



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1474

Appeals MA-010010-1 and MA-010011-1

City of Toronto



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NATURE OF THE APPEAL:

The appellant submitted a request to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to information concerning a named property. The appellant specifically requested access to copies of the following:

1. The Purchase and Sale Agreement between the City and a named third party;
2. Any and all appraisals or valuations conducted or obtained by the City;
3. Any and all due diligence documents, including Environmental Assessments, relating to this transaction;
4. Any and all legal opinions conducted or obtained by the City with respect to the use of S. 11.1 of the former City by-laws to by-pass the requirement to re-zone the property for use as a multiple-unit dwelling for a shelter;
5. All correspondence between the City and Human Resources Development Canada (HRDC) with respect to the acquisition of federal funding for the purposes of converting a named property to a shelter;
6. All correspondence and/or written agreements between the City and the named third party with respect to the future management of a shelter at the named property;
7. The written agreement between the City and a named third party with respect to the operation of an existing shelter at a specific location.

For ease of administration, the City separated the request into two files. The City assigned file # 00-1811 to items 1 to 4 and file #00-1827 to items 5 – 7, and issued a decision letter for each request. The City located eleven responsive records and denied access to them in their entirety. In each instance, the City relied on the exemptions at sections 10 (third party information) and 11 (economic and other interests).

The appellant appealed each of the City's decisions and this office opened Appeals MA-0010010-1 and MA-0010011-1. In this Order, I will address the issues in both appeals.

During mediation of the appeals, the appellant raised the issue of whether there are records responsive to items 4 and 6. The appellant advised the Mediator that she was aware of a reference to item 4 in a "Joint Committee Report", which she had obtained from another source. The City advised the Mediator that no records as described in item 4 exist. The City also stated that no such agreement(s) as referred to in item 6, had been drafted. The appellant was not satisfied with the City's response and, therefore, the reasonableness of the City's search was added as an issue in this appeal.

As mediation was not successful, the appeals were moved to the adjudication stage. I decided to send a Notice of Inquiry to the City initially, inviting its comments on the issues in both the appeals. The City returned representations and in them advised that it had located an additional record that was responsive to item 6 but that access was denied, in full, based on the exemption at section 11 of the *Act*. The City also advised that it was no longer claiming the exemption under section 10 for any of the records in the appeals.

A Notice was then sent to the appellant, together with the non-confidential portions of the City's representations. The appellant also returned submissions. I requested, and received a reply from the City, a response to an issue raised by the appellant in her representations.

In their respective representations, the City and the appellant both set out the background to this appeal. Essentially, the records in this appeal relate to the City's purchase of the named property to establish a shelter, which is to be operated by a community organization (the named third party). Funding for purchase of the building, renovations and operations is based on a cost-sharing arrangement under the HRDC's recently introduced "Supporting Communities Partnership Initiative" (SCPI). The City developed a "Community Plan" identifying how it would "set up, administer and evaluate select projects for SCPI". City staff entered into informal discussions with HRDC and confirmed that the project would qualify in principle as an acceptable project under SCPI. City Council subsequently approved the acquisition and renovation of the named property, "subject to a cost-sharing agreement being finalized". An Agreement of Purchase and Sale was executed with a closing date in 2002.

RECORDS:

There are 11 records at issue in this appeal, which are as follows:

Record 1	Agreement of Purchase and Sale for the named property
Record 2	Appraisal Report for the named property
Record 3	Phase I Environmental Assessment Report for the named property
Records 4 to 9	Correspondence between HRDC and the City concerning the City's application for funding
Record 10	Agreement between the named third party and the City with respect to operating a separate hostel, dated July 1995
Record 11	Correspondence (two letters) between the City and the named third party with respect to the named property

PRELIMINARY ISSUES:

Scope of the Request/Reasonableness of Search

As stated earlier, the appellant indicated why she believes that additional records, responsive to items 4 and 6 of her request, should exist. Where a requester provides sufficient detail about the records which she is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the City to prove with absolute certainty that further records do not exist. To properly discharge its obligations under the *Act*, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate all responsive records (Orders M-282, P-458 and P-535). A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (Order M-909).

Item 4 – legal opinions on rezoning

The appellant submits that the City has “narrowly defined the term ‘legal opinion’ to refer to opinions provided by a lawyer.” She states ... “that the opinions and analyses of [named Senior Plan Examiner] and any other city staff on the zoning issues with respect to this property fit within the broader sense of the original request and should be released.”

