



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

FINAL ORDER MO-2517-F

Appeal MA08-194

City of Toronto



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BACKGROUND:

This order disposes of the remaining issues arising from my interim decision in Order MO-2496-I. For a complete review of the background to this matter, please refer to Order MO-2496-I.

Briefly, this appeal arises out of a request submitted to the City of Toronto (the City) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to a procurement process for the selection of a technology solution for a customer service strategy whose aim was to improve public access to City services. The project was named the 3-1-1 Customer Service Strategy (the 3-1-1 Project). The new technology would allow the members of the public to speak with a customer service agent and obtain information about City services 24 hours a day, 7 days a week and 365 days a year, by calling one telephone number (3-1-1). The 3-1-1 number would replace the hundreds of different phone numbers that were previously required to obtain information on various City services.

Two Requests for Proposals (RFP) were issued by the City in respect of the 3-1-1 Project. The first RFP (Proposal No. 3412-06-3061) was cancelled after the two responsive bidders, the requester in this case and another company (the affected party), were deemed non-compliant with the pricing component of the evaluation process. The City subsequently decided to pre-qualify the requester and the affected party and invited them to participate in a second RFP on pricing (Proposal No. 3412-07-3010) (the Second RFP). In accordance with the terms of the Second RFP, the City engaged a fairness monitor (the Fairness Monitor) to oversee the RFP process. The requester and the affected party submitted proposals in response to the Second RFP. The affected party was ultimately chosen as the successful bidder and the City entered into a contract with it for the delivery of the 3-1-1 technology solution. I understand that the official launch of the 3-1-1 contact centre occurred on September 24, 2009.

NATURE OF THE APPEAL:

As the unsuccessful bidder in the procurement process, the requester sought information regarding its evaluation, particularly with respect to the processing of the Second RFP. In this regard, the requester submitted the following seven-part request:

“Staff Recommendation Reports” (Staff Reports) and the associated Fairness Commissioner Reports (Fairness Reports) relating to at least three different points in time in the process used to arrive at the conclusions reached in the City of Toronto 3-1-1 Technology Solution Request for [the Second RFP].

The particulars of the seven part request are stated as follows:

1. At the conclusion of the evaluation of [the Second RFP], with both technical points awarded and the [Second RFP] pricing envelope opened, [City] staff would have created a report that recommended a winning proponent based on the evaluation criteria of the RFP. [The requester] would like a copy of this report...

2. As per the terms of the use of a Fairness Monitor for this procurement, there would have been a written report (which may even be quite brief, consisting of notes, comments etc if not in full report format) by the Fairness Commissioner/Monitor (however referred to) that would outline their perspective of the principles of Fairness adhered to in the development and authoring of the staff report referred to in Point #1 above. Given that the Fairness report would not be referencing many specifics regarding confidential information pertaining to either competitive bid, unless the City has deviated from the nationally accepted practice for preparing Fairness Reports, [the requester] is expecting a copy with little to no redaction.
3. When City staff decided to invoke the Best and Final Offer (BAFO) process after the conclusion of the evaluation of the [S]econd RFP, another staff report would have been created directly following the evaluation of the BAFO process. [The requester] would like a copy of this report...
4. As outlined in Point #2 above, [the requester] is requesting the similar Fairness report that would have been prepared in relation to this staff recommendation report immediately following the BAFO process...
5. While it is common practice to simply use an existing staff recommendation report as the final report to Council seeking their approval on a contract award, this procurement did not follow common practice in that the entire recommendation process and contract award approval were joined in a confidential process that, in being very unconventional, effectively removed any right to Appeal to any vendor. Given this very uncommon practice..., we believe that there were likely further notes and discussions that could have led to the creation of yet another staff recommendation report (in the same way as Points #1 and #3 above). [The requester] would like a copy of this report...
6. As per points #2 and #4 above, the City would have needed a further Fairness [R]eport to confirm that the creation of the staff report referenced in Point #5 above adhered to all rules of fairness, as per the City's policy of using a Fairness [M]onitor as outlined in the Justice Bellamy Report, stemming from MFP Enquiry. [The requester] would like a copy of this report, whether it is a collection of unstructured notes or a formal document, ...
7. As per Point #5 above, there could have been different reports produced by the evaluation team and other staff members of the [City], specifically a report to a Steering Committee of senior City staff (might be referred to by another name within the City) and another report to a Council subcommittee tasked with the 3-1-1 project from a political perspective. While point #5 references the notes and final recommendation report to council, Point #7 refers to other "versions" of recommendation reports prepared for these different committees. [The requester] would like a copy of these reports...

