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

ORDER MO-1947

Appeal MA-050184-1

City of Toronto

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NATURE OF THE APPEAL:

The requester, CBC Radio-Canada, filed four access-to-information requests with the City of Toronto (the City), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), seeking access to a copy of all records regarding civil lawsuits involving four city departments, which the City had settled with third parties in 1998, 1999, 2000, 2001, 2002, 2003, and 2004, including the number of lawsuits, dates settled, and dollar amounts. The four requests were directed at the following city departments: (1) Finance (for the City as a whole), (2) Emergency Medical Services, (3) Toronto Fire Services, and (4) Transportation Services.

In a decision letter, dated April 26, 2005, the City denied access in full to these records and cited the exemption in section 11 of the *Act*. It further stated that section 11 was being relied upon to withhold records that contained information, the disclosure of which could reasonably be expected to prejudice the economic interests and/or be injurious to the financial interests of the City. Consequently, the City appeared to be relying upon sections 11(c) and (d) of the *Act*.

The requester (now the appellant) appealed the City's decision to my office. In his appeal letter, the appellant's representative stated that he had made it clear to the City's Corporate Access and Privacy department that he was not asking for specific details of each lawsuit, such as the names of people or minutes of settlement. He also noted that similar information had been released to the CBC regarding lawsuits against the Toronto Police Service and submitted that "the current requests are of a similar nature and I believe the information should be released."

The City sent the records at issue to my office. They consist of charts for specific City departments covering the years 1998 to 2004, containing information in three columns:

- Loss date (i.e., year);
- Count (i.e., number of claims in each year);
- Paid (i.e., total amount paid in each year).

During the mediation stage of the appeal process, the appellant submitted that the public interest override in section 16 of the *Act* was applicable in the circumstances of this appeal. No further mediation was possible, and the appeal was moved to adjudication.

I issued a Notice of Inquiry that invited the City to make representations on the issues in this appeal. The City submitted representations and attachments, including a letter from the City's insurance broker and risk management advisor. After thoroughly reviewing the City's representations and attachments, including the aforementioned letter, I decided that it was unnecessary to seek representations from the appellant.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

The City submits that the exemptions in sections 11(c) and (d) of the *Act* apply to the records at issue.

Sections 11(c) and (d) 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;

Summary of the City's Representations

The City requested that certain portions of its representations and the entire letter from its insurance broker and risk management advisor be kept confidential. Consequently, the following is a summary of the non-confidential portions of the City's representations. However, I have also reviewed both the confidential portions of the City's representations and the aforementioned letter, and will be taking all of this information into account in reaching my decision in this order.

In its representations, the City submits that sections 11(c) and (d) are intended to protect the City's ability to find and maintain insurance coverage with costs that are not prohibitive and to protect itself from large financial claims. It submits that the City is reasonably likely to face the following financial and economic harms if the information at issue is disclosed:

- the number of claims made against the City are reasonably likely to increase; and
- premiums are reasonably likely to increase or the City may lose its insurance coverage.

Increase in claims

The City submits that the disclosure of claims information creates an increase in claims and a corresponding increase in costs:

> The release of claims information often sparks widespread public debate and discussion as to when a person may commence an action against the City, which, in turn often leads to a sudden rise in claims against the City. Although the City welcomes public debate and discussion as to what kinds of services the City should provide and what changes should made to its various programs, the City submits that it has an obligation to mitigate financial loss and protect its economic interests by minimizing claims activity.

Higher insurance premiums

The City also submits that if it discloses information that creates a greater risk of future claims, it is reasonably likely that insurers will demand higher premiums to offset such risk, even if most of the claims are for less than the deductible:

> Premiums are calculated by taking into account a number of factors, including whether the number of claims, including those for less than the deductible, have or are likely to increase. If claims information is disclosed and widely publicized, then insurers view this as increasing risk for future claims, which in turn generally results in increased premiums to offset such risk.

Loss of insurance coverage

The City further submits that publicity of claims activity creates unease among insurers, who are concerned not only that claims will increase as a result of publicity, but that their reputation will suffer as the underwriters of a corporation that has claims information widely disclosed. According to staff in the City's Insurance and Risk Management Office, if disclosure of claims information creates an unacceptable risk to insurers, whether such risk is real or perceived, then it is very likely that insurers will be unable or unwilling to provide the City with insurance coverage.

Financial impact

Currently, the City is required to pay for claims that are less than its deductible. The City submits that without any insurance, it would also be responsible for claims equal to or greater than its deductible, which would require the City to have a substantially larger reserve fund, tying up funds that could be used for much needed programs and services.

The City further submits that disclosing the information at issue could reasonably be expected to result in an increase in taxes:

> … whether premiums are raised or private insurance is unavailable to the City altogether, the outcome of disclosing the requested claims information is reasonably likely to be a substantial financial and economic burden to the City which generally results in a corresponding burden on taxpayers.

Analysis

In *Dagg v. Canada (Minister of Finance)* [1997], 2 S.C.R. 403, Mr. Justice La Forest of the Supreme Court of Canada considered the purpose of the federal *Access to Information Act* (the *ATIA*) but also commented on the important role that freedom-of-information legislation plays more generally in Canada:

> The overarching purpose of access to information legislation … is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have

> the information required to participate meaningfully in the democratic process and secondly, that politicians and bureaucrats remain accountable to the citizenry ...
>
> Parliament and the public cannot hope to call the government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view. Access laws operate on the premise that politically relevant information should be distributed as widely as possible …
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *ATIA* recognizes a broad right of access ... it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted.