In its representations, the City describes the steps that were taken to locate the requested records. The City explains that it was not necessary to conduct legal research once it was established that the conversion of the building did not require rezoning, and for this reason no legal opinion was prepared by the City’s legal representative or anyone else. The City also indicates that its legal counsel confirmed she had not been asked to prepare a legal opinion on the application of section 11.1 of the City By-law 307- 68. According to the City, its Corporate Access and Privacy (CAP) staff contacted a named Agency Review Officer who confirmed that she contacted the City’s Senior Plan Examiner. The Senior Plan Examiner, in turn, explained that the property was for the purpose of public services and therefore met the zoning requirements.

I have carefully considered the representations of both parties. As I see it, item 4 of the request concisely states that the appellant sought legal opinions. Acting on the request as clearly indicated, the City conducted a search for responsive records and consulted the legal representative responsible for the acquisition of the named property, and senior staff who was responsible for planning.

I find that the City acted reasonably in the manner in which it interpreted and responded to the request and that the appellant is not entitled to broaden the scope of the request to include the opinions and analyses of other City staff, which clearly would fall outside the scope of item 4 as stated.

Item 6 – the City and third party correspondence / and or written agreements

In her representations, the appellant maintains that a reasonable search was not undertaken to locate records between the City and the named third party. She states that the City and the named third party have participated in community meetings since September 2000, and given the scope of the initiative she questions how “only two pieces of paper” could have changed hands.

The City’s position is that discussions with the named third party have been informal. It submits:

When the property is finally acquired and funding operational details etc. are discussed and finalized with the [named third party] there will be more formal written documentation, including a written contribution agreement.

According to the City, CAP staff contacted a named Agency Review Officer who conducted a search and found records. The City also identifies other professional staff who were consulted and who conducted a further search. As a result, two letters were located (records 10 and 11), both of which were prepared during the mediation stage of these appeals. I have reviewed records 10 and 11 and accept that they support the City’s assertion that the contact with the named third party “at the time of the appellant’s request and in the months that follow”, had not been formalized.

I am satisfied that the City canvassed appropriate staff and that the searches conducted by the City were carried out by experienced and knowledgeable individuals. I also accept that the City has expended a reasonable effort to locate and identify all records which respond to the appellant’s request under item 6.

I find that the City has conducted a reasonable search to locate records responsive to items 4 and 6 of the request.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Introduction

The City submits that sections 11(c) and (d) apply to all the records at issue. Those sections read:

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 be reasonably be expected to be injurious to the financial interests of an institution;

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c) and (d) both take into consideration the consequences which would result to an institution if a record was released.

To establish the application of section 11(c) or (d), the City must provide “detailed and convincing” evidence to establish a “reasonable expectation of probable harm” as described in those sections (Order PO-1747). In Order PO-1747, Senior Adjudicator David Goodis stated:

The words "could reasonably be expected to" appear in the preamble of section 14 (1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (*Workers' Compensation Board*) v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Records 1, 2, 3, and 4 to 9

Record 1 contains information related to the terms and conditions of purchase and sale. Record 2 contains specific information relating to the property's valuation, and discusses the value of comparable properties and potential revenue and projected expenses. Record 3 is a Phase 1 Environmental Assessment report that was prepared for the City. It contains details of the site investigation, a review of relevant information obtained, and a discussion of environmental issues relating to the site.

Records 4 to 9 concern the City's draft applications to HRDC for funding under the SCPI and includes cost-sharing information such as budget and cash flow estimates for the property, the deposit required, the amount of funding requested, and intended use of the property. Also included are e-mail messages (between City staff and SCIP staff / between City staff) with respect to the application, and a draft description of the proposed project (including operational plans and a description of the project, as well as evaluation and monitoring procedures).

Records 10 and 11

Record 10 is of an operational agreement between the City and the named third party, concerning a named hostel. The City states that although the agreement is dated 1995, it is the existing agreement for a hostel that the named third party is currently operating. It sets out the per diem paid to the named third party, and the terms of payment. Record 11 is correspondence between the City and the named third party concerning the latter's involvement with the property at issue.

The City's Representations

The City submits that sections 11(c) and (d) apply to the records at issue because:

The City is seeking to add to the existing number of shelters and as requested by the federal government, the City is taking the leading role in administering [SCPI]. Under SCPI, the City has earmarked some \$2.70 million dollars towards "designated" emergency shelter programs such as [named property]. In addition \$7.90 million has been earmarked for "new" projects.

