



**Information and Privacy
Commissioner/Ontario**

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

FINAL ORDER MO-1897-F

Appeal MA-020403-3

City of Toronto



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This is my final order dealing with the outstanding issues remaining from Interim Order MO-1870-I.

NATURE OF THE APPEAL:

The requester made a request to the City of Toronto (the City) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the City Auditor's report dated June 19, 2001 entitled "Selection and Hiring of Professional and Consulting Services." The requester subsequently clarified that he was seeking access to the complete research and preparation file of the City Auditor for the report.

The City then issued an access decision to the appellant, granting partial access to the records. The City denied access to the remaining information, relying on exemptions in sections 7 (advice or recommendations), 11 (economic and other interests), 12 (solicitor-client privilege) and 14 (invasion of privacy).

The appellant appealed the City's decision.

The context surrounding the creation of the records that are the subject of this appeal, as well as related records no longer in issue, is set out in Order MO-1711:

[I]n 2001, the City Auditor noted that a significant increase in expenditures for the provision of consulting services had taken place during the years following the amalgamation of the former municipalities into the new City of Toronto. As a result, the Auditor's work plan for 2001 included undertaking a review of "consulting expenses". The scope and objectives of this review were included in the work plan. As the review progressed, the City indicates that it became apparent that "there were serious implications and concerns related to specific staff members' handling of the hiring of consultants and the awarding of contracts that required the Auditor's further attention".

During mediation of this appeal, the parties removed a number of records and exemption claims from the scope of the appeal, and the City decided to disclose some additional records to the appellant. As a result, only pages 162-176 and 183-191, and the City's section 7 claim, remained at issue.

After conducting an inquiry and receiving representations from the City and the appellant, I issued Interim Order MO-1870-I. In that order I found that certain portions of the records did not qualify for exemption under section 7 and I ordered the City to disclose those portions.

I also found that certain portions of the records fell within the section 7 exemption. However, that exemption is discretionary. I found that it was unclear whether the City took into account all the relevant factors in exercising its discretion. I therefore included a provision in Order MO-1870-I requiring the City to provide a clearer explanation of why it chose to exercise its discretion against disclosure of the portions of records that fell within the section 7(1) exemption. I also gave the appellant an opportunity to review the submissions of the City and provide representations on whether the City properly exercised its discretion.

I received representations from both the City and the appellant.

DISCUSSION:

EXERCISE OF DISCRETION

The section 7 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons

- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

In its representations, the City states, among other things, that it took into consideration the fact that the records relate to “the very sensitive and high profile issue of City staff’s handling of consultants’ contracts”. Although the City considered the age of the information in the records, notwithstanding their age, the records relate to issues that continue to engage and affect the City’s interests, and which continued at the time of the City’s representations to have possible relevance to a judicial inquiry that was ongoing.

The City states that the records are the City Auditor’s working papers, and when the City’s Corporate Access and Privacy Office consulted with the staff of the City Auditor, they requested that these working papers remain confidential as disclosure would hinder their ability to be frank in their work. Since Order MO-1870-I was issued, the City Auditor’s staff “have confirmed that it is their view that all their working documents should always remain confidential so that they can effectively do their work”. The City points out that “there were at times rather heated discussions between the City Auditor’s staff and senior departmental employees about the City Auditor’s findings and strong disagreement was expressed about the wording of certain recommended courses of action”. The City also points out that the Provincial Auditor’s working papers have statutory protection from disclosure.

In his response to the City’s representations, the appellant states, among other things, that the age of the documents is not relevant to the exercise of discretion; the records were not created in contemplation of a judicial inquiry and this inquiry commenced long after the records were created; and other public auditors “manage to function very well in spite of the FOI legislation”.

Having reviewed the reasons and rationale provided by the City for exercising its discretion against disclosure of portions of the records at issue and the appellant’s response to the City’s representations, I am satisfied that the City has taken into account the particular circumstances of this case, and that there is nothing improper in its exercise of discretion.

ORDER:

I uphold the decision of the City to deny access to those portions of the records at issue that fall within the discretionary exemption in section 7(1) of the *Act*.

John Swaigen
Adjudicator

December 31, 2004