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

ORDER MO-1735

Appeal MA-020303-1

Toronto Transit Commission

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Toronto Transit Commission (the TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a number of records specifically identified in a 10-part request. The request was for records relating to the process of hiring a consultant to conduct a non-union staff job re-evaluation, as well as the records resulting from the re-evaluation. The ten parts of the request identified the specific documents or types of records the requester was interested in obtaining access to.

Upon receipt of the request, the TTC notified an affected third party (the consultant) and then issued a decision letter granting partial access to the responsive records. The TTC denied access to certain portions of records on the basis of section 10 (third party information), and also identified that certain requested records did not exist. Furthermore, the TTC stated that section 52(3)3 (application of the *Act*) applied to some records, and that therefore the *Act* did not apply to those identified records.

The appellant appealed the decision.

Prior to mediation, the appellant informed the TTC that where the TTC had claimed that no responsive record exists (that is, in response to parts 2, 4, and 6 of his request), he now requested an attendance list for each item. With respect to part 1 of his request, the appellant also indicated that he believed that further responsive records exist. In response, the TTC granted access to additional records.

Mediation of the issues was successful in part. The TTC ultimately provided the appellant with a supplementary decision in which it agreed to grant access to more records, and provided further explanations regarding the records. In addition, the appellant acknowledged his satisfaction with the TTC's responses to parts 1 and 7 of his request.

The other matters could not be resolved through mediation, and this appeal proceeded to the adjudication stage. A Notice of Inquiry was initially sent to the TTC and an affected party (the consultant), and both provided representations to this office. The Notice of Inquiry, along with the non-confidential portions of the representations of the TTC and the consultant, was then sent to the appellant, who provided representations in response.

RECORDS:

The following records are still at issue in this appeal.

> Portions of a letter dated June 2, 2000 from the consultant to a named TTC manager (pages 3-11 and 3-12) [responsive to part 3 of the request].
>
> Compensation Program Review document dated August 29, 2001 (pages 5-1 to 5-19) [responsive to part 5 of the request].

> Chart (pages 8-1 to 8-10) [responsive to part 8 of the request].
>
> Guide Chart – Profile, Position Evaluation for an identified position (pages 9-1 to 9-2) [responsive to part 9 of the request].

Furthermore, the appellant takes the position that the Committee of the Whole meeting minutes dated May 8, 2000, August 29, 2001 and November 28, 2001 are responsive to parts 2, 4 and 6 of the request, and are covered by the scope of his request.

I will address the issue of the scope of the request as a preliminary matter.

SCOPE OF THE REQUEST

Parts 2, 4 and 6 of the original request received by the TTC read as follows:

Request 2: The voting record of TTC Commissioners regarding the approval of the staff summary sheet with regards to the TTC job evaluation.

Request 4: The voting records of the TTC Commissioners regarding approval of the tender document and/or contract with [the consultant].

Request 6: The voting records of TTC Commissioners regarding the approval of implementation of the final report from [the consultant].

The TTC responded to these requests by advising the appellant that no records responsive to these three requests exist.

In response, and after appealing the TTC's decision, the appellant advised the TTC that, if no voting records of the approvals referred to in requests 2, 4 and 6 existed, he was interested in obtaining access to an "attendance list per item". The TTC subsequently provided the appellant with the attendance lists for three identified meetings, and advised the appellant that it was disclosing these records (the lists) in full.

During mediation, the appellant identified that he was interested in obtaining the minutes from the identified meetings. The TTC responded by advising:

> With respect to parts 2, 4 and 6 [the mediator] has requested our co-operation in providing any minutes of meetings that **were not part of the original request**. Please be advised that the copies of the minutes and attendance lists for the committee of the Whole meetings held on [three identified dates], which were subsequently asked for after the initial disclosure, were provided to the appellant … [emphasis added].

Mediation did not resolve this issue, and the Notice of Inquiry sent to the TTC asked for representations on the scope of the request.

The TTC responded as follows:

> The appellant's original request sought production of voting records of TTC Commissioners regarding: (a) the approval of the staff summary sheet recommending a non-union staff job evaluation (item 2); (b) [the] approval of the tender documents and/or contract with [the consultant] (item 4); and (c) [the] approval of the implementation of the final report from [the consultant] (item 6).
>
> The TTC responded that the records indicated in items 2, 4 and 6 did not exist. … the appellant provided clarification regarding items 2, 4 and 6 of the request. The appellant wrote that "if no recorded approval exists, please provide an attendance list per item".
>
> …the TTC responded to the amended request and provided the attendance lists. In addition, … the TTC also provided the appellant with the minutes to the Committee of the Whole meetings which related to the compensation review.
> …
>
> The TTC further submits that the portion of the minutes which were severed were not "reasonably related" to the appellant's request. The portion of the records which were severed deal with other, unrelated, items that were discussed at the Committee of the Whole meeting.

