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

ORDER MO-2555

Appeal MA08-296

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The requester submitted the following request to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> Names of City of Toronto services, programs, and properties that receive money from corporate sponsorships and/or have sold naming rights, including the names of the sponsoring corporations and naming rights purchasers, and the value of each deal.

The City located a record responsive to the request, which is a one-page chart that sets out six "initiatives" that received corporate sponsorship and one "initiative" that received a donation from a foundation. This record also identifies the specific corporation or foundation that sponsored each initiative, the length of the sponsorship and the approximate value of the sponsorship.

In its decision letter, the City stated that it was providing the requester with access to all the information in this record, except for the dollar value of each sponsorship or donation. It denied him access to these portions of the record pursuant to the mandatory exemption in section 10(1) (third party information) and the discretionary exemption in section 11 (economic and other interests) of the *Act*.

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

During the mediation stage of the appeal process, the City stated that it was relying specifically on sections 10(1)(a) and (c) and sections 11(c), (d) and (e) of the *Act*.

In addition, the City agreed to disclose the dollar amount of the donation made by a foundation for a specific initiative, because this information is already available on the City's website. However, it continued to deny access to the specific dollar amounts of the corporate sponsorships for the remaining six initiatives.

The five corporations that provided sponsorship for the six initiatives are affected parties in this appeal. The mediator successfully contacted four of these affected parties to determine if they would consent to disclosing the dollar amount of their sponsorships. All of these affected parties informed the mediator that they objected to the disclosure of such information. The mediator was unable to contact the remaining affected party.

This appeal was not resolved during mediation and was moved to the adjudication stage of the appeal process. The adjudicator previously assigned to this file sought representations from the City and all five affected parties. In response, he received representations from the City and three affected parties.

The adjudicator then sent the same Notice of Inquiry to the appellant, along with the representations of the City and three affected parties. Limited portions of the representations of the City and one affected party were withheld because they fell within this office's

confidentiality criteria on the sharing of representations. The appellant also submitted representations.

After the notice of inquiry was sent to the appellant, and before his representations were received, one affected party consented to the disclosure of the amount provided by it to the City.

After reviewing the appellant's representations and the consent provided by one affected party, the previous adjudicator decided to seek reply submissions from the City, and provided it with a copy of the appellant's submissions and the affected party's consent. The City was invited to comment on the appellant's submissions and was also invited to comment on whether the affected party's consent to disclosure affected the City's decision to withhold the amount relating to this affected party. The City provided submissions in reply.

The previous adjudicator then decided to seek reply representations from the three affected parties who objected to disclosure of the information contained in the record, and provided them with a copy of the appellant's representations, with only the appellant's identity severed from them. Two of the three affected parties submitted representations in reply.

The file was subsequently transferred to me to complete the adjudication process.

RECORD:

The information remaining at issue in the one-page chart is the dollar amounts of sponsorships that five corporations provided to the City for specific initiatives.

PRELIMINARY MATTERS:

In its reply representations, the City raises two procedural fairness concerns regarding the manner in which this inquiry has been conducted. Both of these concerns arise from the fact that the City was invited to provide reply representations in response to the appellant's representations.

I note that Adjudicator Smith recently addressed issues regarding the process of deciding whether to seek reply representations. In Order PO-2899-R, this issue was raised by a party which was not given the opportunity to provide reply representations. Adjudicator Smith reviewed previous orders and court decisions regarding this issue, and stated:

> The decision as to whether or not to proceed to the latter stages of the inquiry is based on all of the circumstances of the case, including the content of the submissions already provided, as well as considerations of procedural fairness.

I agree with this statement from Order PO-2899-R, and will apply it in reviewing the City's concerns.

I also note that, after the City makes its arguments regarding the procedural fairness concerns and prejudice to it in being invited to make reply representations, the City proceeds to provide

approximately four pages of reply representations, responding to the appellant's representations. In these representations the City challenges the appellant's position on a number of points, alleges incorrect statements made by the appellant, and points out what it perceives to be inconsistencies in the appellant's representations. Although this seems to argue against the City's view that it is prejudiced by having been invited to provide reply representations, I will briefly address the two procedural matters raised by the City.