As per other points above, [the requester] also expects to see any notes or comments captured by the Fairness Commissioner with respect to these recommendation reports to the various committees within the City.

The City issued a decision letter in which it granted partial access to the responsive records, denying access to the withheld portions pursuant to the discretionary exemptions in sections 6(1)(b) (closed meeting), 7 (advice to government), 11(economic and other interests), 12 (solicitor-client privilege) and 15(a) (information available to the public) of the *Act*. The City also claimed the application of the mandatory exemptions in sections 10 (third party information) and 14 (personal privacy) of the *Act* to the responsive records. In its decision, the City indicated that no records exist in response to part 7 of the request.

The requester (now the appellant) appealed the City's decision to deny access to information responsive to its request.

During the mediation stage of the appeal process, the appellant indicated that it was *not* interested in pursuing access to records that were withheld pursuant to sections 14 and 15(a) of the *Act*. Accordingly, those portions of the records to which sections 14 and 15(a) had been applied were removed from the scope of the appeal.

Also during mediation, the appellant advised that it believes records responsive to part 7 of the request exist. Accordingly, the adequacy of the City's search for responsive records was added as an issue. The appellant also raised the application of the public interest override (section 16) regarding disclosure of the information at issue under sections 7 and 11.

After conducting an inquiry during which I received written representations from the City, the Fairness Monitor, the affected party, the City's outside legal counsel and the appellant, I issued Order MO-2496-I. In my interim decision I upheld the City's search for responsive records. In addition, I upheld the City's decision to withhold access to certain information pursuant to the exemptions in sections 6(1)(b) (closed meeting) and 12 (solicitor-client privilege). I also found some information exempt under section 7; however, I concluded that the public interest override in section 16 applied to this information and I ordered it disclosed. I also found that certain information the City had withheld did not qualify under any of the exemptions claimed and I ordered the City to disclose this information to the appellant.

As set out in my interim order, I was not persuaded that the City had adequately exercised its discretion in applying sections 6(1)(b) and 12 to information that I had found exempt in Records 1, 2, 3, 4, 6, 8, 10, 11, 12 and 13. Accordingly, I included a provision in my interim order requiring the City to re-exercise its discretion with regard to the information that I had found exempt under sections 6(1)(b) and 12, and to advise the appellant and myself, in writing, of the results of its re-exercise of discretion.

In response, I received further representations from the City regarding the exercise of discretion issue. The appellant was provided with a copy of the City's representations, but chose not to make representations in response to those submitted by the City.

I also received, unsolicited, a letter from the Fairness Monitor who brought to my attention a record titled "Fairness Letter 'final' June 25, 2007" (the June 25th letter). The Fairness Monitor notes in his letter that the index of records set out in Order MO-2496-I does not make reference to the June 25th letter despite his view that it is a record responsive to the appellant's request. I subsequently wrote to the City asking it to account for the whereabouts of the June 25th letter and to issue an access decision to the appellant if it is located. I provided the appellant with a copy of my letter to the City. The City responded that it does not view the June 25th letter as a record that is responsive to the appellant's request. Conversely, the appellant has indicated that it views the June 25th letter as a responsive record.

What follows is my final order in which I address the City's re-exercise of discretion and the responsiveness of the June 25th letter.

DISCUSSION:

EXERCISE OF DISCRETION

General principles

The exemptions in sections 6(1)(b) and 12 are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so and/or whether it erred in exercising its discretion by acting in bad faith, or by taking into account irrelevant considerations, or by failing to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all of those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

The City submits that it “properly re-exercised its discretion” by denying access to the information found exempt under sections 6(1)(b) and 12 after specifically considering the following factors:

- the purposes of the *Act*
- the wording of the exemptions and the interests the exemptions seek to protect
- the public interest in open and accountable government, the transparency of the City’s decision making and whether disclosure of the information at issue would increase public confidence in the City’s operations
- the nature of the information and the extent to which it is significant and/or sensitive to the City
- the age of the information at issue
- the historic practice of the City in relation to the requested records
- whether the requester has a sympathetic or compelling need to receive the information

With regard to each of these factors, the City states:

The purposes of the *Act*

The right of access under the *Act* is subject to limited and specific exemptions to protect the legitimate needs of government for confidentiality. The City considered whether disclosure of any portions of the records in question would inform or enlighten the public about the City's activities, by in some way adding to the information the public has in order to express public opinion or make political choices. The City determined that disclosure of the information in question would not add, in any meaningful way, to the information the public already possesses to express public opinion or make political choices. In light of this determination, and in consideration of the legitimate public interests sought to be protected by the exemptions claimed, the City concluded that disclosure of this information would not be consistent with the purposes of the *Act*.