The TTC then also provided representations on the application of the exemption in section 6 (closed meeting) to the severed portions of the minutes of the Committee of the Whole.

The appellant was provided with a copy of the TTC's representations. In response he stated:

> [It is] the [appellant's] position that the records are reasonably related to the request. The records themselves, as requested (the Committee of the Whole meeting minutes for the above-noted dates) define their responsiveness. The documents in their entirety are responsive and reasonably related to the request.

Findings

In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

In Order P-134, former Commissioner Sidney B. Linden also commented on the proper interpretation of section 24(2), stating, among other things:

> ...the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the *Act* compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

In Order PO-1897-I, commenting on the above orders, Adjudicator Sherry Liang noted that in the appeal under consideration in Order P-134, the request was somewhat vague, and that the institution had genuine difficulty in interpreting the scope of the request. She pointed out, however, that "even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request".

In this case, however, the appellant's original request for the records in items 2, 4 and 6 of his request was detailed and specific. He specifically sought access to "the voting records" of TTC commissioners regarding the approvals for three specific matters. The TTC's response to that request was that no records existed. In my view there was no ambiguity nor uncertainty concerning the records the appellant was seeking, nor was there any obligation on the TTC to seek clarification concerning the scope of the request. The appellant apparently accepted the TTC's response to the request for the identified records.

As identified above, after filing this appeal, the appellant requested an attendance list "per item". The TTC provided him with the attendance list for the meetings discussing the identified items. The TTC also provided him with portions of the minutes of those meetings.

The appellant now takes the position that all of the minutes of those meetings are records responsive to his request. He states that "the records themselves, as requested (the Committee of the Whole meeting minutes for the above-noted dates) define their responsiveness". If the request made to the TTC had been for those meeting minutes, as the appellant submits, the records would clearly be responsive to the request. However, the relevant parts of the appellant's original request were specifically for the voting records, and the modified request, made subsequent to the filing of this appeal, was for the attendance lists. Neither of these requests was for the Committee of the Whole meeting minutes.

Accordingly, I do not accept the appellant's position that the minutes of the identified meetings are caught within the scope of the request. In my view his original request was clear, and the TTC's response was also clear.

I uphold the TTC's decision that the minutes of the meetings fall outside the scope of the appellant's request.

APPLICATION OF THE *ACT*

Introduction

As stated above, the TTC has taken the position that section 52(3)3 applies to records responsive to parts 5, 8 and 9 of the appellant's request. If section 52(3)3 applies to the records, and none of the exceptions found in section 52(4) apply, section 52(3)3 has the effect of excluding the records from the scope of the *Act*.

Section 52(3)3 of the *Act* states:

> Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In order to fall within the scope of paragraph 3 of section 52(3), the TTC must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

The TTC takes the position that the records identified as responsive to parts 5, 8 and 9 of the request are excluded from the scope of the *Act* due to section 52(3)3. Request parts 5, 8 and 9 were for:

5. Any interim and/or final report from [the consultant] given to TTC management.

8. All TTC non-union staff job evaluation "score sheets" affected by [the consultant's] report.

9. The revised [consultant's] job evaluation "score sheet" of [an identified position] as a result of the appeal based on the updated job description.

The TTC identified the following records as responsive to those parts of the request:

> Compensation Program Review document dated August 29, 2001 (pages 5-1 to 5-19).
>
> Chart (pages 8-1 to 8-10).
>
> Guide Chart – Profile, Position Evaluation (for an identified position) (pages 9-1 to 9-2).

Requirement 1

The TTC submits:

> … the responsive records were collected and prepared by the [consultant] on behalf of the TTC. The records were collected and prepared in accordance with the contract with the [consultant] to develop and implement a compensation philosophy and strategic compensation plan for TTC staff employees.
>
> In addition, the responsive records were used by the TTC in order to implement the compensation plan for staff employees which was prepared by the [consultant].

On my review of the records and the surrounding circumstances, I find that all of the records were collected, prepared, maintained or used by the consultant on behalf of TTC. Therefore, I find that the first requirement of section 52(3)3 has been satisfied.

