [Order PO-2034].

The City states:

The City submits that all of the documents for which the exemption has been claimed contain such information throughout their contents.

The City then refers to what it describes as “illustrative examples” of this type of information. It refers specifically to pages 152-171 of Batch #3 and states that these pages set out certain criteria (which are referred to in its confidential representations), and also that these pages “are not policies on potential legislative decisions, rather they illustrate City staff’s opinions and recommendations on the criteria to be used” in making certain determinations “... which will arise from the adoption of each one of the various options concerning the redevelopment of the Gardiner Expressway.” The City then states:

These examples illustrate that the documents contain an actual pre-determined course of action for the City to [sic] proceeding in the context of financial

negotiations in relation to decisions taken by the City in relation to development of various areas of the City. The City submits that the various documents contain information which would reveal pre-determined ways or courses of action that the City will undertake in relation to negotiations, and as a result, section 11(e) would apply.

### ***Findings***

As a preliminary note, I note that the City has provided representations which refer to certain pages as “examples” of the records at issue, and that these “examples” apply to the other records as well. Unless the records are all of a particular kind (which these records are not), this approach is not particularly helpful. In the circumstances, I will review the records remaining at issue to determine whether they qualify under section 11(e).

I have found above that certain pages of records qualified for exemption under section 11(g). These pages contained specific information about the location and/or valuation of particular pieces of property in identified areas being considered by the City.

I found above that the remaining records at issue (Batch #3 pages 136-143, 151, 154-157 and 175-177) contain information which can be categorized as general information relating to the process of decision-making, general information about the options and/or the decision-making process, and records which do not contain site-specific or cost-specific information. Given the nature of the information contained in these records, I find that the records do not contain 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 my view, the information remaining at issue is too general to qualify for exemption under section 11(e), and I find that the exemption does not apply to these records.

### **PERSONAL INFORMATION**

As identified above, in the course of processing this appeal, I noted that the affected parties were identified in a few of the records at issue, and I sought representations from them on the issue of whether or not the records contain their personal information and, if so, whether disclosure would be an unjustified invasion of privacy. One of the affected parties contacted this office and advised that he had no objection to the disclosure of the information at issue. I did not receive representations from the other two individuals.

If the names of these individuals were to constitute the “personal information” of these individuals, the mandatory exemption in section 14(1) of the *Act* might apply to that information. Accordingly, it is necessary to decide whether the records contain “personal information” and, if so, to whom it relates.

“Personal information” is defined in section 2(1) of the *Act* as “recorded information about an identifiable individual.” A list of examples of personal information is set out in paragraphs (a) to (h).

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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). Section 2(3) modifies the definition of the term “personal information” by excluding an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity”.

I have carefully reviewed the records which identify the three affected parties, and the context in which these names appear. I find that these individuals are identified as people who are involved in the matters relating to the issues because of their professional responsibilities or expertise. In my view, the names of these individuals identify them in a professional capacity, not a personal capacity. Consequently, these names do not qualify as “personal information.”

The personal privacy exemption in section 14(1) of the *Act* only applies to “personal information.” Because the names of the individuals do not qualify as “personal information,” I find that the personal privacy exemption in section 14(1) cannot apply to this information.

## **PUBLIC INTEREST**

As identified above, the appellant takes the position that the public interest override at section 16 of the *Act* applies in the circumstances of this appeal, as there exists a compelling public interest in disclosure of the records.

Section 16 states:

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

In this appeal, I have found that some of the information at issue does not qualify for exemption under the *Act*, and I have ordered it disclosed. There are also portions of the records which I have found qualify for exemption under sections 7(1) and 11(g) of the *Act*.

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

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. 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 or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest is not automatically established where the requester is a member of the media [Orders M-773 and 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.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered “compelling” and the override will not apply [Orders PO-2072-F and PO-2098-R].

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

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614];
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613].

### ***The appellant’s representations***

The appellant’s representations on the public interest override are brief, and focus specifically on the public interest in records relating to the “decision-making process.” The appellant acknowledges that the City has released a “significant” amount of information relating to the appeal, and states:

While decisions about the Gardiner Expressway have become public since this [request] was first filed, I still believe there is a public interest override in disclosing details about the work itself. ...

The appellant then refers to the public interest in the process by which decisions were made regarding this matter.

### ***Findings***

I have carefully reviewed the appellant’s representations on the public interest override, as well as the information which I have found qualifies for exemption under the *Act*, and the information which I have ordered disclosed in this appeal.

I accept that there is a public interest in issues relating to the future of the Gardiner Expressway in relation to waterfront revitalization. Furthermore, I accept the appellant's position that a public interest also exists in the process by which decisions about the expressway were made. I also note that much information about the decisions made regarding the expressway has also been made public by the City.

In addition, with respect to the information at issue in this appeal, I have found that a number of pages of records at issue do not qualify for exemption under that *Act*, and I have ordered that they be disclosed. I note that a number of these pages include information about what the appellant describes as the "decision making process."

With respect to the portions of records and pages that I have found qualify for exemption under sections 7 and 11, I am not satisfied that there exists a compelling public interest in the disclosure of this information to override the exemptions claimed.

In the first place, the representations of the appellant focus primarily on certain aspects of the decision-making process, not on the type of information which I have found qualifies for exemption under sections 7 and 11. Furthermore, on my review of the portions of records which I have found qualify for exemption under section 7 and 11, I am not satisfied that a compelling public interest exists to override the application of the exemption to those records. I note that the purpose of the section 11 exemption, as identified above, is to protect certain economic interests of institutions. The purpose of the section 7(1) exemption 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.)].

I have examined the portions of the records which I have found qualify for exemption under sections 7(1) and 11. I note that many records have been disclosed to the appellant, mostly by the City in the course of responding to the request, and some also by this order. With respect to the remaining information, I find that there does not exist a compelling public interest in disclosure of the records that outweighs the purpose of the exemptions claimed.

Accordingly, I find that the public interest override in section 16 of the *Act* does not apply to this information.

## **ORDER:**

1. I uphold the application of the exemption in section 7(1) to pages 78-79 of Batch #2 and page 174 of Batch #3.

2. I uphold the application of the exemption in section 11(g) to pages 215-219 and 240 of Batch #2 and pages 144-150, 152-153 and 158-173 of Batch #3.
3. I order the City to provide the appellant with the remaining pages of records (pages 136-143, 151, 154-157 and 175-177 of Batch #3) sending a copy by **October 5, 2010** but not before **September 30, 2010**.

Original signed by: \_\_\_\_\_

Frank DeVries  
Adjudicator

\_\_\_\_\_ August 31, 2010