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

ORDER MO-2635

Appeal MA10-43

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 City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to any plans, drawings or paperwork submitted to the City respecting the lobby of a specified condominium building. The condominium building has both residential and commercial occupants and is located on the Toronto harbourfront close to the Toronto Island Airport.

The City explains that following the terrorist attack that occurred on September 11, 2001, the City's Buildings Division (Buildings) together with the Corporate Access and Privacy Office (CAP), drafted guidelines to assist Buildings staff in addressing requests for access to building and site plans. The City states in its representations that:

> Over the years, CAP and Buildings have continued to further clarify and refine the guidelines, based largely in part on their consultations with the City's security and legal staff, other municipalities, IPC orders, the Toronto Police Services, provincial and federal agencies, etc., as well as a review of the policies and procedures with respect to the release of building plans in other jurisdictions.
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> Currently, access requests for building plans only are processed by the City's Buildings Division. Where a request is for both building records and drawings, the request is processed formally under the legislation by the CAP office.

After receiving the request, the City identified responsive records and, in its initial decision letter, granted partial access to them. The City also relied on section 14(1) (personal privacy) to deny access to certain withheld portions of the responsive records. Finally, the City stated in its decision letter that consent from the condominium board was required before it could release any building plans.

The requester (now the appellant) appealed the decision.

At mediation, the appellant confirmed that he/she is not seeking access to any of the information withheld under the mandatory exemption at section 14(1) of the *Act*. As a result, that information and the application of section 14(1) is no longer at issue in the appeal.

Also during mediation, and within the time frame for claiming additional discretionary exemptions, the City issued a supplementary decision letter advising the appellant that because consent was not given to the release of the building plans, it was relying on the discretionary exemption at section 8(1)(i) (endanger life or safety) of the *Act* to deny access to them.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

I commenced the Inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the City and a party whose interests might be affected by disclosure of the responsive records (the affected party). I determined that it was not necessary to seek the representations of the appellant to dispose of this appeal.

RECORDS:

At issue in this appeal are the building plans relating to the lobby of a specified condominium building, more particularly described in a two-page attachment to the City's supplementary decision letter as architectural, structural, electrical, mechanical and designer drawings.

DISCUSSION:

In its representations, which it requested not to be shared with the appellant, the affected party sets out a number of its concerns and provides submissions in support of the application of the section 8(1)(i) exemption claimed by the City. The affected party also takes the position that the section 8(1)(e) discretionary exemption is applicable. I will first address the affected party's concerns and then determine whether the affected party should be permitted to raise the potential application of section 8(1)(e).

Knowing the Case to Meet

The affected party takes issue with the manner in which the request and this appeal has been processed. It also complains that it did not participate at the request or mediation stage of this matter.

Section 39(3) of the *Act* provides that:

> Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an interest in the appeal, including an institution within the meaning of the *Freedom of Information and Protection of Privacy Act*, of the notice of the appeal.

Section 41(13) of the *Act* provides that:

> The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 39 (3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made.

The affected party appears to be alleging that although it was informed of the appeal, and has been given an opportunity to provide representations, it is not fully aware of the case it has to meet. I disagree.

The Notice of Inquiry sent to the affected party clearly describes the records at issue, sets out a summary of the facts and issues in the appeal and invited the affected party to provide submissions in response. The affected party provided extensive submissions setting out its various concerns and its substantive arguments with respect to the application of the section 8(1)(i) exemption claimed by the City. I am satisfied that the affected party is aware of the case it had to meet and, since receiving the Notice of Inquiry, has been an active participant in the appeals process. In my view, the affected party has failed to establish that there has been any breach of procedural fairness or that it is unaware of the case it has to meet.

Frivolous and Vexatious Request

The affected party alleges that, depending on who made the request, it may have been made in bad faith and should be determined to be frivolous and vexatious. An assertion that a request for access is frivolous or vexatious, raises the potential application of section 4(1)(b) of the *Act*.

Section 4(1)(b) of the *Act* states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > *the head is of the opinion* on reasonable grounds that the request for access is frivolous or vexatious. [Emphasis added.]