Requirement 2

The representations of the TTC state:

> The TTC submits that the responsive records (the interim/final report of the consultant, the "score sheets" affected by the report of the [consultant] and the revised evaluation "score sheet" for the [identified position]) were collected, prepared, maintained and used by the TTC or on its behalf in relation to meetings, consultations, discussions and communications between the TTC and [the consultant].
>
> As part of the contract for the work the [consultant] was required to work with the TTC Project team …. As part of the process, the [consultant] was required to meet and discuss with the TTC Project Team the 120 benchmark jobs that were to be evaluated. The contract also required that any report be based on consultation with the TTC Project Team and senior TTC management.

The TTC then identifies that the consultant and the TTC did hold meetings and discussions relating to the records.

I find that the TTC collected, maintained and used the records in relation to meetings, consultations, discussions or communications. Accordingly, I find that the second requirement of section 52(3)3 has been satisfied.

Requirement 3

To meet the third requirement the TTC must establish that the "meetings, consultations, discussions or communications" were "about labour relations or employment related matters" and that the TTC "has an interest" in these matters.

The TTC provided the following submissions on this third requirement:

> The nature of the employment–related matter is the development and implementation of a TTC compensation philosophy and strategic compensation plan for TTC staff positions. The records relate to the TTC's need to continue to ensure that its compensation package is attractive in order to attract qualified individuals to its workforce, while also maintaining fiscal responsibility. The TTC submits that the compensation payable to staff employees and the implementation of a new compensation plan philosophy are employment-related matters.
> …
>
> The TTC submits that the final report and the "score sheets" were used by the TTC in order to negotiate new compensation structures for staff employees and thus, the records relate directly to employment-related matters.

With respect to whether the TTC has an interest in the records, the TTC submits:

> The responsive records relate directly to the compensation of TTC staff employees and to the implementation of compensation ratios. The TTC clearly has an interest in how and in what manner its employees are compensated for work performed….

Findings

In Order MO-1264, Adjudicator Cropley had to determine whether certain reports, prepared by a consultant for a municipality (in that case, the City of Barrie), fit the requirements under part three of the three part test in section 52(3)3. She stated:

> The City states that the reports were requested, obtained and utilized by it for the review of its compensation plans relating to both its unionized and non-union

> employees. The City submits that there is a clear labour relations issue when dealing with a compensation plan for employees.
>
> As I suggested in Order MO-1249, remuneration for the services performed by individuals is an integral part of the "employment" relationship. In my view, "remuneration" is of vital importance in defining this relationship. Activities undertaken by the City to address this component of the employment relationship, in my view, clearly relate to or are "about" labour relations or employment-related matters. Therefore, I find that the meetings, consultations, discussions and/or communications were about labour relations or employment-related matters.

I adopt the approach taken by Adjudicator Cropley.

The records which the TTC claims fall outside of the jurisdiction of the *Act* are a Compensation Program Review document, a chart containing the summary of point scores for each position, and a position evaluation and point scores for a specifically identified position.

I am satisfied that these records relate to the review of the compensation package for the TTC's employees, and that this information, including the compensation payable to employees and the implementation of a new compensation plan philosophy, are employment-related matters for the purpose of section 52(3)3 of the *Act*. Accordingly, I accept the position of the TTC that the records responsive to the request parts 5, 8 and 9 deal with "employment related matters".

The only remaining issue is whether this is an employment-related matter in which the TTC "has an interest".

The Court of Appeal stated in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner*) (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509, that "interest" must be more than a "mere curiosity or concern", though not necessarily a "legal" interest. In addition, the court stated that the "matter" must relate to an institution's own workforce and that once records are excluded from the operation of the *Act*, they remain excluded.

In my view, the TTC clearly had more than a mere curiosity or concern about the information contained in the records, as these records relate to compensation for the TTC's own workforce. I find that the TTC has an "interest" in the information at issue, and that the second part of the third requirement has been met.

Conclusion

I find that the TTC has established all of the requirements of section 52(3)3.

Section 52(4)

The appellant takes the position that, if section 52(3) applies, section 52(4) also applies as an exception. Section 52(4) states:

> This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The appellant's representations refer to the application of section 52(4)3. The representations state:

> Essentially these records make up new employment contracts with non-union staff. They outline a revised compensation scale, and as such [the appellant] is directly affected and should have a copy…

In my view, the records at issue do not fit within the exception found in section 52(4)3. The records are not "agreements" between an institution and one or more employees, nor did they result from "negotiations" between the institution and the employee(s). (See also Order PO-1302)

Accordingly, none of the exceptions in section 52(4) applies. I conclude that the Records responsive to parts 5, 8 and 9 of the request are excluded from the scope of the *Act*.