1) Standard of Proof

The City appears to take the position that, because the City was provided with a copy of the appellant's representations and invited to provide representations in response to them, this office has imposed a standard of proof on the City which is not in keeping with previous jurisprudence.

The City's position, as I understand it, consists of the following:

- previous orders have established the standard of proof to be met in determining whether an exemption applies;
- the City provided representations in the first instance which, in its view, met that standard;
- the appellant's representations (which the City states include "unsupported contentions", "statements of personal belief" and "incorrect statements") are not relevant considerations in determining whether the exemptions are made out; and
- by inviting the City to address the appellant's representations, this office is imposing a standard of proof on the City which is not in keeping with previous jurisprudence.

After assuming carriage of this appeal, I reviewed the entire file, including all of the steps taken as well as the information that was disseminated throughout the appeal. I find the City's concern regarding procedural unfairness in the conduct of the appeal, based on the standard of proof, to be without merit.

The process followed in this appeal is precisely the one outlined in section 7 of the *Code of Procedure* issued by this office in relation to access appeals, which expressly contemplates and exchange of representations and the possibility of seeking reply representations. I also note that inviting reply representations is a common practice in litigation and has no impact on the standard of proof required of the City, which is set out in section 42 of the *Act*. If the City is of the view that its initial representations speak for themselves and the appellant's representations are insufficient to rebut them, it is at liberty to respond in that manner when invited to provide reply representations.

In this case, the appellant's representations identified a number of matters and raised certain questions which the previous adjudicator decided the City ought to be given the opportunity to reply to, including whether there was a compelling public interest in disclosure of the record at issue. As already noted, the City could have chosen not to provide reply representations if it disagreed with the previous adjudicator and/or thought the appellant's position did not need a response. After raising the two procedural matters, the City chose to provide substantial representations in response to the appellant's representations. On my review of this appeal, I am

satisfied that the decision to proceed to the latter stages of the inquiry was based on all of the circumstances of the case, including the content of the appellant's submissions, and considerations of procedural fairness. In doing so, I find that this office did not impose a standard of proof on the City which is not in keeping with previous jurisprudence, and I reject the City's position on this matter.

2) Case to be met

The City takes the position that, because certain documents referred to by the appellant in its representations were not provided to the City, the City has not been provided with the case to be met. In particular, the City states that the appellant makes reference to a portion of the representations of one of the affected parties, which were shared with the appellant. This affected party's representations had not been shared with the City, and the City takes the position that it is prejudiced by not having been provided with this affected party's representations.

The City is correct in identifying two important aspects of procedural fairness in administrative decision-making; the parties must be advised of the case to be met and must be given a reasonable opportunity to address the issues. I also generally accept the City's position that, if a document is referred to and relied on by a party, absent confidentiality concerns addressed by section 41(13) of the *Act* and section 7 of the *Code of Procedure*, the opposing party ought to have the opportunity to view it. An adjudicator, in deciding whether to provide some or all of the representations to the other party, must make that decision in keeping with the principles of procedural fairness.

The previous adjudicator in this appeal chose to share the non-confidential portions of the appellant's representations (including a number of attachments) with the City, and to allow the City the opportunity to make representations in reply. He chose not to provide a copy of the affected party's representations, a portion of which was referred to by the appellant. In its reply representations the City is taking the position that it ought to have the opportunity to also review the referenced representations of the affected party.

In most appeals, affected parties who do not consent to disclosure are aligned in interest with the institution, in this case, the City. Representations of institutions and affected parties are normally solicited at the same time, and the non-confidential portions raising issues that require a response are normally shared with the appellant as the second step. Only in an unusual case, or where an affected party takes a position opposed by an institution, would this office provide an affected party's representations to an institution. To do so entails an additional step in the process which would of necessity increase the length of the inquiry.

In this case, I am not relying on the statement made by the affected party that the City refers to. Accordingly, I find that the City has not been prejudiced by not having been provided with this affected party's representations, and I reject the City's position that this office has not provided the City with the case to be met.

DISCUSSION:

THIRD PARTY INFORMATION

The City and three affected parties claim that the information at issue is exempt under sections 10(1)(a) and/or (c).