Section 20.1(1) of the *Act* states:

> A head who refuses to give access to a record or a part of a record *because the head is of the opinion that the request for access is frivolous or vexatious*, shall state in the notice given under section 19,
>
> > (a) that the request is refused because *the head is of the opinion* that the request is frivolous or vexatious;
> >
> > (b) *the reasons for which the head is of the opinion* that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 39(1) for a review of the decision. [Emphases added.]

The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

A review of these provisions makes it very clear that they exist for the benefit of "institutions" under the *Act*. Section 4(1)(b) sets a condition precedent for its application that "the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious." This theme is repeated in the notice requirement established by section 20.1(1). Similarly, sections 5.1(a) and (b) of Regulation 823 prescribe that:

> A head … shall conclude that the request for a record or personal information is frivolous or vexatious if:
>
> (a) *the head is of the opinion* on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
>
> (b) *the head is of the opinion* on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access. [Emphases added.]

In Order PO-2490, which dealt with the equivalent provision in the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) Senior Adjudicator John Higgins concluded that sections 10(1)(b) and 27.1(1) of the *FIPPA* and sections 5.1(a) and (b) of Regulation 460 of *FIPPA* can only be relied upon by the head of an institution under the *Act*. In reaching this conclusion, Senior Adjudicator Higgins states:

> In my view, the universal requirement in these provisions that *the head* (i.e., the head of an institution under the *Act* – see the definition in section 2) must have *formed an opinion* that the request is frivolous or vexatious make it even more difficult for an affected party or appellant to rely on these provisions than to rely on a discretionary exemption, as discussed above. In fact, based on the statutory wording, I believe this is an insurmountable hurdle. I find that the appellant is not entitled to rely on these sections, *per se*. [Emphases in original.]

However, Senior Adjudicator Higgins goes on to state that parties to an appeal are not precluded from arguing that a request under the *Act* is an abuse of process at common law. In this regard, Senior Adjudicator Higgins endorsed the reasoning of former Commissioner Tom Wright in Order M-618, who considered a claim of abuse of process on the basis of common law principles, prior to the addition of the "frivolous or vexatious" provisions to the *Act*. In that case, former Commissioner Wright stated:

> I have been referred to ample and persuasive legal authority for the proposition that, as an administrative tribunal exercising quasi-judicial functions, the Commissioner is "master of his own process". On this basis I believe that I have the necessary authority to control what I identify as abuse of that process which would frustrate the intent of the Legislature in creating both a freedom of information regime and an office for its administration.

> The authority of an administrative tribunal to prevent abuses of its own process is affirmed in the judgment of Misener J., of the Ontario Court (General Division), in Sawatsky v. Norris (1992), 10 O.R. (3d) 67. Judge Misener considered that, even absent the express power to deal with abuses of process granted by section 23 of the Statutory Powers Procedure Act R.S.O. 1990, as amended, a review board under the Mental Health Act "has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right" (at p. 77).

Senior Adjudicator Higgins then went on to consider the application of the common law principles in the circumstances of PO-2490. However, because the common law principles are, to a significant extent, the foundation of the "frivolous or vexatious" provisions of the *Act*, he referred to previous decisions in that regard, and other case law on the subject, in deciding this issue in Order PO-2490.

In the case before me, as in Order PO-2490, the "abuse of process" issue has been raised not by the City but rather by the affected party. Accordingly, following the reasoning of Senior Adjudicator Higgins in Order PO-2490, I will consider whether the request is an abuse of process under the relevant common law principles in the circumstances of this case. Like Adjudicator Higgins in Order PO-2490, because the principles that would apply to an allegation that a request is an abuse of process or "frivolous or vexatious" at common law are, to a significant extent, the foundation of the frivolous or vexatious provisions of the *Act*, I will refer to previous decisions in that regard, and other case law on the subject, in deciding this issue.

Pattern of conduct

As noted above, paragraph (a) of section 5.1 of Regulation 823 requires the head of an institution to conclude that a request is frivolous or vexatious if the head is of the opinion, on reasonable grounds, that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution.

Accordingly, the affected party must establish that the request is part of a "pattern of conduct." A "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester [Order M-850]. I have not been provided with any evidence of any related or similar access requests under the *Act* made by the appellant in this appeal. I find that the affected party has failed to establish that the request is part of a "pattern of conduct."

