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

ORDER M-10

Appeal M-910006

City of North York

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O R D E R

The appellant wrote to the City of North York (the "institution") pursuant to the provisions of the Municipal Freedom of Information and Protection of Privacy Act (the Act") seeking access to a copy of an Engineering Report provided by [a named company] (the "owner"). The institution responded to the request by letter dated January 23, 1991, and informed the appellant that access to the record was being denied pursuant to sections 8(1)(a) and 8(1)(b) of the Act because the record "was prepared pursuant to an order under the Property Standards By-Law 28200 and is an ongoing matter". The appellant appealed this decision.

BACKGROUND:

A Notice of Violation, dated March 11, 1988, was sent by the institution to the owner of an underground garage indicating that the garage did not conform with the standards prescribed by North York Property Standards By-law 28200, as amended. The Notice of Violation indicated the work required to remedy the violations of the by-law and referred specifically to section 3.02.02 which reads as follows:

> If in the opinion of the Officer there is doubt as to the structural adequacy or condition of a building or structure or parts thereof, the Officer may order that such building or structure or parts thereof be examined and a written report be prepared by a professional engineer, licensed to practice in Ontario, and employed by the owner of the building or his authorized agent. The written report, including drawings, signed and stamped by the engineer and giving details of the findings and proposed repair methods, shall be submitted to the Property Standards Officer for his evaluation and approval.

The Notice of Violation stated that the work should be completed as soon

as possible, and that within a reasonable time after May 11, 1988, the property would be re-inspected.

On May 18, 1988, an Order to Comply was sent informing the owner that certain defects identified in the Notice of Violation had not been remedied, and that the property had to be brought into a condition of compliance regarding the defects set out in Schedule "A" to the Order to Comply.

The owner notified the institution that it was appealing the terms and conditions of the Order to Comply to the Property Standards Committee. The appeal was scheduled to be heard on July 5, 1988, but the Property Standards Committee granted an adjournment to August 9, 1988, subject to the owner fulfilling a number of undertakings. Two of those undertakings were:

1) that the owner provide a preliminary engineering report on "Phase I" before August 9, 1988; and

2) that the owner provide a completed Condition Survey by September 30, 1988.

According to the owner, the Property Standards Committee "confirmed" the work order on the basis that a completed Condition Survey was to be provided and a repair schedule worked out between the institution and the owner. A further appeal was launched by the owner to District Court but was subsequently abandoned.

The preliminary engineering report, dated August 4, 1988, and the condition survey, dated September 30, 1988, were prepared by an Engineering Firm and submitted to the institution by the owner. These reports describe the state of the underground garage. A repair schedule was negotiated between the institution and the owner based on the two reports.

The institution has initiated a prosecution in Provincial Offences Court

as the owner was "not proceeding with work as required in the Engineering Report". On January 20, 1992, this matter was adjourned to June 8, 1992.

The preliminary engineering report and the condition survey comprise the record in this appeal. The appellant is a tenant in the building which contains the underground garage.

The Appeals Officer obtained and reviewed a copy of the record at issue in this appeal. During the course of mediation, the Appeals Officer determined that the record might be of such a nature that the provisions of section 10 of the Act could apply. Section 10 is a mandatory exemption which applies to certain types of information "supplied" to an institution by third parties.

The Appeals Officer contacted certain third parties - the owner, the Consulting Firm which drafted the Reports, and the Engineering Firm whose one-page report was included in one of the reports at issue. None of these parties consented to the disclosure of the record. As settlement of this appeal was not effected, the appeal proceeded to inquiry.

An Appeals Officer's Report was prepared and sent together with a Notice of Inquiry, inviting all of the parties to make representations regarding the application of the exemptions found in sections 8(1)(a) and (b) and section 10 of the Act. Representations were received from the appellant, the institution, and the third parties.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether the information contained in the record qualifies for exemption under section 8(1)(a) of the Act.

B. Whether the information contained in the record qualifies for exemption under section 8(1)(b) of the Act.

C. Whether the information contained in the record qualifies for exemption under section 10 of the Act.

D. Whether the information contained in the record qualifies for exemption under section 12 of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the record qualifies for exemption under section 8(1)(a) of the Act.