Sections 10(1)(a) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> …
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

I will begin with the second part of the three-part test under section 10(1) of the *Act*.

In order to satisfy part 2 of the section 10(1) test, the City and/or third party must establish that the information was "supplied" to the City "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be supplied to an institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)* [2005] O.J. No. 2851 (Reasons on costs at [2005] O.J. No. 4153) (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution." The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

Representations

The City states that:

> [I]nformation may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party. The City submits that the severed information would reveal not only the particulars of the value of a specific commercial transaction, but would also reveal information concerning the overall financial operations of each of the specific affected parties.

One affected party notes that it is "committed to investing in education and literacy and was therefore very pleased to have the opportunity to contract with the [City] for the sponsorship rights…[and] proudly reported its involvement in this project…[in] its 2005 Corporate Responsibility Report…."

This affected party also notes that it:

> …negotiated in good faith with the City in order to arrive at terms that were acceptable for both parties. An important part of the consideration for the Sponsorship was a confidentiality clause which formed part of the final agreement and is excerpted at Exhibit "B". [The affected party] is of the view that the confidentiality clause is express evidence of [the affected party's] and the City's shared intention to maintain the confidentiality over information exchanged during the course of negotiation, including the amount [the affected party] paid to the City for the Sponsorship.

Another affected party refers to the "Sponsorship Agreement" entered into between it and the City. Although its representations do not specifically state that this agreement was negotiated, in the portion of its submissions relating to harms it argues that disclosure would affect its ability to "negotiate future sponsorship agreements."

Similarly, the third affected party notes that it entered into a contract with the City, and refers to the various rights and obligations under the agreement. This party also notes that the agreement contained confidentiality obligations on both parties.

Analysis and findings

After reviewing the City and affected parties' submissions on this issue, I find that even though the amounts of the sponsorships are contained on a chart prepared by the City, these amounts are derived from the agreements entered into between the affected parties and the City, and as noted above, contractual information will only meet the "supplied" test if one of the exceptions listed above is found to apply. In my view, putting this information into chart form does not alter its fundamental character.

I am not persuaded that the inferred disclosure or immutability exceptions apply to this information. I have considered the confidentiality agreements as described by the affected parties, and included along with the submissions of one affected party. As the first affected party notes, the confidentiality clause was designed to "maintain the confidentiality over information exchanged during the course of negotiation". In particular, the confidentiality agreement included in Exhibit B to the first affected party's submissions refers to the fact that either party may, as a result of entering the agreement, "have access to or receive disclosure of certain confidential or proprietary information about the business and management of the other party…" I accept that during the negotiation process, either party may have exchanged information about its business or management, some of which might fall into the inferred disclosure or immutability exceptions.

Nevertheless, the information at issue here is the dollar amount (described as the value amount in the chart) stipulated in a contract, and neither exception applies. Many previous orders of this office have stated that it is not possible for an institution to alter its statutory duties under the *Act* by entering into a contract with a business partner that contains a confidentiality clause. While such a clause may provide evidence to support a submission that information was provided with an expectation of confidentiality, this fact on its own does not automatically lead to the application of section 10. Rather, section 10 only applies if all of its constituent elements are present.

As stated in Order PO-2879-R, the question is not whether disclosure is contrary to a confidentiality provision (in that case, contained in an RFP that pre-dated the contract); rather, the question is whether section 10(1) of the *Act* applies to exempt the information at issue. In this case, the information was not "supplied" and part 2 of the test is therefore not met.

I am, moreover, not persuaded that, even if the severed information met the "supplied" test, it could be characterized as confidential or proprietary information about the business and management of either party, or that the funding amount would fall into either of the exceptions.

Because all three parts of the test must be met, and part 2 is not met here, I find that section 10(1) does not apply.

ECONOMIC AND OTHER INTERESTS

The City claims that the discretionary exemptions in sections 11(c), (d) and (e) apply to exempt the withheld portions of the record. These sections of the *Act* state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (e) 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;

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

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

For sections 11(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11 [Orders MO-1947 and MO-2363].

Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests [see Orders MO-2363 and PO-2758].

Sections 11(c) and (d)

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Orders P-1190 and MO-2233].