Therefore, [named property] is only one of a number of projects to be funded under SCPI. The City will be looking towards either purchasing other properties and entering into agreements with community operators to provide the service or allocating funds to external non-profit, voluntary, or private sector organizations to construct, develop and manage the shelters.

The ability of the City to successfully negotiate and purchase properties in the competitive Toronto real estate market and/or to enter into agreements with prospective operators is dependent upon the City being able to maintain certain sensitive information.

As previously stated, the closing date for the purchase of [named property] is [date] 2002. The City submits that the premature disclosure of information relating to the purchase of [named property] could lead to the perception by the vendor that the City is not acting in good faith, or could create unnecessary delays and costs in the processes and negotiations that could harm the City's economic, competitive and financial interests.

The Agreement of Purchase and Sale sets out the terms and conditions under which the City has agreed to purchase the property. It is acknowledged and understood by both the City and the vendor that such terms and conditions remain confidential, particularly at a time when the purchase transaction has not been finalized.

The purpose of the Appraisal Report is to provide information and guidance with respect to the market value of the property and is useful in the negotiation process. Since the purchase transaction is still pending, this report is relevant to any ongoing or further negotiations between the City and the vendor. In the event that the project falls through and the vendor is required to sell to another party under less favourable terms, the City may have some legal responsibility for any los[s] incurred by the vendor as [a] result of terms and conditions being known to the new purchaser.

The purpose of the Phase 1 Environmental Site Assessment is to identify any potential contamination and liabilities that are present or may exist at the site in order to determine whether or not a business case has been met for acquiring the property. Since the vendor is still the owner of this property, the premature release of this information could be considered or perceived to be [a] violation of the terms of the purchase by the City and again, should the project not proceed, the City may bear some legal liability.

Furthermore, if the purchase falls through, the City will likely seek other suitable sites/properties as alternatives to the [named property] location. ...

The City submits that the disclosure of the records relating to its purchase transaction for the [named property] location could reasonably be expected to place the City at a disadvantage in any negotiations with other vendors of suitable properties, as they will be in a position to know under what terms and conditions the City is willing to negotiate, what the City accepts as fair market value etc. They may seek to use the information as leverage in their negotiations and thereby jeopardize the City's position.

With respect to records 4 to 9, the City submits:

... much of the details provided to HRDC relating to the project, in particular the budget and cash flow figures, operational plans and description of project activities etc., are in draft, preliminary or estimated only. This information is likely to change.

The City claims the section 11(c) and (d) apply to records 10 and 11, on the basis that "until the purchase of the property is completed and there is formal written agreement, it is possible for [named third party] to withdraw from the participation of the new shelter."

The Appellant's Representations

The appellant asserts that the City has "already released the most competitively sensitive financial details of this transaction ..." She submits:

... prospective property vendors already have access to the key details about the City's concept of fair market value. Furthermore, the City claims that the property was competitively listed. If so, then any astute vendor of another potential site would have had the opportunity to familiarize themselves with the property. Therefore, the City's concept of "market value" for shelter properties is already public knowledge. What is not known are the fine points in the Purchase and Sale agreement – such as the conditions upon which either the vendor or the purchaser can terminate the agreement – or the rationale behind the City's appraised value of \$6.455 [million].

She also maintains that the City has "not met the burden of proof required to demonstrate a reasonable expectation of harm from the release of the incremental details." To support her assertion, the appellant attached an appendix (Appendix "A") to her representations in which she reproduced extracts from City Council Meeting minutes. She makes specific reference to confidential communications and a report which she states are now public in their entirety. I provided the City with an opportunity to respond to this assertion and it confirmed that the information contained in the appendix is extracted from the minutes of specific City Council Meetings. The City also states:

... the now public report contains only general references to the information while the records at issue contain detailed and specific confidential information that would harm the City's economic interests if disclosed.

More specifically, the report and the communication provide some information about the purchase of the property and the City's intended use of it as a family shelter and about early discussions with HRDC. They do not contain the information that is at issue in this appeal since they provide neither the details nor the substance of the terms and conditions of the purchase agreement, the results of the appraisals and the environmental site assessments, the preliminary budget and SCI cashflow estimates provided to HRDC, the terms of the present [named third party] Agreement relating to another shelter etc.

The records that do contain this detailed information are not, and have not been available to the general public.