THIRD PARTY INFORMATION

The TTC and the affected party claim that the severed portions of Record 3 are exempt under section 10(1)(a) and/or (b) of the *Act*. Those sections read:

> 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

Section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 10(1) is designed to protect the "informational assets" of businesses or other organizations that provide information to the government (Order PO-1805).

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 information which, while held by government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the TTC and/or the affected party must satisfy each part of the following three-part test:

> the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 10(1) will occur. (Orders 36, P-373, M-29 and M-37).

Part one: type of information

Both the TTC and the affected party (the consultant) submit that the information at issue consists of financial information.

The information for which this exemption claim is made is the severed portion of Record 3, which is an excerpt from a letter dated June 2, 2000 from the consultant to the TTC. The severed information is contained in the section titled *Investment* and is located at the bottom portion of page 3-11 and the top portion of page 3-12.

The consultant identifies that this information contains privileged financial information.

The TTC states:

> [The TTC] submits that the information severed from [the record responsive to part 3] of the appellant's request is "financial information" in accordance with section 10 of the [*Act*]. The information severed is contained within the part of the [consultant's] submissions to the TTC entitled "Investment". The information relates directly to the professional fees charged for each part of the work that is required to be completed under the terms of the contract. The total contract price has been provided.
> …
>
> The information severed from part 3 of the appellant's request is financial information related directly to the pricing practices of the [consultant].

This office has defined the term financial information as follows:

> Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. (Orders P-47, P-87, P-113, P-228, P-295 and P-394)

I adopt this definition for the purpose of this appeal.

On my review of the severed portion of the record, I am satisfied that the severed information constitutes financial information, since it pertains to the pricing practices of the affected party. (See Order PO-1973).

Part two: supplied in confidence

Introduction

In order to satisfy part 2 of the test, the TTC and/or the affected party must show that the information was "supplied" to the TTC "in confidence", either implicitly or explicitly.

"Supplied"

General principles

The requirement that it be shown that the information was supplied to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties. The following passage, from *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), addresses this purpose:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind.
> (pp. 312-315) [emphasis added]

To meet the "supplied" aspect of part 2 of the test, it must first be established that the information in the record was actually supplied to the TTC, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to it (Orders P-203, P-388 and P-393).

Representations

The TTC states that the information at issue was supplied by the consultant to the TTC in confidence. With respect to whether or not the information was "supplied", the TTC states:

> [The] TTC issued a sole source (only one company) request for Proposal document requesting a "proposal" from the [consultant] based on the terms and conditions outlined in the Request for Proposal.
>
> The Request for Proposal requires the proponent to submit a proposal of methodology required to complete the work, however, all of the other terms and conditions as outlined in the Request for Proposal are generally not negotiable. The Request for Proposal document also requires that any pricing be firm for a set period of time and be non-negotiable. The term "proposal" is misleading in that it creates an assumption that terms and conditions are negotiable. This is incorrect. The TTC's Request for Proposal document is really a tender, except that proponents are to provide a methodology of how the work is to be performed. The conditions of how the work is to be completed is established by the TTC and unless an exception is taken, the proponent is bound by those terms and conditions.
>
> In response to the TTC's sole source request, the [consultant] provided a proposal…

> The information contained in the section entitled "Investment" was provided by [the consultant] to the TTC as part of the TTC's Request for Proposal requirements. The proponent was required to submit pricing information, including a price breakdown, for completing the work.

The consultant identifies that the record containing the information at issue was sent by the consultant to the TTC. The consultant takes the position that the entire document was provided in confidence, and that the severed portion contains privileged financial information, the disclosure of which would cause the consultant harm by allowing competitive parties to be aware of its pricing structure.

Findings

The record at issue is the severed portion of a letter dated June 2, 2000 from the consultant to a named TTC manager. On its face, the record appears to have been supplied by the consultant to the TTC. Furthermore the letter itself is marked "confidential".

Previous orders of this office have determined, however, that the contents of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 10(1) of the *Act* since the information in a contract is typically the product of a negotiation process between two parties (see, for example, Orders P-36, P-204, P-251, P-1545, PO-2018, MO-1705).

In addition, the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been "supplied" by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545, MO-1705, MO-1706).