Bad faith

As noted above, paragraph (b) of section 5.1 of Regulation 823 requires the head of an institution to conclude that a request is frivolous or vexatious if the head is of the opinion, on reasonable grounds, that the request is made in bad faith or for a purpose other than to obtain access.

Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct" [Order M-850].

"Bad faith" has been defined as:

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will [Order M-850].

Applying the definition of bad faith referred to above, I find that there is insufficient evidence before me to support a finding of bad faith on the part of the appellant in this appeal.

Purpose other than to obtain access

Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct" [Order M-850]. A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective [Order M-850].

In Order MO-1924, Senior Adjudicator John Higgins provided extensive comments on when a request may be found to have a purpose other than to obtain access. In that case, the institution argued that the objective of obtaining information for use in litigation or to further a dispute between an appellant and an institution was not a legitimate exercise of the right of access. In rejecting that position, Senior Adjudicator Higgins stated:

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada* (*Minister of Finance*), [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have a "right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the

> requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

I adopt the approach set out by Senior Adjudicator Higgins for the purposes of this appeal. I find that the affected party has not provided sufficient evidence to support a finding that the appellant's request was made for a purpose other than to obtain access. Although the appellant was not asked to submit any representations regarding his/her purpose for seeking access, I am not prepared to find in the circumstances of this appeal that the request was made in bad faith.

In the circumstances before me, I am not satisfied that the appellant is making the request for a purpose other than to obtain access to the requested records.

In my view, the affected party has failed to meet the threshold of establishing on reasonable grounds, that the access request is made in bad faith or for a purpose other than to obtain access.

I therefore dismiss the affected party's "frivolous or vexatious" arguments, whether they are considered in the context of the *Act*, or in the context of abuse of process at common law.

The Identity of the Requester

The affected party asserts that the identity and motives of the requester in this matter is relevant to any determinations that I may make in this appeal and that failing to disclose the identity of the requester is a breach of natural justice.

As a general rule, the identity of a requester is irrelevant. As set out in Order PO-1998:

> Access to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records. As has been stated in a number of previous orders, access to general records under the *Act* is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put.

Although the identity of the requester was disclosed in Order PO-2649, the factual foundation for that type of order simply does not exist in the case before me. Furthermore, there was no evidence provided to me by the affected party or the City regarding actual or potential threats to the security of the property, within the meaning of section 8(1)(i), that emanated from any identified individual. Accordingly, and in keeping with my determinations above, the identity of the requester or their possible motivation for wishing to have copies of the records, is not, in my opinion, relevant to my consideration of whether section 8(1)(i) (or for that matter 8(1)(e)) applies.

The submissions of the City and the affected party regarding their view of general potential threats to the security of the property, is dealt with below.

The Impact of the *Copyright Act*

The affected party asserts that releasing the records would result in a breach of the provisions of the *Copyright Act*. It is not necessary for me to delve into this issue in great length. Sections 32.1(1)(a) and (b) of the *Copyright Act*, provide:

> 32.1 (1) It is not an infringement of copyright for any person
>
> (a) to disclose, pursuant to the Access to Information Act, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material;
>
> (b) to disclose, pursuant to the Privacy Act, personal information within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like information; …

Disclosure, however, is subject to the limitation set out in section 32.1(2) of the *Copyright Act*, which states that:

> Nothing in paragraph (1)(a) or (b) authorizes a person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the copyright in the record, personal information or like information, as the case may be, has a right to do.

Simply put, the fact that the information contained in the records may be subject to copyright, while it may suggest some measure of ownership, it does not, in and of itself, provide a basis to deny access to the information under the provisions of the *Act*, or oust its application.

Disclosure will affect unit holder's right to privacy in their records

The affected party takes the position that disclosure of the information at issue will affect a condominium building unit holder's right to privacy in their records.

The appellant is not seeking any personal information that may be contained in the records. Personal information is no longer at issue in the appeal. Accordingly, I am not satisfied that disclosing the records will affect any unit holder's right to personal privacy.

Breach of Fiduciary Duty

The affected party argues that because the City is the custodian of the records, disclosing them would be a breach of its fiduciary duties.

