

**Submissions by: the Centre for Local Research into Public Space (CELOS)**

**To: The Information and Privacy Commissioner of Ontario**

**Appeal MA 050302-1**

**Date: March 3, 2006**

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CELOS wishes to make submissions with respect to the following issues set forth in the Notice of Inquiry and the additional issue of a compelling public interest:

**1) THIRD PARTY INFORMATION – Issue B: Part 3 : harms**

CELOS submits that the City of Toronto has not discharged its burden of providing “detailed and convincing” evidence to establish a “reasonable expectation of harm” to the third party. Nor is there anything exceptional about the circumstances in this case to suggest that any harm can be inferred.

**2) COMPELLING PUBLIC INTEREST**

In the event that the Commissioner finds that the City has established a “reasonable expectation of harm”, CELOS argues that the compelling public interest of disclosure in this case clearly outweighs the purpose of the exemption.

**3) SEARCH FOR RESPONSIVE RECORDS – Issue C: reasonable search**

The City asserts that the requested Loan agreement with the Federation of Canadian Municipalities for Green Municipal Investment Fund (GMIF) has not been finalized.

CELOS submits that the City’s own documentation asserts that the \$ 10.3 million Cinergy contract was approved by City Council based on the information that \$ 2.5 million of the total contract price was to be financed through the GMIF loan which had been approved as of or before April 30, 2004.

This makes the City’s assertion that the loan agreement has not yet been signed almost two years later (well after the arena work began), very puzzling. How does the City council report square with the City’s response to CELOS, that the requested record has not yet been created?

**Background:**

CELOS became interested in the rinks-and-arenas energy retrofit project when people with clipboards and “Cinergy” signs began to inspect Dufferin Rink in the winter of 2004/2005. When we found out that the \$10.3 million project cost would

be coming from the Parks, Forestry and Recreation operating budget, we became quite concerned. We read that the City would save as much or more in energy charges. The savings were to be calculated by Cinergy (see attached contract “excerpts” from the park web site) based on a comparison of energy charges before the project and afterwards. However, any baseline energy charts we saw seemed highly flawed, even preposterous.

Much later, we heard that at least some of the comparisons for outdoor artificial ice rinks would be based on “deemed” energy charges rather than actual ones. This method of calculation seems tricky. Therefore we want to see what is to be done for the \$10.3 million – is it plausible that the measures taken will

1. save the City at least \$10.3 million in energy costs over 7 years to run its rinks and
2. fulfil City Council’s intention to reduce greenhouse gases to the extent advertised?

Based on other recent experiences with the city government, our group did not have confidence that due diligence had been done in the case of this project. A plan to get \$10 million of work done without spending a penny might be too good to be true. In such a case, it may be incumbent on citizens to try and find out what we are getting for our money.

When we learned that the information was a secret, we became even more concerned. Subsequently, we obtained one “concept report” for a rink we know from the City Councillor’s office, and several additional ones from the project manager. That was helpful in focusing our thinking, but so far our concerns have not been laid to rest. In fact, it seems that

- these measures are not rocket science and
- the additional questions raised by the reports we’ve seen are very troubling, and they need follow-up now.

1) THIRD PARTY INFORMATION – Issue B: Part 3 : harms

CELOS submits that the City of Toronto has not discharged its burden of providing “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Nor is there anything exceptional about the circumstances in this case to suggest that any harm can be inferred.

The City claims that disclosure of the Concept Report could reasonably lead to one or more of the harms set out in sections 10(1) (a) and (c) of the Act.

The City’s arguments in support of this alleged harm are set out below, with CELOS’ comments in bold beneath the relevant City’s points.

- Cinergy’s business is energy performance contracting; a knowledge based business.
- Cinergy competes with other companies for work not only for the City of Toronto but also other municipalities.
- The Report is not the final and complete report and has not been “accepted” or approved by the City.
- **To the contrary, from the City Clerk, letter (attached) dated November 16, 2005: “All of the concept reports have been put together under one binder (The Concept Report). Everything in the binder has been approved at the same time.”**  
(<http://www.dufferinpark.ca/research/wiki/wiki.php?n=Cinergy.CinergyCorrespondenceDiary>)
- The disclosure could undermine its ability to bid on other projects with other Canadian municipalities as this information could be used by its competitors to undercut costs or use Cinergy’s technological information such as its methodology.
- **CELOS did not ask for the dollar amounts for any of the items in the Cinergy report. Rather, our interest is in the scope and the methods to be used to achieve increased energy-efficiency. This seems a fundamental question.**

**Furthermore, the five outdoor rink Concept reports that CELOS has obtained from the City do not reveal any specific technological information or methodology which would lead to any possible harm to Cinergy.**

**Rather, the reports outline plans to reduce energy consumption in city rinks through three main avenues: retrofitting lighting fixtures and bulbs with low wattage units, air sealing building doors and windows, and installing a central automation system to control**

**refrigeration plants and heating systems. The former two schemes implement readily available technologies that are not exclusive to Cinergy Solutions. The latter (Building Automation System – BAS) involves a decision to centralize simple management schemes that could be easily implemented on site by trained staff. In other words, simple duties of existing staff are to be replaced by central computers. Whether such a scheme will save money or energy ought perhaps to be debated publicly, with the union included, rather than slipped in under the heading of energy savings.**