In this case, the TTC takes the position that the severed information in the consultant's proposal was not the result of a negotiation process, since the TTC set the terms, and the proposal merely provides a methodology of how the work is to be performed. The TTC submits that the severed information does not establish the conditions of how the work is to be completed.

I do not agree with the TTC's characterization of the information at issue. Upon my review of the record at issue, it is my view that the proposal submitted by the consultant, including the letter of June 2, 2002 (the severed portion of which is at issue) constituted a proposal of the terms of an agreement put forward by the consultant, which could be accepted, rejected or further negotiated between the parties. The letter itself identifies that it constitutes a proposal put forward by the consultant. Indeed, a portion of the document which was disclosed identifies that certain revisions could be made to portions of the proposal, if required. The severed portion of the record also supports the view that the proposal reflects suggested terms which could be further negotiated between the parties.

As identified by Adjudicator Morrow in Order MO-1706, in general, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers, or the result of an immediate acceptance of the terms offered in a proposal. As he stated, except in unusual circumstances (for example, where a contractual term incorporates a company's "secret formula" for manufacturing a product, amounting to a trade secret), agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to have been "supplied".

I accept that as a practical matter, the affected party physically supplied the proposal to the TTC. However, when the proposal was agreed to by the TTC, it changed from constituting a mere proposal to a document reflecting the terms of the agreement between the TTC and the consultant.

Accordingly, I find that, based on the evidence before me, the severed information in the record comprises the terms of the agreement between the TTC and the consultant, and does not meet the "supplied" test in section 10(1) and, therefore, part 2 of the 3 part test has not been met.

As all three parts of the test must be met in order for section 10(1) to apply, I find that the severed portion of the record does not qualify for exemption under section 10(1)(a) and (b).

REASONABLE SEARCH

Introduction

In appeals involving a claim that responsive records exist, as is the case in this appeal, the issue to be decided is whether the TTC has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the TTC will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Mumtaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

> … the *Act* does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

The Mediator's Report, which was sent to the parties, identified the outstanding issues. It noted that the issue of whether or not the search for responsive records was reasonable remained an issue with respect to parts 2, 3, 4, 5, 6, 8, 9 and 10 of the request.

The Notice of Inquiry sent to the TTC requested representations from the TTC on this issue.

The TTC's representations focus on this issue with respect to parts 2, 4 and 6 of the request. The TTC's representations identify the steps the TTC took to determine whether records responsive to the requests for "the voting records of TTC Commissioners" regarding the approvals referred to in those request parts exist. These representations include the identity of the individuals conducting the searches, the areas searched, and the results of the searches.

The appellant's representations on the issue of the reasonableness of the search for records identify his concern that the TTC only identified the searches conducted in response to certain parts of his request. He states that the TTC has not addressed this issue with respect to the other request parts.

I agree that the TTC's representations do not address this issue for the other parts of the request.

However, in the Notice of Inquiry sent to the appellant, which attached a copy of the TTC's representations, the appellant was specifically asked to provide the following:

> Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the TTC's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.
>
> The appellant is asked to include in his representations any other details he is aware of concerning records which have not been located, or any other information to indicate that the search carried out by the TTC was not reasonable.

With one exception, the appellant's representations on this issue make general broad statements about the appellant's view that the TTC has not properly responded to his 10-part request. The appellant also identifies that he believes additional records exist; however, the appellant does nothing more than refer in general terms to confidential evidence supporting his position. The appellant has not provided me with the evidence in support of his beliefs, nor has he even identified the nature of this evidence. In addition, the appellant identifies that he believes (again based on information not provided to me) that certain responsive records no longer exist.

The one exception is the appellant's reference to the existence of a record discussed in the course of the mediation of this appeal. That record is discussed under the section entitled *Request part 10* set out below.

I will now review the issue of the reasonableness of the search conducted by the TTC for responsive records for the different parts of the request.

Request parts 2, 4 and 6

Based on the detailed representations provided by the TTC on the search conducted for records responsive to request parts 2, 4 and 6, and based on my decision (above) identifying the scope of those parts of the request, I am satisfied that the searches conducted by the TTC for records responsive to these parts of the request were reasonable.

Request part 3

Part 3 of the appellant's request was for:

> The tender document and/or contract to hire [the consultant] as well as any other tender offering submitted regarding the non-union staff job evaluation.

The TTC identified a number of records responsive to the request including the Request for Proposal (which includes the correspondence, a portion of which is reviewed under the section 10 exemption, above), and various Purchase Orders and amendments.