Section 8(1)(a) of the Act reads as follows:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> interfere with a law enforcement matter;

In order to determine whether disclosure of the record would "interfere with a law enforcement matter", I must first decide whether or not the proceedings undertaken by the institution satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. That definition reads as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

The institution submits that the matter in question relates to the enforcement of the provisions of Property Standards By-law 28200 of the

City of North York, and that it is therefore an investigation or inspection that leads or could lead to proceedings in a court or tribunal where a penalty or sanction could be imposed. To support this position, the institution refers to the Planning Act, 1983 which grants a municipality the authority to pass a Property Standards By-law. The institution also points to the fact that enforcement of a Property Standards By-law is made under the Provincial Offences Act, and that the Provincial Offences Court has the authority, upon conviction, to levy fines or incarcerate.

In Order M-4, dated December 11, 1991, I determined that, in situations where the institution's process of by-law enforcement involved investigations or inspections that could lead to proceedings in a court of law where penalties could be imposed, the process of by-law enforcement qualified as "law enforcement" under the Act. Accordingly, I am satisfied that the proceedings undertaken by the institution qualify as law enforcement as defined in the Act.

Having found that the matter in issue is a law enforcement matter, I must now determine whether the disclosure of the record could reasonably be expected to interfere with the law enforcement matter.

At page 11 of Order 188, dated July 19, 1990, I discussed the meaning of the words "could reasonably be expected to" in the context of section 14(1) of the Freedom of Information and Protection of Privacy Act. The words "could reasonably be expected to" also appear in section 8(1) of the municipal Act. As I said in Order 188, supra:

> It is my view that [the] section requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the ... exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section

53 of the Act.

The institution claims that disclosure of the record to the appellant could provide him with an opportunity to contradict the reports, to question their validity and generally interfere with the law enforcement proceedings although he is not a party to them.

The institution further states:

> It is submitted that administration of the by-law should occur without the necessity of the release of the Engineering Reports received or interference by outside parties who wish to comment on those Reports. There would be no finality to the process. The owner of the property should have some expectation of discretion on behalf of the institution. These Engineering Reports have traditionally been treated as confidential documents by the By-Law Enforcement Division of the Legal Department.

As I understand it, the institution seems to be saying that inspections and by-law enforcement could be carried out more efficiently and economically in the absence of scrutiny by the public. In my view, when members of the public actively seek information about the activities of their government, or one of its agencies, every effort should be made to accommodate this interest within the confines of the Act. I believe this is reflected in section 1 of the Act, which sets out the purposes of the Act as they relate to access to information. These purposes 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,
> and ...

In this case, the institution has correctly pointed out that the appellant is not a party to the proceedings and it has not provided me with any evidence to demonstrate how questioning the contents of the reports on the part of the appellant could delay or cause there to be "no finality" to proceedings at which the appellant has no standing. Accordingly, it is my view that the institution has not provided sufficient evidence to establish that interference with a law enforcement matter could reasonably be expected to result from disclosure of the record.

ISSUE B: Whether the information contained in the record qualifies for exemption under section 8(1)(b) of the Act.

Section 8(1)(b) of the Act reads as follows:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The institution also submits that the matter is a law enforcement matter because it relates to the survey of underground parking garages undertaken by the City of North York to determine the structural adequacy of those garages. It is the institution's position that the inspections which led to the enforcement of By-law 28200 were conducted as part of a "comprehensive audit of structural conditions of underground garages in North York", which was undertaken as a result of a "Condominium Committee Report", dated January 4, 1984, regarding the deterioration of underground parking garages.

I am uncertain whether the institution is attempting to argue that the "comprehensive audit" constitutes a separate law enforcement matter from the notice to and possible prosecution for a by-law violation by a specific property owner. If this is what the institution is claiming, I do not accept this argument. The comprehensive audit of underground garages is merely the vehicle by which the institution has determined which owner it may wish to approach regarding possible by-law violations.

For the same reasons which I expressed in my discussion of the application of section 8(1)(a), I am of the view that the institution has not met the onus on it to provide sufficient evidence to substantiate the reasonableness of the expected harm as required by this section.

ISSUE C: Whether the information contained in the record qualifies for exemption under section 10 of the Act.