It is arguable that section 11(d) is broader in scope than section 11(c), however, both sections take into consideration the consequences that would result to an institution if a record was released (Order MO-1474).

In order to better understand the City's position on this issue, it is helpful to recite the background information it provided on the value of sponsorship partnerships to the enhancement of City services or facilities:

> With limited resources and most capital funds being directed to other areas such as health and safety and maintenance/repairs, it is not unusual for the City to look for and consider alternative funding such as

> naming rights, donations, and sponsorship for projects that will enhance City services or facilities.
>
> Sponsorship partnerships are often developed with private corporations/industry, special interest/community groups, other institutions, etc. Not only are there financial benefits to be gained, there are also the benefits of sharing resources and expertise, referrals or access to multiple resources, finding supports for clients in a "one-stop" setting, and an integrated approach to improving client service.

The City also points out that in contrast to the Request for Proposal process, which involves the City purchasing a tangible good or service, the naming rights or sponsorship process involves the City selling a tangible good, in what the City describes as a "relatively new and emerging market."

With respect to the harms envisioned under sections 11(c) and/or (d), the City states:

> City staff members have been informed, from current and potential partners that if disclosure of the severed information is ordered, the City should expect the following developments:
>
> 1. partners may not be willing to enter into naming rights arrangements with the City; or
>
> 2. if willing to enter into naming rights agreements, partners may not be willing to enter into naming rights agreements on terms as favourable to the City, as the ability to retain financial and commercial information, is in itself, of a value to parties to naming rights agreements.

The City submits that there is a reasonable basis for expecting that its financial and/or economic interests will be prejudiced by disclosure of the information at issue.

I note that one of the affected parties to this appeal subsequently consented to disclosure of the value of the sponsorship agreement that it entered into with the City.

The three other affected parties echo the City's submissions on this point. One affected party notes the "constant and intense competition" with its rivals in many areas, including sponsorships. It expresses concern that when other entities learn what it is prepared to spend on sponsorship agreements, they will want the same or more money. This affected party notes that if the information is disclosed, it will re-evaluate how it deals with the City with respect to future sponsorship activities.

Another affected party states:

> The publication of the amount will not have detrimental impacts on [the affected party's] business interests but it will greatly impact on our approach to any future donations of this kind.

This affected party also points out that the City sought out the donation in question, and that the results of the agreement are plain to see. It submits that there was "no secrecy in the application of the agreement."

The third affected party does not explicitly state that it would no longer enter into sponsorship agreements, but notes that "corporate sponsorships and naming rights are competitive advantages that corporations seek out in order to promote their brands." This affected party notes further that sponsorships are subject to negotiation and exclusivity, usually at the request of the sponsor, in order to prevent direct competition at an event or with respect to a particular naming right. The affected party submits that:

> Revealing the price paid for promotional rights, particularly an exclusive right, means that competitors know where the bidding starts in order to undercut a rival. This means either the sponsorship will cease, with a resulting loss to the [City], or the price of the sponsorship may be artificially increased…

In addition to the above argument, the City submits that:

> [D]isclosure of past values obtained for the sale of naming rights will adversely affect the City's competitive position in future negotiations…sale of naming rights of public spaces in Toronto is a situation where, due to the immaturity of the market, the City is *selling* an intangible good of unknown supply. Therefore, the City submits that it is in the interests of the public at large and the City, for the City to obtain the maximum value possible for any one sale of public space…
>
> The greater competitive level of knowledge the City has with respect to the value of the good in comparison to the bidders, the greater the ability to establish the best value for the City. The City submits that greater the information surplus in the City's favour, the better the City could tailor the price of the naming rights to the maximum price that a potential purchaser would pay.
>
> Without any knowledge as to the City's minimum acceptable price potential purchasers would be foolish to deny the City's offer (as the price is the maximum acceptable to the purchaser). However, if the severed information is disclosed, the comparative advantage of the City in information decreases, and the maximum value that the purchasers would be willing to pay will decrease….

The City submits that disclosure of the information at issue in this appeal 'will adversely affect the City's ability to maximize value for the sale of naming rights to public spaces," and would result in the harms identified in sections 11(c) and/or (d).