The wording of the exemptions and the interests the exemptions seek to protect

The City examined the purposes of sections 6(1)(b) and 12 and the interests sought to be protected by these exemptions. Pursuant to Order MO-2496-I, sections 6(1)(b) and 12 were found to apply to portions of the records that the City had withheld under these exemptions.

Section 6(1)(b) allowed the City to deny access to documents which, if disclosed, would reveal the substance of deliberations specifically authorized to be held in the absence of the public. In this case, disclosure of the documents in question would result in the disclosure of the deliberations of *in camera* meetings held to consider specific solicitor-client advice.

With regard to section 12, the City relies on the views of the Supreme Court of Canada in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 13 S.C.R. 209, in which the Court expressly directs that solicitor-client privilege must remain as close to absolute as possible if it is to retain relevance. The City also notes that in reviewing the meaning of the solicitor-client exemption, the Courts have applied a restrictive test, to the extent that records subject to solicitor-client privilege may be ordered disclosed only where absolutely necessary – a test just short of an absolute prohibition (see *Goodis v. Ontario (Ministry of Correctional Services)* (2006), 271 D.L.R. (4th) 407).

The City acknowledged that it may wish to disclose additional information found exempt under section 12 in circumstances where increased transparency regarding its activities may be of benefit to the public at large. The City states that it has conducted a review of the information in question and has determined that there is

no information that, if disclosed, would assist the public in expressing its views or making political choices. In the City's view, this information is sensitive and was provided in confidence, and its disclosure would advance private interests at the expense of the public's interest in ensuring that the City is able to consider solicitor-client privileged information in confidence in order to make informed decisions regarding actions that will affect the City and the public at large. The City has reviewed the information in question and has determined that there is no interest present in the current case that would justify disclosing information that would reveal the deliberations of a meeting held by City Council to discuss information received by the City as the client in the solicitor-client relationship.

In light of the crucial importance of the interests sought to be protected by the application of sections 6(1)(b) and 12, the City submits that no further disclosure of information would be appropriate.

The public interest in open and accountable government, the transparency of the City's decision making and whether disclosure of the information at issue would increase public confidence in the City's operations

The City acknowledges that openness and transparency are critical components of any public procurement process involving the expenditure of taxpayers' money. The City recognizes the vital importance of open procurement processes and of having mechanisms in place to monitor its procurement processes to safeguard against abuse, promote accountability and maintain public confidence in the City and its processes. In an effort to promote accountability and maintain public confidence in the City, the City states that it disclosed a significant amount of information to the public about this matter, which it views as appropriate in meeting the public interest in achieving open and accountable government.

The City has concluded that the disclosure of the information found exempt under sections 6(1)(b) and 12 would not on its own, or in conjunction with the other information disclosed by the City, inform or enlighten the public about the City's activities and the fairness of the procurement process in this case.

The City also states that it has considered whether the disclosure of the information at issue would increase public confidence in the operations of the City. The City has reviewed the importance of, and need for openness and transparency, in its public procurement processes, as a means of increasing public confidence in the City's operations. The City has balanced this public interest against its right to conduct business in confidence, where it is appropriate to do so based on the application of the exemptions in sections 6(1)(b) and 12. The City has concluded that any potential increase in public confidence as a result of further disclosure would be greatly outweighed by a decrease in public confidence in the City's operations that would result from the disclosure of *in camera* deliberations of City Council

concerning solicitor-client privileged advice about a matter that could result in legal action.

The nature of the information and the extent to which it is significant and/or sensitive to the City and the appellant

The City acknowledges that the appellant may have a significant private interest in the requested information. However, the City argues that it has a significant interest in preserving the ability of City Council to meet to consider solicitor-client advice and maintaining the confidentiality of its discussions with its solicitors. As a result, the City has determined that this factor does not support further disclosure of the information in question.

However, given the passage of time, the City states that it did consider whether the sensitivity of some of the information had diminished and it was on this basis that it agreed to release additional information, as set out in the reply representations it submitted during the initial phase of the inquiry prior to the issuance of Order MO-2496-I.

The age of the information at issue

The City acknowledges that the information in question is approximately three years old. However, the City argues that there continues to be a “live issue concerning the City's deliberations including solicitor-client advice” in relation to the procurement process in question. The City concludes that the age of the information at issue does not support further disclosure.

The historic practice of the City in relation to the requested records

Generally, the City does not disclose solicitor-client advice, or communications necessary for providing such advice, to the public where there are on-going allegations of wrong-doing by the City, or where there is the potential for legal action in regard to the subject of the legal advice. Since, in the City's view, the potential for legal action remains possible, City has determined that the solicitor-client privilege exemption should continue to be maintained in relation to the information at issue.

