

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-4343

Appeal MA21-00456

City of Toronto

March 8, 2023

Summary: Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant sought from the City of Toronto (the city) a list of city-owned properties that are candidate sites for modular housing projects. The city withheld the requested information based on the discretionary exemptions at sections 11(c) and (d) of the *Act*, which permit an institution to withhold information whose disclosure could reasonably be expected to prejudice the institution's economic interests or competitive position, or to injure its financial interests. In this order, the adjudicator finds that the city has not established the necessary connection between the particular information sought by the appellant and the potential harms from disclosure claimed by the city. She orders the city to disclose the information at issue to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 11(c) and (d).

OVERVIEW:

[1] In this order, I do not uphold the decision of the City of Toronto (the city) to withhold under sections 11(c) and (d) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) details of city-owned properties that are candidate sites for future modular housing projects. This is because I find the city has failed to establish the necessary connection between disclosure of the information at issue in this appeal and the claimed harms to the city's economic or financial interests, or to its competitive position in the Toronto real estate market.

[2] The appeal arises from the appellant's request under the *Act* to the city for the following:

[A list of] Toronto Modular Housing Future sites - there are 40-50 sites chosen for future modular housing sites.

[3] The request covered a timeframe of January 1, 2018 to December 31, 2020.

[4] The city issued a decision granting partial access to a record containing a list of candidate sites. It withheld access to the majority of the record, citing the discretionary exemptions at sections 11(c) and (d) (economic and other interests) of the *Act* as the basis for its denial of access.

[5] The appellant was dissatisfied with the city's decision and appealed it to the Office of the Information and Privacy Commissioner of Ontario (IPC).

[6] During the mediation stage of the appeal process, the appellant clarified that she seeks access only to information about city-owned sites. As a result, information in the record concerning privately-owned sites was removed from the scope of the appeal.

[7] No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeal process, during which I conducted an inquiry under the *Act*. The parties' representations were exchanged in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[8] In this order, I do not uphold the city's reliance on sections 11(c) and (d) of the *Act* to withhold the information at issue. As a result, I allow the appeal, and order the city to disclose this information to the appellant.

RECORD:

[9] The record is a list of candidate sites for modular housing in Toronto. At issue are the withheld portions of the record concerning city-owned sites.

DISCUSSION:

Does the discretionary exemption at section 11(c) and/or (d) for economic and other interests of the institution apply to the withheld portions of the record?

[10] The purpose of section 11 is to protect certain economic and other interests of institutions. Section 11 also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental

organizations.¹

[11] In this appeal, the city relies on sections 11(c) and (d) of the *Act*, which 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[.]

[12] An institution resisting disclosure of a record on the basis of sections 11(c) and/or (d) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.²

[13] The institution must show that the risk of harm is real and not just a possibility.³ However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁴

[14] The information at issue in this appeal is a list of city-owned properties, described by address and other particulars (main intersection, ward, councillor, and ownership), which the city has identified as prospective sites for modular housing.

[15] The city explains that some of these properties are too small or have other constraints attached to them that would make it necessary for the city to acquire and to consolidate neighbouring properties in order to develop these sites for their intended use as modular housing sites. The remainder of the properties are ones on which there are existing city and third-party uses. The city says that in order to develop these latter sites for modular housing purposes, the city would first have to relocate the existing uses. This process would entail two steps: negotiating changes to or terminating existing arrangements with third-party users of the properties; and negotiating with owners of other lands upon which the city would relocate the municipal services.

¹ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

² Orders MO-2363 and PO-2435.

³ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

[16] In both cases, the city says, the harms of disclosing the candidate sites are multi-faceted. In the case of the smaller city properties that would have to be consolidated with neighbouring properties, the city submits that these landowners' knowledge that the city requires their properties for land assembly could result in the city's paying higher than fair market prices for these properties. The city notes that failure to negotiate with neighbouring land owners could result in costlier expropriation processes. The city also states that there is a risk that acquisitions or expropriations will not be completed within the necessary timeframes for the city to access funding from other levels of government for these projects. The city thus submits that neighbouring land owners could exploit the city's time-limited ability to use the lands for these purposes by increasing the amount they demand from the city for their lands.

[17] The city is also concerned that land speculators will purchase neighbouring properties at fair market value, or at a slight premium, in order to exploit the city's need to acquire those properties within specific timeframes. For example, the city says, a holding company could seek profits by collecting a portfolio of properties required by the city and charging excessive premiums to the city based on its knowledge of the city's plans for the lands. The city also observes that due to the relative demand for Toronto real estate at this time, the holding company could readily dispose of any properties that it does not sell to the city for this purpose. I understand this to be an argument about the low risks of such speculation activity, and thus of the likelihood it will occur in the event I order disclosure of the information at issue in this appeal.

[18] In addition, specifically with regard to the second type of property (i.e., city-owned properties on which there are existing uses), the city submits there is a further risk that existing users could "prolong negotiations concerning ... a change to, or the termination of, existing arrangements with respect to the use of the property" if the information were disclosed. In the city's submission, this would "likely delay re-development and lead to increases in the cost to redevelop (due to increase in construction costs and interest rates)." The city also states that the types of existing uses (such as uses for parks, municipal parking lots, seniors' buildings, and city staff buildings) are often "geographically restricted," so that the city would have to find new properties in the vicinity of the existing properties to be able to provide continuity of service to city residents. The city submits that these factors "would make it relatively easy for a knowledgeable investor to determine and acquire" the sites needed by the city for relocation purposes. According to the city, these additional considerations would exacerbate the pressures, described above, on the city to acquire the necessary lands for its modular housing projects.