Consequently, in the appeal before me, it is important to take into account the broad purposes of the freedom-of-information legislation that applies to the City and in particular, sections 1(a)(i) and (ii) of the *Act*:

The purposes of this *Act* are,

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific,

In this appeal, the City submits that the exemptions in sections 11(c) and (d) of the *Act* apply to the records at issue. Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. Consequently, the onus is on the City in this appeal to prove that the records at issue fall within the exemptions in sections 11(c) or (d) of the *Act*.

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the

> statute ... Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

To establish a valid exemption claim under section 11(d), an institution must demonstrate a reasonable expectation of injury to its financial interests.

For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The basis of the City's representations is that disclosure of the claims information sought by the appellant could reasonably be expected to prejudice the economic interests of the City [section 11(c)] and be injurious to the financial interests of the City [section 11(d)]. I have carefully reviewed the City's representations and attachments, including the letter from its insurance broker and risk management advisor. I am not persuaded that the City has satisfied the requirements of the sections 11(c) or (d) exemptions, for the following reasons.

The City submits that the release of claims information often sparks widespread public debate and discussion as to when a person may commence an action against the City, which, in turn often leads to a sudden rise in claims against the City. However, it has not adduced any fact-based evidence to support this assertion. The City has not cited any other previous instances where the release of the types of claims information at issue in this appeal led to a "sudden rise in claims" against the City. Nor has the City pointed to any other cities or public bodies that have faced a "sudden rise in claims" after disclosing the types of claims information sought by the appellant. In a different section of its representations, the City acknowledges that similar claims information related to the Toronto Police Service was previously released, but does not offer any evidence, numerical or otherwise, that the release of this information led to a "sudden rise in claims."

The City also submits that if it discloses information that creates a greater risk of future claims, it is reasonably likely that insurers will demand higher premiums to offset such risk, even if most of the claims are for less than the deductible. Moreover, the City argues that if disclosure of claims information creates an unacceptable risk to insurers, whether such risk is real or perceived, then it is very likely that insurers will be unwilling to provide the City with insurance coverage. The resulting financial impact would be less funds available for much needed programs and services, and an increased burden on taxpayers.

Given that the City has not adduced any fact-based evidence to support its assertion that the release of the types of claims information sought by the appellant could reasonably be expected to lead to a "sudden rise in claims" against the City, it does not logically follow that its insurer would demand increased premiums, that the City would lose its insurance coverage altogether, that there would be less funds available for much needed programs and services, or that there would be an increased burden on taxpayers. Moreover, the City's submission that the disclosure of claims information may create an unacceptable risk to insurers, "whether such risk is real or perceived," is further evidence that the City's submissions are based on speculation of possible harm, which is not sufficient to meet the requirements of sections 11(c) or (d).

I would also point out that in a free and democratic society, citizens have a right, subject to certain limitations, to sue governments, including the City, if they believe that the government has violated a contract, committed a tort, or otherwise breached the law. The release of claims information, may, as the City points out, "spark widespread public debate and discussion," which may heighten citizens' awareness about their legal rights. However, Ontario has a functional legal system for resolving disputes between plaintiffs and defendants. If the City settles claims or the courts find the City liable for damages in various legal proceedings, any adverse economic and financial consequences that may result, such as higher insurance premiums or loss of insurability, would have been caused by the City's own conduct, not by the disclosure of general claims information under the *Act*.

The City's representations include confidential portions and are supplemented by a confidential letter from the City's insurance broker and risk management advisor, which makes similar arguments about the economic and financial harms that could reasonably be expected to occur if the claims information sought by the appellant is disclosed. I will not reveal the substance of this confidential information in this order. However, I have taken the confidential portions of the City's representations into account in reaching my decision. In addition, I have reviewed and considered the confidential arguments of the City's insurance broker and risk management advisor and find that they are also highly speculative and unpersuasive.

I conclude, therefore, that the City has not discharged the burden of proving that the records at issue fall within the exemptions in sections 11(c) or (d) of the *Act*. The evidence adduced by the City amounts to speculation about possible harm, which is insufficient to meet the requirements of sections 11(c) or (d). In short, the City has failed to provide detailed and convincing evidence to demonstrate that disclosure of the claims information sought by the appellant could reasonably be expected to prejudice the economic interests of the City or be injurious to the financial interests of the City. Consequently, the records at issue must be disclosed to the appellant.

OTHER COMMENTS

Given that I have found that the City has failed to discharge the burden of proving that the records at issue fall within the exemptions in sections 11(c) or (d) of the *Act*, it is not necessary for me to consider whether the public interest override in section 16 of the *Act* applies to the records at issue.

It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts. Consequently, taxpayers have a right to know, at a minimum, how many lawsuits or claims have been filed against the City, and how much money the City has paid out in damages or in settling such matters in specific years. Without such information, citizens would be in the dark and have no meaningful way of scrutinizing whether the City is processing such claims in a financially responsible manner. Nor would citizens have sufficient information to begin to assess whether the conduct of the City may be contributing to the number of claims it receives.

In a report on CBC-Radio on June 10, 2005, Toronto Mayor David Miller made the following statement: "Council recently gave direction to City staff to routinely disclose everything possible. That's our obligation as a government, and if that's not happening, it will change, because that's the philosophy that I believe in and that City Council overwhelmingly believes in as well."

I am pleased that the Mayor is committed to open and transparent government and would urge him to follow through on his commitment by ensuring that there is a shift in the City bureaucracy from a protective mindset to a culture of openness. This culture shift should be based on the principles that information should be available to the public, and that necessary exemptions from the right of access should be limited and specific. Exemptions should not simply be claimed because they are technically available in the *Act*; they should only be claimed if they genuinely apply to the information at issue.

ORDER:

1. I order the City to disclose the records in their entirety by sending them to the appellant no later than **August 8, 2005**.

2. To verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records disclosed pursuant to order provision 1, above.

Original signed by: July 22, 2005
Ann Cavoukian, Ph.D.
Commissioner