The access provisions of the *Act* apply to institutions when access is requested to a record that falls within the jurisdiction of the *Act*. In determining the matters in issue before me, the scope of my jurisdiction is governed by the applicable provisions of the *Act*. In my view, the type of common law duties sought to be advanced by the affected party along with any potential

associated remedies, in the circumstances of this appeal, is outside the scope of the *Act* and my inquiry.

Raising of a Discretionary Exemption by an Affected Party

The *Act* contains both mandatory and discretionary exemptions. A mandatory exemption indicates that a head "shall" refuse to disclose a record if the record qualifies for exemption under that particular section.

A discretionary exemption uses the permissive "may". In other words, the legislature expressly contemplates that the head of the institution is given the discretion to claim, or not claim, these exemptions. In this case, the affected party seeks to rely on section 8(1)(e), an exemption that was not claimed by the City. The City chose only to rely on section 8(1)(i).

Section 8 of the *Act* contains what are referred to as "law enforcement exemptions". Sections 8(1)(e) and (i) read:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > …
> >
> > (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required.

In Order PO-1705, former Assistant Commissioner Mitchinson dealt with an affected party raising the possible application of discretionary exemptions in the context of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), the provincial equivalent of the *Act*. He wrote:

> During mediation, the third party raised the application of the sections 13(1) and 18(1) discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.
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> This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:

> The *Act* includes a number of discretionary exemptions within sections 13 to 22 [of *FIPPA*, the equivalent of sections 6 to 16 of the *Act*] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
>
> The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17(1) of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
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> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

I agree with these conclusions and adopt them for the purposes of this appeal.

With respect to the additional discretionary exemption upon which the affected party seeks to rely, I am not satisfied that this qualifies as the "most unusual of cases [where] an affected person could raise the application of an exemption which has not been claimed by the head of an institution." Discretionary exemptions all indicate that the head "may refuse to disclose…." In other words, as discussed earlier, the Legislature expressly contemplated that the head of the institution is given the discretion to claim, or not claim, these exemptions. In this case, the City has exercised its discretion against claiming this additional discretionary exemption. In my view, the affected party's concerns are addressed in the consideration of the application of section 8(1)(i) of the *Act*. The affected party has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary approach of

permitting an affected party to claim a discretionary exemption when the head has elected not to do so.

In all the circumstances, therefore, I will not consider the application of the section 8(1)(e) discretionary exemption raised by the affected party.

Finally, even if I had allowed the affected party to rely on the section 8(1)(e) discretionary exemption, I would have held that it did not apply, for the same reasons I give for finding that section 8(1)(i) does not apply, below.

Section 8(1)(i)

Section 8(1)(i) provides:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required.

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Where section 8 uses the words "could reasonably be expected to", 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 [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Although this provision is found in a section of the *Act* dealing specifically with law enforcement matters, its application is not restricted to law enforcement situations but can be extended to any building, vehicle or system which reasonably requires protection [Orders P-900, PO-2461].

The City's representations

With respect to the application of section 8(1)(i) of the *Act*, the City submits:

> … the events of September 11, 2001 have given rise to legitimate concerns with respect to the security of buildings. These events showed the ease with which

attacks can be made. The possibility of a limited or massive attack is no longer considered to be fanciful, imaginary or contrived.

Now, based on experience, addressing such fears is viewed as reasonable; the anticipated harm is not seen as remote. It is considered prudent to restrict access to information that could possibly be used to assist in an attack by terrorists, extremists, etc. Both the public and private sectors have changed their ways of doing business in order to protect against the general threat to the security of properties.

Since 9/11 which took place some nine years ago, a number of terrorist incidents have occurred around the world. The more recent ones include the undetonated bomb left in an abandoned car in Times Square, New York and the firebombing attack at a Royal Bank of Canada branch in Ottawa. The anarchist group responsible for the latter cited the bank's sponsorship of the 2010 Olympics as its motive and warned of further attacks against the G8 and G20 meetings in Toronto.

Incidents such as these, both here and abroad, clearly attest to the continued need for diligence to prevent any potential attacks. Further, it should not be forgotten that Canada has been identified by Al Qaeda as being an "enemy"; it would, therefore, not be unreasonable to believe that Toronto, as the largest City in Canada, could come under an attack.