- As a result of the disclosure, Cinergy “might experience pressure” from other municipalities to provide similar work at the same cost savings as detailed in the draft report.
- The disclosure could prejudice Cinergy’s competitive position with respect to the companies that they intend to engage to provide materials and service for retrofits.
- **As state above, CELOS is not seeking the financial details contained in the Cinergy report.**

CELOS submits that the City has provided neither detailed nor convincing evidence to establish a “reasonable expectation of harm”. It has not, as required in Order PO-1805 “described a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms...would occur” if the information was disclosed. On the facts in this case, as in the facts of the Ontario Hydro case in Order PO-1805, the City’s submissions on harm are highly speculative, and the harms described in section 10 (a) and (c) do not logically flow from the scenarios described.

In Order PO-2020, the Commissioner quotes the Federal Court, Trial Division: “Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of the specific information and the harm alleged. The court must be given an explanation of how or why the harm alleged would result from disclosure of specific information.” The facts in the Cinergy case in no way support an inference of harm as was drawn in PO-2020.

The reports that CELOS has seen to date contain generalized and widely known information and does not reveal any specific information about Cinergy’s business activities.

## **2) COMPELLING PUBLIC INTEREST**

In the event that the Commissioner finds that the City has established a “reasonable expectation of harm”, CELOS argues that the compelling public interest of disclosure in this case clearly outweighs the purpose of the exemption.

On this issue, CELOS submits that Commissioner Cavoukian’s Other Comments in Order MO-1947, also involving the City of Toronto, are directly on point in this Inquiry.

*...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.... Consequently, taxpayers have a right to know....Without such information, citizens would be in the dark and have no meaningful way of scrutinizing whether the City is [undertaking its business] in a financially responsible manner.*

CELOS’s is concerned that the public interest with respect to parks and public space are being seriously jeopardized by decisions being made by the City.

Several “notwithstanding” clauses in the City’s contract with Cinergy (<http://www.dufferinpark.ca/research/wiki/wiki.php?n=Cinergy.TheCityAndCinergyAgreementExcerpts>) make us worry that Parks and Recreation may not get back what they pay out, and that therefore the servicing of the \$10.3 million loan through Parks and Recreation operating funds may negatively affect our public spaces (i.e. parks and recreation facilities).

Such an situation would not be unprecedented in City government.

In the context of the work done by people who use a thriving park and outdoor skating rink at Dufferin Grove Park, CELOS’ aim is to ensure that these same people can participate meaningfully in civic affairs and hold politicians and bureaucrats accountable for the decisions they make. In the case of this inquiry, as in MO-1947, “taxpayers are responsible for footing the bill” for the \$ 10.3 million Cinergy project which was undertaken for the purpose of reducing energy use the City buildings and facilities by at least 15 percent by 2005.

CELOS submits that in this case, there is a compelling public interest in disclosure of the Concept reports so that CELOS may continue to conduct research into this City initiative.

### **3) SEARCH FOR RESPONSIVE RECORDS – Issue C: reasonable search**

In its representations before this Inquiry, the City’s asserts repeatedly that the Loan agreement with the Federation of Canadian Municipalities for Green Municipal Investment Fund (GMIF) has not yet been signed.

CELOS submits that the City's assertions raises serious concerns about the discrepancy between the information submitted to, and upon which City Council approved the \$ 10.3 million Cinergy contract in May 2004, and the City's response to CELOS that the requested record has not yet been created.

The \$ 10.3 million Cinergy contract was approved by City Council based on the information that \$ 2.5 million of the total contract price was to be financed through the GMIF loan.

The City Clerk's Report to the Administration Committee to Policy and Finance Committee dated April 30, 2004 clearly states that the GMIF loan agreement was approved as of or before April 30, 2004.

*The City has received approval for a \$ 8.75 million loan from the Federation of Canadian Municipalities (FCM), through the Green Municipal Investment Fund, for its energy and water capital retrofit work. These loans are to be repaid at a rate of ... 3.18% at present. The Facilities and Real Estate Division of Corporate Services proposes to apply \$ 2.52 million of this loan to the City Arenas energy and water retrofit project, ...*

*Debt service costs for the repayment of principal and interest will be funded from guaranteed energy and water cost savings..."*

*Report No. 9, Clause 81(a) of the Policy & Finance committee from the Chief Administrative Officer regarding the City's applications made to the Federation of Canadian Municipalities (FCM) Green Municipal Funds was received by City Council at its meeting September 22, 23, 24 and 25, 2003. This report included a reference to an application for a \$ 5 million loan from the Green Municipal Investment Fund to be used towards water and energy retrofit projects in City facilities. This loan was subsequently approved by FCM in the amount of \$8.75 million.*

CELOS requests that the Commissioner seek a clarification from the City about this contradiction.

Finally, it's clear that the City entered into this Cinergy contract with an agreement that the details can never be made public. If institutions can routinely negotiate such an agreement in all their contracts, presumably the Information and Privacy legislation would be no longer be a trouble to institutions. We hope that the Act anticipated such a difficulty, and provided a remedy.