With respect to records 10 and 11, the appellant states that no economic harm would result as the named third party is a registered charitable foundation and does not "negotiate competitively in the classic sense."

Findings

The City and the appellant both rely on previous orders of this office to support their positions. Of the two positions, the City's more accurately reflects the principles articulated in these decisions. That is, as a general rule, information that relates to the terms of an offer to purchase property, which has not yet closed, qualifies for exemption under section 11(c) and/or (d).

In Order PO-1894, Senior Adjudicator David Goodis considered the provincial equivalent of the exemption at section 11 with respect to records concerning property located in Etobicoke. The records at issue in that order included Agreements of Purchase and Sale (drafts and the executed conditional agreement) and documents related to the sale of the property including correspondence on its use or value. He concluded:

Having reviewed the records, I am satisfied that information which relates to the terms of the conditional agreement of purchase and sale, which has not yet closed, qualifies for exemption under section 18(1)(d) of the *Act*. I am also satisfied that records containing information about the possible uses or value of the property also qualify for exemption under this section. I accept that until the purchase and sale of the property has been finalized, it is possible that the sale will not take place, and that the ORC may have to find a new purchaser for the property. If that were to occur, disclosure of the terms negotiated between the ORC and the current prospective purchaser could place the ORC in a disadvantageous position with future potential purchasers. Furthermore, disclosure of prospective uses and the value placed on the property by various parties could similarly be disadvantageous. ...

This reasoning is consistent with previous orders and I accept that it is applicable here (see, for example, Orders MO-1228, MO-1258). I acknowledge that the institution in this situation is the *purchaser*, rather than the *vendor*. However, having considered the particular circumstances of this appeal, I accept that the City's position, as purchaser, can be similarly disadvantaged. Until the purchase and sale of the named property has been finalized, it is possible that the sale will not take place, in which case, the City would have to locate another property. If that were to occur, release of undisclosed terms currently being negotiated with the vendor could place the City in a disadvantaged position with the vendor, or a prospective competitive purchaser for the property or, in the event that these negotiations are not successful, in future negotiations in its efforts to locate property for establishing this shelter.

I also note that record 1 contains several clauses that are found in standard contracts for the purchase and sale of property. In Order P-251, former Commissioner Tom Wright questioned the types of harms that could result from the disclosure of standard clauses of an Agreement of Purchase and Sale. In so doing, he suggested that an institution ought to look carefully at the information it is refusing to

disclose particularly when the property at issue concerns publicly-owned lands. I agree and raise the same question in this appeal.

From my reading of clauses 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of record 1, it is clear that they constitute clauses which are standard in this type of contract. I have no evidence before me indicating that the disclosure of these standard clauses would result in the types of consequences identified in section 11(c) or (d). In the absence of such evidence, I cannot find that disclosure of the information contained in these standard clauses qualifies for exemption under section 11(c) and (d), and they should be disclosed to the appellant.

As for records 4 to 9, I am satisfied that they contain preliminary budget and cashflow estimates which were provided by the City to HRDC prior to the closing of the transaction. These records contain information about the possible uses or value of the property which qualifies for exemption under section 11(c) and/or (d) of the *Act*. For the same reasons discussed above, I conclude that until the purchase and sale of the property has been finalized, it is possible that the sale will not take place.

Based on the foregoing, I accept that disclosure of the information contained in records 2, 3, and 4 to 9 could reasonably be expected to lead to the harms identified in section 11(c) and/or (d). Subject to the severances of standard clauses as described above, I find that the balance of the information contained in record 1 is similarly exempt.

Records 10 and 11

After reviewing these records, I am satisfied that the City is involved in on-going negotiations with the named third party. The City has also provided evidence, in the form of correspondence from the named third party, supporting its contention that until the sale is complete and there is a formal written agreement it is possible for the named third party to withdraw from participating in the shelter. Accordingly, I accept that disclosure of records 10 and 11 could reasonably prejudice the City's competitive position and economic interests should the information be disclosed before the transaction closes. I find that these records also qualify for exemption under section 11(c) and/or (d) of the *Act*.

ORDER:

1. I uphold the City's decision to withhold records 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.
2. With respect to record 1, I order the City to disclose the information highlighted on the copy of this record, which is included with the City's copy of this order, no later than **November 16, 2001**, but not earlier than **November 12, 2001**.

3. To ensure compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the materials sent to the appellant.

Original signed by: _____

Dora Nipp
Adjudicator

October 12, 2001