



**Information and Privacy  
Commissioner/Ontario**

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

# **FINAL ORDER MO-2149-F**

**Appeal MA-030046-2**

**City of Toronto**



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## **NATURE OF THE APPEAL:**

This appeal arises out of a decision of the City of Toronto (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the Act). The requester (now the appellant) made a request under the Act for

...all information available (notes, memos, official documents, plans, permits, contracts, drawings, records, photographs etc.) regarding past construction, or repair, or plans of future work with regard to roads, sidewalks, water mains, rivers and drainage, and buildings...[for a specified area in the City].

The City identified several hundred responsive records and provided partial access to them (the Group A Records), denying access to the undisclosed portions on the basis that some were non-responsive and relying on section 14(1) (personal privacy), section 12 (solicitor-client privilege) and section 7(1) (advice or recommendations) to deny access to portions of the responsive records.

With respect to some of the responsive records, the City requested payment of a processing fee in the amount of \$93.00.

The appellant appealed the City's decision.

In his letter of appeal, the appellant indicated that the records at issue are essential for ensuring the health and safety of his neighbours, himself and the public, raising the possible application of section 16 (public interest override).

After filing his appeal, the appellant informed this office that he had requested and had been denied a fee waiver with respect to the City's \$93.00 fee, and that he wished to pursue this issue on appeal. Fee wavier was therefore added as an issue in the appeal.

The appellant also stated his belief that additional records exist, particularly additional records from Works and Emergency Services including engineering reports, additional work permits and maps and surveys and, as a result, reasonable search was added as an issue in the appeal.

The appeal was streamed through the mediation stage of the appeal process, during which the City located additional responsive records (the Group B Records). The City issued a second decision letter in regard to the Group B Records, granting access in full to some of the records and providing partial access to others, with severances made pursuant to section 14(1) of the Act.

Mediation did not resolve the appeal, and the matter was transferred to the adjudication stage of the appeal process.

I conducted an inquiry into the appeal and sought representations from the parties on a number of issues, including the application of section 12 to portions of the Group A Records. Following the receipt of representations, I issued Interim Order MO-2124-I, in which I ordered the release of some records and found, among other things, that section 38(a) (discretion to refuse requester's own information), read with section 12, or section 12 alone applied to exempt some of the Group A Records from disclosure. I also found that that the "public interest override" at section 16 did

not apply since, based on its wording, it cannot apply to records that are exempt under section 12.

However, the section 38(a) and section 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact it could withhold it. I therefore considered the City's exercise of discretion in Order MO-2124-I, and stated:

As is evident from the City's representations, the City's position on the discretion issue was predicated, at least in part, on the fact that the litigation between the appellant and institution was ongoing. However, in light of the fact that this litigation was settled during the course of this inquiry, I will return the matter to the City and ask that it reconsider its exercise of discretion with regard to the records found exempt under section 38(a), in conjunction with section 12, or under section 12 alone.

Accordingly, in provision 3 of Order MO-2124-I, I ordered the City to re-exercise its discretion with regard to the records I found exempt.

In accordance with provision 3 of Order MO-2124-I, the City has provided me with a letter setting out its representations on the exercise of discretion issue, which it copied to the appellant. In its letter, the City states that it has re-exercised its discretion and maintains its position that it is refusing to disclose the records at issue. The appellant was provided with a copy of the City's representations and invited to respond to them. The appellant did submit representations, however, they do not address the exercise of discretion issue.

The sole issue before me in this final order is whether the City properly re-exercised its discretion.

## **DISCUSSION:**

The section 38(a) and section 12 exemptions are discretionary, and permit 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

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)].

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

I have carefully reviewed the City's representations and considered the City's re-exercise of discretion in the overall context of this appeal. I have also carefully reviewed the appellant's submissions in an attempt to determine their relevance to my analysis of this issue. Unfortunately, the appellant's representations are focused on concerns unrelated to the exercise

of discretion issue, such as, the application of the section 12 exemption in the circumstances of this case. Therefore, while I acknowledge the appellant's concerns his representations are of no assistance to me in my analysis of the exercise of discretion issue.

Based on the information before me, I am now satisfied that the City considered relevant factors in deciding to exercise its discretion not to disclose the records at issue, and did not consider irrelevant ones. I therefore find that the City's re-exercise of discretion was proper.

**ORDER:**

I uphold the City's decision to withhold the portions of the Group A Records, which I found to be exempt under the section 12 and/or section 38(a) exemptions, as itemized in Interim Order MO-2124-I.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

\_\_\_\_\_  
January 30, 2007