The appellant disputes the position argued by the City and affected parties. He notes that other institutions have disclosed similar information without a concern about the harms identified above, and provides documents in support of the publication of similar information by other institutions, including the Toronto Public Library and the Toronto District School Board. One of the attachments provided by the appellant reveals that the dollar amounts in other sponsorship agreements not involving the City, with at least one of the affected parties have been disclosed. Much of the appellant's submissions relate to his position that disclosure of the information at issue is in the public interest, and I will address this issue below.

The appellant's submissions were sent to the City and affected parties in order that they be provided with an opportunity to reply to the appellant's arguments, as noted above, and as they relate to the public interest override.

Overall, the City and affected parties are very dismissive of the appellant's arguments that the disclosure of similar information by other institutions is relevant. I do not agree with their view of this issue. In my view, the disclosure of similar information by other institutions raises some credibility concerns regarding the position taken by the affected parties and the City. In his representations, the appellant essentially asks me to take into account the information that is publicly available regarding sponsorships and partnerships and then to consider the reasonableness of the affected parties' cautions that they would either cease to provide sponsorships or that they would approach them differently, to the City's detriment.

In my view, although the appellant only provided a limited number of examples of publicly available information, he raised a reasonable question in my mind. In considering this issue, I briefly reviewed the City's website for documents relating to sponsorships, including, but not only those, it has referred to in its representations. I also reviewed the websites of the affected parties to determine the level of disclosure they provide to the public regarding sponsorships and funding issues generally.

For the most part, I find that a random review from these sources supports the positions taken by the City and affected parties, with some exceptions. The City's website contains a considerable amount of information regarding sponsorships, donations and partnerships. The information on its website is consistent with the attachments provided by the City with its representations. It is very clear from this information that the City places a high economic value on funding from these sources.

With respect to the information contained on the websites of the affected parties regarding this issue, although they make reference to sponsorship activity, and disclose a global amount spent on this type of funding, they are silent insofar as the actual value of individual sponsorships is concerned. Conversely, I did come across some documents on the City's website (which I will address below), which reveal that the City has disclosed the dollar amounts in some other sponsorship agreements that it has entered into with named corporations. Indeed, as I noted above, during mediation, the City agreed to disclose the dollar amount of the donation made by a foundation for a specific initiative, because this information is already available on the City's website.

The appellant provides evidence of the disclosure of the value of the corporate sponsorship from one of the affected parties made by another public institution at about the same time as the current access request was made.

Although the example provided by the appellant demonstrates that there is some information about sponsorships given to the public, it is not sufficient to undermine the one affected party's position, in part because it is not clear from the appellant's evidence whether this affected party was notified prior to disclosure of the information.

The City has provided a number of arguments for a finding that the information at issue is exempt under section 11(c) and/or (d). One of these arguments relates to the financial value to the City of the continued sponsorships of the affected parties in the circumstances of this appeal. Although there is evidence that the value of sponsorships made by other organizations, corporate or otherwise, has been made public, the affected parties in this appeal have expressed strong objections to having their information made public in this case. In reviewing the affected parties' and City's websites, it appears that the specific value of individual sponsorships in the past has not been made public. Although the appellant has raised a reasonable question regarding the credibility of the affected parties' assertions, the evidence he has provided to support his position is insufficient to adequately challenge the positions taken in the circumstances of this appeal. The affected parties have stated in no uncertain terms that they would approach their dealings with the City differently if they were compelled to disclose this information. Accordingly, with one exception, I am satisfied that the City has provided sufficient "detailed and convincing" evidence to demonstrate that disclosure of the information at issue in the record "could reasonably be expected to" result in the harms set out in sections 11(c) and (d).

I am not persuaded that the harms in sections 11(c) or (d) could reasonably be expected to result from the disclosure of the amount of a sponsorship agreement, for the reasons cited above, when the affected party consents to its disclosure. I find the City's position to be indefensible regarding this particular amount given that, as I noted above, its website contains similar information with respect to other sponsors (see: for example, a City Staff Report dated November 12, 2007 entitled, "Donations to Parks, Forestry and Recreation," located on the City's website as an attachment to the Toronto City Council Decision Document for meetings held December 11, 12 and 12, 2007).