In correspondence provided in the course of this appeal the TTC identified that the records provided are the actual contract with the consultant, including amendments. The TTC also responded to questions raised by the appellant concerning why additional specified documents do not exist, by explaining the reasons why the TTC would not be in possession of the documents identified by the appellant.

In the circumstances, I am satisfied that the search conducted by the TTC for records responsive to part 3 of the request was reasonable.

Request parts 5, 8 and 9

As identified above, request parts 5, 8 and 9 were for the following:

5. Any interim and/or final report from [the consultant] given to TTC management.

8. All TTC non-union staff job evaluation "score sheets" affected by [the consultant's] report.

9. The revised [consultant's] job evaluation "score sheet" of [an identified position] as a result of the appeal based on the updated job description.

The records identified as responsive by the TTC were a Compensation Program Review document, a chart containing the summary of point scores for each position, and a position evaluation and point scores for a specifically identified position.

The appellant submits that the TTC did not conduct a reasonable search for all responsive records; however, as identified above, he has not provided representations in support of his position.

On my review of the parts of the request and the responsive records, it appears to me that there may exist records responsive to the request, particularly part 8 of the request, which have not been provided to me. In documentation provided during the processing of this appeal, the TTC identifies that it is providing this office with the summary of the point scores for each position. Whether this document is the only record in the custody or control of the TTC responsive to part 8 of the request is, in my view, a valid question. However, I have found above that the summary document responsive to part 8 falls outside the jurisdiction of this office due to the application of section 52(3)3 of the *Act*.

Previous orders have examined the obligations on an institution to conduct further searches for records in circumstances where section 52(3) applies. In Order MO-1412, Senior Adjudicator Goodis was faced with a similar issue. He stated:

> … the appellant submits that Hydro did not conduct a reasonable search for responsive records. In his representations, the appellant provides detailed descriptions of the records or types of records which he believes Hydro should have identified as responsive to his request. In my view, these records, whether or not they exist or should have been identified by Hydro, would fall within the scope of section 52(3)3, for the reasons outlined above. Accordingly, no useful purpose would be served by making a determination on this issue and, therefore, I will not do so.

I adopt the approach taken by Senior Adjudicator Goodis.

I have not been provided with representations from the appellant on this issue. However, on my review of parts 5, 8 and 9 of the request, additional records responsive to those parts of the request, whether or not they exist or should have been identified by the TTC, would fall within the scope of section 52(3)3, for the reasons outlined in my discussion under the section 52(3)3 analysis above. Accordingly, no useful purpose would be served by making a determination on whether or not additional records responsive to parts 5, 8 and 9 exist.

Request part 10

Part 10 of the request reads:

> Any internal documents/reports summarising the total annual increase/decrease in costs of TTC operating and capital budgets as a result of [the consultant's] report and implementation.

The TTC responded to the request by providing the appellant with a document identified as a "Five-year Cost-adjustment Summary of Current v. Proposed Pay Structure".

As identified above, the appellant's representations on the reasonableness of the TTC's search do make reference to one specific record. The existence of this record was identified in the course of the mediation of this appeal, and the record is the attendance list and the minutes of a meeting dated March 8, 2002. The appellant takes the position in his representations that this record is responsive to part 10 of his request, and should have been captured by the search conducted for responsive records.

The appellant took the same position in the course of processing this appeal. The appellant identified for the TTC that he had information indicating that on March 8, 2002 there was an amendment to the budget approved by the Commissioners. In response, in the course of processing this appeal, the TTC identified for the appellant that the amendment to the budget approved by the Commissioners related to a change in the timing regarding payment of certain components, but that the net amount did not change.

Although the appellant takes issue with the manner in which the TTC responded to his interest in obtaining a copy of the minutes of the March 8, 2002 meeting, he has not responded to the position taken by the TTC concerning this issue.

In the absence of any further information, I am satisfied that the search conducted by the TTC for records responsive to part 10 of the request was reasonable.

ORDER:

1. I order the TTC to disclose the severed portion of Record 3 to the appellant by sending the appellant a copy of the information by **February 2, 2004** but not before **January 28, 2004**.

2. I uphold the TTC's decision that records responsive to parts 5, 8 and 9 of the request fall outside the scope of the *Act* by virtue of section 52(3)3 of the *Act*.

3. I uphold the TTC's search for responsive records.

4. In order to verify compliance with the terms of provision 1, I reserve the right to require the TTC to provide me with a copy of the material which it discloses to the appellant.

Original signed by: December 24, 2003
Frank DeVries
Adjudicator