[19] In both cases, it is the city's submission that disclosure of the information at issue would expose the city to higher prices to acquire the properties it needs for its modular housing projects, based on the knowledge of the counterparties to these negotiations of the city's plans for the properties, and of the "time-limited pressures" on the city attached to these projects.

[20] The appellant provided representations that largely outline her experience with the consultation process for one of these projects. I have not found the appellant's submissions to be relevant in deciding the issues before me in this appeal, and thus I did not require the city to respond to them.

[21] In this appeal, the city bears the burden of showing that it properly withheld the information at issue under the claimed exemptions in the *Act*.⁵ For the reasons that follow, I find the city has failed to discharge this burden. As a result, I do not uphold the city's denial of access to the information at issue under section 11(c) or (d) of the *Act*.

[22] I begin by noting that although the information the appellant seeks in this appeal relates to city-owned properties, I accept the city's submission that its modular housing projects will require the city to negotiate with private land owners to acquire the necessary neighbouring lands, or geographically proximate lands on which to relocate existing city services in order to accommodate these projects. The city describes the economic and market pressures it expects to bear in attempting to acquire the necessary properties for these purposes. These pressures largely relate to the current state of the real estate market in Toronto, and I accept these to be realistic concerns on the part of the city.

[23] However, even accepting that these concerns are founded, I am not persuaded that disclosure of the particular information at issue in this appeal "could reasonably be expected" to yield the harms contemplated by section 11(c) or (d) of the *Act*. In my view, the economic and market pressures the city describes would be present irrespective of whether the city discloses the candidate site locations all at once, through disclosure of the record at issue in this appeal, or reveals this information piecemeal, through its separate negotiations with each property owner, and with each existing user of services at candidate site locations, about the city's plans for acquisition or relocation of city services. I am not persuaded that the potential difficulties of negotiating with private property owners would be attributable to the city's disclosure of the information the appellant seeks, rather than the reality of negotiating in an active real estate market.

[24] In making this finding, I have considered the city's argument that disclosure of the information at issue will reveal the city's ultimate plans for the properties, and that this knowledge will enhance property owners' ability to seek premiums from the city for the purchase of their lands. In my view, a private land owner who is approached by the city about acquisition of its land would already have a reasonable basis to believe the city has particular needs or uses in mind for that property; this belief may well factor into the private land owner's negotiations with the city. I am not persuaded that advance knowledge of the specific use to which the city intends to put the properties (i.e., modular housing projects) would appreciably enhance the private land owner's

⁵ Section 42 of the *Act*.

negotiating position or appreciably diminish the city's negotiating position in this situation.

[25] I acknowledge that the city refers to some unique "time-limited pressures" around modular housing projects: The city states that it may lose funding if it is not able to meet certain timelines. I do not discount the possibility that constraints on the city around timing, funding, and other aspects of these projects could affect the city's negotiating position when it deals with counterparties who are aware of these constraints. However, the city has not provided me with adequate information about these constraints—including, significantly, the extent to which these constraints are publicly known—that would allow me to reach this conclusion in this case. Instead, the city has made unsupported statements about its "time-limited ability to utilize these lands" and "time pressures for funding" relating to these projects that, without more, are not sufficient to establish a reasonable expectation of the claimed harms to the city from disclosure of the particular project information that is at issue in this appeal.

[26] Finally, I have considered the scenario proposed by the city, in which a holding company acquires all, or most, of the properties the city requires (either for land assembly or for service relocation purposes), in order to later sell the properties to the city at maximum profit. I note that this would require the holding company to make accurate assumptions about the properties to which the city would relocate existing services. The city proposes that such assumptions would be within the ken of a "knowledgeable investor;" for the purposes of considering the city's argument, I will assume without deciding that this is true. Again the city refers to the "time-limited pressures concerning funding" that, the city suggests, make it likelier that the city would pay excessive premiums to the holding company for the necessary properties.

[27] The city appears to suggest that it would be at a greater disadvantage in negotiations with one seller (i.e., a holding company that has acquired all, or most, of the lands the city needs for the projects) rather than in separate negotiations with multiple sellers. Even assuming this were true—assuming, for example, that the city could expect to pay a higher price to one seller for all the properties than it could expect to pay to multiple sellers—I do not see what prevents the city from commencing the process of acquiring the necessary properties before or at the same time that a holding company could. The information at issue in this appeal was compiled over the period January 1, 2018 to December 31, 2020, meaning that the city has already had a number of years to begin these negotiations.

[28] More generally, I am not persuaded that the city has established that disclosure of the particular information at issue in this appeal "could reasonably be expected" to give rise to the claimed harms to the city's economic or financial interests or its competitive position. The exemptions in sections 11(c) and (d) require that the city establish more than a mere possibility of harms: It must provide detailed evidence about how disclosure could reasonably be expected to result in these harms. Based on the evidence before me, I am simply not satisfied of this degree of connection between

disclosure of a list of candidate (not confirmed) sites compiled between 2018 and 2020 and the claimed harms. In my view, some of the economic and other pressures the city describes as potential harms would in any event be present in the active real estate market in which the city will have to negotiate. Other claimed harms from disclosure of the candidate—and not confirmed—sites are, in my view, purely speculative, and have not been supported by evidence to establish their reasonable likelihood in the circumstances.

[29] For the foregoing reasons, I do not uphold the city's reliance on section 11(c) or (d) to withhold the information at issue in the record. I allow the appeal, and order the city to disclose this information to the appellant.

ORDER:

1. I do not uphold the city's denial of access to the information at issue under section 11(c) or (d) of the *Act*.
2. I order the city to disclose this information to the appellant by **April 11, 2023**.
3. I reserve the right to require the city to provide me with a copy of the information it discloses to the appellant in accordance with order provision 2.

Original Signed by: _____
Jenny Ryu
Adjudicator

_____ March 8, 2023