In the current appeal, the building drawings that have been requested provide construction details, including the type and property of the materials used, mechanical details, such as heating and ventilation ducts, electrical/wiring components and fixtures, security cameras, details of bulk heads, design specifications, etc. The disclosure of such details could provide information on the building's vulnerabilities including the best point of a physical or biological attack.

The City notes that in Order MO-2181 which also involved the City, the Adjudicator found that the section 8(1)(i) exemption did not apply to the plans for a residential dwelling. The Adjudicator acknowledged that some buildings, such as "nuclear power plants or sensitive military installations, may by their very nature give rise to a reasonable basis for believing that endangerment could result from disclosure" but found that "residential structures, by their very nature, do not establish a reasonable basis for believing that harms set out in section 8(1)(i) will result from the disclosure of their building plans."

The building at issue is neither a nuclear power plant nor a military installation but neither were the twin towers of the World Trade Centre. Further, the present case can be distinguished from the previous appeal in that the property in question is not a single detached residential dwelling. It is part of a two tower complex

> which has not only residential suites but also a number of diverse businesses including a restaurant and hotel.
>
> It is located right at the City's harbour, close to many other high rise buildings, and the Toronto Island Airport, an ideal location to cause maximum destruction not only to buildings, residents and businesses but also to the City's waterfront and even the airport, in the event of an attack such as that of 9/11.
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> The City is certainly not suggesting that the appellant would engage in any specific activities that would cause harm to the building … . Rather, the City recognizes that the disclosure of information cannot be conditional or restricted only to the requester. It is addressing the well established freedom of information principle that disclosure is "disclosure to the world". Moreover, because of the internet, disclosure to the world is now true in both the literal and figurative sense.
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> Technology permits the transmission of information around the cyber world virtually instantaneously. It has been well demonstrated that international terrorists may obtain and use information through the internet in order to plan and execute an attack.
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> In summary, the City submits that the events of 9/11 themselves substantiate the reasonableness of the expected harm(s) of disclosure. Concerns about security, the nature of the records at issue and world events have reduced the bar for what constitutes a fanciful, imaginary or contrived fear or what would be considered "detailed and convincing" evidence.
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> The City is of the view that in this particular situation, the disclosure of the detailed building plans could reasonably be expected to endanger the security of a building for which protection is reasonably required and therefore section 8(1)(i) of the *Act* applies.

The representations of the affected party

The affected party takes the same position as the City. In its representations, the affected party sets out its concerns regarding the disclosure of any information that may aid in a terrorist attack on the condominium building, and suggests how that might occur. In an effort to demonstrate that there is a need for security, it sets out that there are extensive security measures in place with respect to access to the condominium building.

Analysis and Finding

It must first be borne in mind that the drawings at issue pertain to the lobby of the condominium building, no more and no less. These are not extensive drawings or design specifications of the actual towers themselves. In that regard, I do not accept the submissions of the appellant that attempt to put them on an equal footing with drawings of the actual structure that contains the lobby. Furthermore, the condominium building does not contain facilities that have historically

been targeted by extremists (such as the twin towers in New York City) nor is it a government building, a nuclear power plant or a sensitive military installation.

As discussed above, in Order MO-2181, Assistant Commissioner Brian Beamish had the opportunity to address the City's claim that section 8(1)(i) applied to the building plans for a residential property. He wrote:

> The City submits that the events of September 11, 2001 have highlighted the vulnerability of residential and commercial property. In particular, the City argues that municipalities must consider the safety of building occupants in addition to the possibility of future liability and litigation. In support of its position, the City provided a few examples of how building permit requests are handled by municipalities in Canada, the United States and Australia. The examples provided by the City highlight that there is a growing concern regarding disclosure of building plans to requesters who are not the owners of the building. Accordingly, municipalities are increasingly placing restrictions on who may obtain copies of the building plans.
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> The City's representations also suggest that this office should re-consider what constitutes a reasonable expectation of harm taking into consideration current security concerns. The City states:
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> > … that it is a widely held view that due diligence must be taken with respect to disclosure of plans of both commercial and residential buildings, and that it is not unreasonable to anticipate harms to the security of the property, if access to such plans is not restricted. Further, what constitutes reasonable expectation of harm has changed since the IPC's earlier orders.
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> In support of their position, the City referred me to Order MO-2074. In Order MO-2074, Adjudicator Beverley Caddigan found that disclosure of residential building plans, which showed "floor layouts including kitchen and counters, washrooms, finished floors, locations of coolers, freezers, light fixtures, interior elevations, etc." could reasonably be expected to endanger the security of a building. In making her determination, Adjudicator Caddigan took into account that the requester was charged with assault on one of the affected party's family members which resulted in a restraining order against the requester. Further, the Judge who issued the restraining order against the appellant commented that the requester's "… actions toward the [affected parties] and their family are sufficient to cause them extreme concern for their safety".
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> …
>
> In general, the City's position is that, in a post September 11th environment, all building plans should be subject to restricted access on the basis of a potential risk of endangerment as set out in section 8(1)(i). With respect, I disagree with this