The City has adopted the practice of no longer maintaining the confidentiality of deliberations held during *in camera* meetings, or denying access to documents that would result in the disclosure of the subject matter of the *in camera* meeting once the City's interests that were sought to be protected are no longer present. The City has determined that purposes for which the information in question were considered *in camera* remain present and so it is not comfortable releasing this information.

The City asserts that its treatment of the information at issue is consistent with its historical practices with respect to the requested records and the application of sections 6(1)(b) and 12 to them.

Whether the requester has a sympathetic or compelling need to receive the information

In the City's view, the appellant has not articulated a sympathetic or compelling need to receive the information at issue that would outweigh the exemptions that have been applied. The City also notes that it has provided a fair amount of information to the appellant through the debriefing process and through correspondence.

Analysis and findings

I have carefully considered the City's representations regarding its re-exercise of discretion, submitted in response to Order MO-2496-I. While I do not necessarily agree with the conclusions it has reached regarding the possible disclosure of further information, I am nevertheless satisfied that the City has undertaken a thoughtful review of the information at issue and the application of sections 6(1)(b) and 12 to it and has, in good faith, considered only relevant factors in revisiting the exercise of its discretion.

Accordingly, I accept and uphold the City's re-exercise of discretion.

STATUS OF THE JUNE 25TH LETTER

As alluded to above, the existence of the June 25th letter was brought to my attention by the Fairness Monitor, who was involved in the evaluation of the Second RFP. As an affected party in this appeal, the Fairness Monitor had been provided with a copy of Order MO-2496-I. After reviewing the interim order, the Fairness Monitor raised some concerns about the records noted in the index of records that had been included with my order. One of those concerns related to the absence of the June 25th letter from the index. The Fairness Monitor suggested that this was a record that was responsive to the appellant's request and, therefore, should have been included in the index. I then wrote to the City asking it to account for the June 25th letter and to issue an access decision to the appellant if it was located. The appellant was provided with a copy of my letter to the City.

The City responded that it does not view the June 25th letter as a record that is responsive to the appellant's request, noting that this letter was "not requested by the appellant." The City further states that the appellant did seek access to a "final" report in item 6 of its request and that Record 13 – Fairness Opinion, dated June 25, 2007 – was responsive to that part of the appellant's request.

The appellant also wrote to our office to express the view that the June 25th letter is responsive to its request as it "corresponds to a record of interest referenced as 'the executive summary or

covering letter to the staff recommendation report to Council' in its original appeal letter." The appellant asks that I order the City to disclose June 25th letter to it.

Having carefully considered the parties views on the status of the June 25th letter, I conclude that it is a record that is responsive to the appellant's request. While it does not appear to have been expressly requested by the appellant in its original request, it clearly corresponds to Record 13 – Fairness Opinion, dated June 25, 2007 – as it appears to be the cover letter to that record. I find it noteworthy that when the City initially identified all of the records responsive to the appellant's request, it recognized both the cover letter to an earlier Fairness Opinion prepared by the Fairness Monitor, dated April 14, 2007 (Record 3), as well as the Fairness Opinion itself, dated April 14, 2007 (Record 4), as responsive records. In the interests of consistency, it seems only fair and logical that the June 25th letter should be viewed as a responsive record in light of its connection to Record 13, just as Record 3 was in relation to Record 4.

I acknowledge that the appellant would like me to order the City to disclose the June 25th letter to it. I am not able to order disclosure at this time due to possible third party notification issues under section 21 of the *Act*. Accordingly, under the circumstances, I will order the City to make an access decision in accordance with section 21 of the *Act*. In the event the appellant wishes to appeal the City's decision, the appellant will not be required to pay an additional fee to file the appeal.

ORDER:

1. I uphold the City's re-exercise of discretion with regard to the information in Records 1, 2, 3, 4, 6, 8, 10, 11, 12 and 13 that I found exempt under sections 6(1)(b) and 12, pursuant to Order MO-2496-I.
2. With regard to the June 25th letter, I order the City to notify any affected parties of the appellant's request for this information and to issue an access decision, all in accordance with section 21 of the *Act*, and without recourse to a time extension under section 20 of the *Act*, treating the date of this order as the date of the request.
3. I further order the City to provide me with a copy of the decision issued pursuant to Provision 2, above.
4. I remain seized of this matter pending compliance with Provision 2, above.

Original Signed by: _____
Bernard Morrow
Adjudicator

_____ April 23, 2010