The City argues in its reply submissions that the example of disclosure by another institution provided by the appellant (referred to above) only reveals what the institution found acceptable for the funding of the programs, but does not reveal the maximum amount that the sponsors would pay for the ability to sponsor the particular programmes. The City submits that knowledge of previously accepted optimal amounts combined with the disclosure of additional information would result in prejudice to that institution's future negotiations. I do not find this argument persuasive. In my view, the City is second guessing the reasoning behind the other institution's decision to disclose the information and I find the argument to be speculative and unconvincing.

In general, the City takes the position that the disclosure of any of the information at issue "will adversely affect the City's ability to maximize value for the sale of naming rights to public spaces. With respect to the consent given by one affected party, the City states:

> [T]he post facto issuance of a consent to the release of the information is question is irrelevant to the correctness of the City's initial decision to deny access to the financial information…At the time the decision was issued, the City had not received the consent. The City had no basis to assume that the affected party would not take the position that the release of the information in question would result in harm to the affected party…
>
> As of the date of these reply submissions, the City still has no basis to assume that the information in question was not financial information supplied in confidence, which if released, would reasonably cause harm to [the affected party]. As a result of receiving the notice of [the affected party], the City is merely informed that [the affected party] has acknowledged its consent to the disclosure of the information in question. From the information submitted, the City cannot be sure of whether [the affected party] is of the position that section 10 does not apply to the information in question, or it has merely made the choice to consent to the disclosure of the information in spite of the application of section 10.
>
> [The affected party] may have made the business decision that in the present case, the economic harms from the release of this information would be outweighed by the positive effect which increased publicity of their corporate largess would provide. Alternatively, perhaps, [the affected party] has simply chosen to utilize its resources to address more pressing business issues than to attempt to protect its informational assets from thorough participation in the current IPC appeal…
>
> …
>
> To date, there has been no evidence provided to the City that would raise any basis for any possible finding that not all of the requirements of the section 10 test have been fulfilled…However, in light of [the affected party] signing a consent to the disclosure of the information in question, the City is willing to issue a new access decision…no longer claim the section 10 mandatory exemption to the financial information of [the affected party].

I find the City's position to be entirely without merit. Section 10(2) provides that the institution may disclose the information belonging to an affected party on consent. In my view, this provision contemplates that, by consenting, the affected party has declared that it has no financial or other concerns about disclosure. The discretionary nature of this provision simply recognizes that the City may wish to claim other exemptions to withhold the information, despite the consent of the affected party.

Moreover, I find it noteworthy that in addressing this particular issue on reply, the City did not address its own interest in maintaining the information in confidence under section 11, but chose

to rely on section 10 as a basis for refusing to alter its position. It is apparent that a significant factor in the City's decision to withhold the information at issue stems from the comments made by the affected parties regarding the impact disclosure would have on their relationship with the City regarding sponsorship money. This argument is no longer valid for the value of the sponsorship relating to an affected party that consents to disclosure.

The second basis for the City's decision to exempt the information under section 11(c) and (d) pertains to its own financial interests in being able to obtain the maximum value possible for any one sale of public space. In my view, this position is undermined by its own inconsistent approach to disclosing the value of sponsorships noted above. Accordingly, I am not persuaded that disclosure of the amount relating to the affected party that consented could reasonably be expected to result in the harms set out in sections 11(c) or (d) of the *Act*.

Section 11(e)

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

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034]. Background information that may have formed the basis for positions taken during negotiations are distinguishable from the positions themselves, and such background information is not exempt under section 11(e) [Order M-862].

In its representations, the City states:

> The City is currently engaged in an on-going endeavour to grow the City's long-term prosperity in accordance with the City policies, guidelines and documentation, for example, Toronto's Agenda for Prosperity [website provided]. As a result the City is reviewing potential partnerships with private sector partners. The severed information will reveal the positions or criteria which the City will use in these future negotiations. Therefore, the City submits that the exemption for disclosure contained in section 11(e) is applicable in the present situation.

In the confidential portion of its representations, the City provides a brief explanation of how it intends to use the information at issue.