> interpretation of section 8(1)(i). I acknowledge that some buildings, such as nuclear power plants or sensitive military installations, may by their very nature, give rise to a reasonable basis for believing that endangerment could result from disclosure. However, in the absence of other evidence, this same approach cannot be applied to residential buildings. Residential structures, by their very nature, do not establish a reasonable basis for believing that harms set out in section 8(1)(i) will result from the disclosure of their building plans. In my view, the wording of section 8(1)(i) does not support a blanket application to the building plans of all structures, regardless of their nature, or the circumstances in which access is sought.
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> The only evidence relative to this residential building provided by the City is the fact that the appellant chose not to view the building plans during the adjudication process and that the appellant has stated that the addition to the affected party's home violates his rights. In my view, this fails to establish a reasonable basis for believing that endangerment could result from disclosure. The circumstances in this case are very different from those in Order MO-2074, where the affected party provided representations supporting the City's position. Further, the evidence presented in Order MO-2074 provided a clear and rational basis for the adjudicator to conclude that disclosure of the building plans at issue in that appeal to a requester who was subject to a restraining order could reasonably be expected to endanger the affected party's residence. This contrasts sharply with the evidence that has been presented to me in this appeal. In fact, as noted above, the owner of the building did not provide representations when offered the opportunity. That the owner was also willing to allow the appellant to view the building plans also undermines the City's position that disclosure of the plans would endanger the security of the residence.
>
> Though I appreciate the important role the City plays in taking steps to ensure that law enforcement concerns are considered before plans of buildings are disclosed to requesters, the evidence presented to support the City's position in this appeal is not sufficient to substantiate denial of the building plans at issue under section 8(1)(i) of the *Act*.

In the appeal before me, the City and the affected party also take the position that greater vigilance is required in a post-September 11th environment and that, based on its location, the building is at particular risk. Again, I must reiterate that the records at issue in this appeal are drawings for the lobby of a condominium building. While I agree that greater vigilance has become the norm, the evidence provided that disclosure of these drawings could reasonably be expected to endanger the security of the condominium building, in my view, amounts to simple speculation.

As noted above, the condominium building, unlike the properties that have been found to be subject to the application of section 8(1)(i) (or the equivalent section in *FIPPA*), is not a structure containing facilities that have historically been targeted by extremists; nor is it a nuclear power plant or sensitive military installation [see in this regard Orders P-1537, PO-2197 and PO-2960-

I]. In my view, the allegations regarding harm that could arise through disclosure of the drawings pertaining to the condominium lobby, by a terrorist or similar type of attack, are highly speculative. Furthermore, the types of inconvenience to the affected party that it alleges that a particular individual may cause should the drawings of the lobby be disclosed, does not, in my opinion qualify as the type of harms to which section 8(1)(i) is intended to apply.

While I can appreciate the concerns of the City and the affected party, in my view, I have not been provided with sufficiently detailed and convincing evidence to establish that, in the circumstances of this appeal, section 8(1)(i) should apply.

ORDER:

1. I Order the City to disclose the responsive records to the appellant by sending it to the appellant by **August 5, 2011**, but not before **July 29, 2011** .

2. In order to verify compliance with the terms of this order, I reserve the right to require the City to provide me with a copy of the records as disclosed to the appellant.

Original Signed by: June 30, 2011
Steven Faughnan
Adjudicator