Having reviewed the City's brief submissions on the application of section 11(e), I am not persuaded that this exemption applies in the circumstances of this appeal. Apart from one brief sentence in which the City states how it intends to use the information at issue, the City has provided no other evidence that supports its assertion. Neither the record, nor any of the background information provided or which came to light during mediation, support the City's position. Indeed, as I discussed above, there is evidence that the City itself has placed donor amount information on its website in other circumstances. The City does not attempt to distinguish those circumstances from the current appeal. In my view, the inconsistent treatment of similar information by the City undermines its assertions regarding the intended use of the dollar amounts of the donations it receives.

Keeping in mind that the City has disclosed information about the identities of the donors and information about the various initiatives involved, and that the only information remaining at issue is the amount of the donation, I am not persuaded that this record contains or that the information at issue reflects the City's positions, plans, procedures, criteria or instructions that are intended to be applied to current or future negotiations. Accordingly, I find that section 11(e) does not apply to the withheld information.

Summary

In summary, I find that, with the exception of the value amount pertaining to the affected party that consented to disclosure, and subject to my findings below under the exercise of discretion and public interest override, the remaining values qualify for exemption under sections 11(c) and (d) of the *Act*.

EXERCISE OF DISCRETION

The section 11 exemptions 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, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails 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)].

Representations

The City states that in exercising its discretion to withhold the information at issue it took into consideration, *inter alia*, the purpose of the *Act* and the exemptions at issue, and the fact that it has disclosed the related information pertaining to "the receipt of financial compensation through the operation of programs available on its website," the nature of the information and the extent to which it is significant and/or sensitive to the City, appellant or the affected parties.

The appellant's representations focus on the application of the public interest override in section 16 of the *Act*, which I will address below, but do not address the City's exercise of discretion in any concrete manner.

Based on the City's representations, and taking into consideration the fact that the City has disclosed the majority of the record, which identifies and details the various sponsorships that it has entered into, I am satisfied that the City considered relevant considerations and did not take into account irrelevant considerations in exercising its discretion to apply sections 11(c) and (d) to the value of the sponsorships.

Accordingly, I find that the City properly exercised its discretion to deny access to the portions of the record that I have found to qualify for exemption under section 11(c) and (d).

PUBLIC INTEREST OVERRIDE

As I indicated above, the appellant submits that there is a compelling public interest in disclosure of the information at issue in this appeal.

Section 16 states:

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

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23 of *FIPPA*, which is equivalent to section 16 of the *Act*:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

Representations

The appellant submits that there is an "enormous public interest at stake" regarding the issue of sponsorships. He goes on to state:

> Large portions of the public are tired of being inundated with corporate advertising, especially on public space, without their consultation. Many interested citizens actively oppose the commercialization of public space as it threatens to obligate public space and public policy to corporations. Indeed, this is a huge public policy matter with important implications for the public, which cannot be sidelined by the City's desire to gain top dollar by selling out public space or from a corporate interest in secrecy and profit maximization.

The appellant submits further that withholding the value of the sponsorships undermines public policy "and thus democracy in Toronto itself." He contends that since these corporations have chosen to involve themselves in the public sphere, they should not expect secrecy; rather, "they have chosen to involve themselves in public matters and the democratic responsibilities that necessarily entails."

The appellant has provided a number of attachments to his representations, including documents that support his contention that the exemptions should not apply. He has also attached three media releases, which appear to support his submission that there is a compelling public interest regarding sponsorships.

The City and some of the affected parties have made submissions in reply that respond to the appellant's arguments. The City argues that the appellant's interest in obtaining the information at issue is a private interest "in preventing the City from selling public assets." The City submits further that the appellant's "personal opinion as to the best policy decision for the City to pursue is not a public interest per se." The City suggests that the appellant would be better to "participate in municipal democracy" rather than attempt to have the City disclose information that it believes would harm its interests.

With respect to the appellant's arguments that there is a public interest in the issue of commercialization of the public sphere, the City acknowledges the public interest, but takes the position that the public is generally in favour of "moderate commercialization," and again suggests that the appellant attempt to make changes to public opinion through democratic methods. In addition, the City refers to a number of items from its website, and states that there has been significant public discussion about the issue, including public hearings where the issue of naming rights has been subject to public debate.

One of the affected parties suggests that the appellant leave public policy matters to the legislature. Another affected party discusses its view of how the democratic system should operate, noting that once the citizens have elected City Council, they should leave it up to Council to look out for the public interest. It appears that this affected party believes that "unelected interest groups" have no role to play in ensuring that City officials act in the public interest.

Analysis and Findings

Before discussing whether there is a compelling public interest in disclosure of the information at issue, it is important to address some misconceptions held by the affected parties and to a certain extent by the City as well.

The purpose of the *Act*, as set out in section 1 is to provide the public with a right of access to government information. In my view, it is clear that this right is intended to be a broad one based on the following principles: that information should be available to the public, that exemptions are to be limited to those that are necessary and should be limited and specific, and that there should be independent review of an institution's decisions to refuse access.

In *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) the rationale for the adoption of a freedom of information scheme in Ontario was discussed. This rationale includes public accountability, informed public participation, fairness in decision-making and protection of privacy. With respect to "accountability," the Williams Commission Report stated at page 77:

> Increased access to information about the operations of government would increase the ability of members of the public to hold their elected representatives accountable for the manner in which they discharge their responsibilities. In addition, the accountability of the executive branch of government to the

> legislature would be enhanced if members of the legislature were granted greater access to information about government.

Regarding public participation, the Williams Commission Report stated at page 78:

> The value of citizen participation in the formulation of public policy is often cited in support of the adoption of freedom of information legislation. Although freedom of information laws themselves do not establish an institutional framework for public participation, an informed citizenry is better able to make effective use of the means of expression of public opinion on political questions.

The importance of this right of access was discussed by the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* [1997] 2 SCR 403 per La Forest J. at 432-434, paras. 61-63:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry…Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.

In my view, the ability of the public to scrutinize the manner in which institutions use public funds or, as in this case, fund public spaces, is an important aspect of public accountability. The more information the public has regarding these issues is relevant to the ability of the public to participate in the formation of public policy. Subject to a public interest in *non*-disclosure, information such as that requested by the appellant is integral to the ability of the public to assess the operations of government and to hold it accountable for the use of, in this case, public property.

Even if it could be successfully argued that the appellant has a private interest in obtaining the records, the request and appeal raise issues of a more general application. I am satisfied that there is a public interest in the disclosure of information regarding sponsorships and partnerships as they pertain to the "commercialization" of public spaces. The question that I must decide is whether this public interest applies to the specific amounts at issue, and whether any such public interest is "compelling." I find that it is not.

In making this decision, I take note that the City has disclosed almost all of the information in the record pertaining to the partnerships set out in the record, including the division, the type of service, the name of the initiative along with a brief description of it, who the partner is, the types of partnership and funding, and length of the partnership. The only information that has been withheld is the dollar value.

The appellant's representations do not persuade me that knowing the value of the sponsorships would inform the citizenry about the activities of their government, or add 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.

The appellant has attached two media articles in support of his public interest argument. One article cites criticisms put forth regarding a partnership that would outfit two Toronto schools with state-of-the-art technology. I note that the criticism as described relates to the issue of the partnership itself and the commercialization of educational facilities, not to the value of the partnership. The second article relates to a $400 million funding agreement with naming rights for a stadium. Although the criticisms noted in this article relate to the value of the sponsorship, they are made in the context of government bailouts and the loss of jobs at the sponsoring corporation. In my view, neither of the two articles provided by the appellant support a conclusion that there is a compelling public interest in the public obtaining the value of the sponsorships set out in the record at issue.

Based on the parties' submissions, the information that has been disclosed and the amount of information available on the City's website regarding the issue of sponsorships and partnerships generally, I am satisfied that there is sufficient information available to the public to inform it about the activities of the City and to permit the public to effectively express public opinion or to make political choices. Accordingly, I find that there is no compelling public interest in the disclosure of the information that I have found to be exempt under section 11.

ORDER:

1 I order the City to disclose the dollar amount relating to the affected party that consented to disclosure, by providing the appellant with this information on or before **November 2, 2010**.

2 I uphold the City's decision to withhold the remainder of the record at issue.

3 In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the portion of the record disclosed to the appellant.

Original signed by: October 12, 2010
Laurel Cropley
Adjudicator