Section 10 states as follows:

> (1) 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

[IPC Order M-10/April 21, 1992]

> information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.
>
> (2) A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

Section 10 of the Municipal Freedom of Information and Protection of Privacy Act is similar in wording to section 17 of the Freedom of Information and Protection of Privacy Act. The test which must be met in order for a record to fall within the exemption found in

section 17 of that Act was recently reviewed in Order P-276, dated February 25, 1992. On pages 3 and 4 of that Order, Assistant Commissioner Mitchinson stated as follows:

> In Order 36, dated December 28, 1988, former Commissioner Sidney B. Linden established a three part test, each part of which must be satisfied in order for a record to be exempt under section 17(1)(a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section 17(1)(d). This new section is not covered by the test established in Order 36, and is also not relevant in the circumstances of this appeal. The test for exemption under section 17(1)(a),(b) or (c) is as follows:
>
> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the

> institution in confidence, either implicitly or explicitly; and
>
> 3. 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 subsection 17(1) will occur.
>
> At page 7 of Order 36, Commissioner Linden set out the requirements for meeting the third part of the test as follows:
>
> > In my view, in order to satisfy the Part 3 test, the institution and/or third party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a) - (c) would occur if the information was disclosed.

I adopt the test set out above for the purpose of this appeal. However, as section (d) of section 10(1) is not in issue in this appeal, it is only necessary for me to examine the applicability of sections 10(1)(a), (b) and (c).

I have carefully considered the representations received from the parties. I am satisfied that the information contained in the record at issue can be considered to be technical information. Thus, the first part of the test is met. With regard to the second part of the test, because of the nature of what has taken place between the institution and the owner to this point, I have difficulty accepting that the owner implicitly understood that the reports were being supplied in confidence. Nevertheless, despite my reservations I will consider whether the third part of the test, the "harms" test, can be met. I wish to make it clear that, for purposes of this order, I have not found it necessary to reach a conclusion as to whether the second part of the test has been met.

The owner takes the position that the disclosure of the record could reasonably be expected to prejudice significantly the competitive position of the owner and interfere significantly with the contractual

or other negotiations of a person or organization. The owner further states that the disclosure of the record will affect its competitive position because of the negative publicity which may be generated by the release of the record. The owner states it is in a business which is highly competitive. Furthermore, the owner is concerned that the disclosure of the record, without a full understanding that the "comprehensive audit" was undertaken as a the result of a general concern about the condition of underground garages, not only in North York, but nation-wide, could suggest that the structural problems which had been identified were unique to its property.
It is my view that the owner's concerns about the effect disclosure of the record may have on its competitive position are, at best, speculative.

The owner is also concerned that a negative interpretation may be put on the reports and this might have an effect on other parties (e.g. present and future tenants) who regularly deal with the owner. I do not find this evidence to be "detailed and convincing", and I do not accept the owner's statement that the disclosure could reasonably be expected to interfere <u>significantly</u> with the contractual or other negotiations referred to by the owner.

I am also not persuaded that the disclosure of this record could reasonably be expected to result in similar information no longer being supplied to the institution. The institution appears to have the authority to inspect properties and have reports, such as those at issue, produced. I do not accept that if the record is disclosed to the appellant, it can reasonably be expected that similar information would no longer be supplied to the institution.

Finally, I have not been provided with any evidence that the disclosure of the record could reasonably be expected to result in undue loss or gain to any person.

In summary, I am not satisfied that the third part of the test has been

met and therefore the exemption does not apply to the record.

ISSUE D: Whether the information contained in the record qualifies for exemption under section 12 of the Act.

The institution did not claim section 12 to exempt the record from disclosure. However, in its representations, the owner takes the position that the documents which comprise the record are protected from disclosure because the common law solicitor-client privilege and litigation privilege apply to them. As section 12 and section 19, which is the equivalent section of the provincial Act, have been interpreted, both these privileges are reflected in the exemption. [see Orders 49, P-218, M-2]

The owner's representations set out the following:

> The reports were a means by which facts were provided to the solicitors for the City of North York on the basis of which legal advice could be provided to the City. As such, it attracts both solicitor and client privilege from the perspective of the City of North York as well as solicitor client privilege claimed by [the owner]. In addition, as it was provided in the course of litigation, it is submitted that it attracts the same privilege as the report would attract if the matter had been litigated civilly. Any documents produced in the course of a discovery between the parties cannot be used outside of that litigation process. (Reichmann et al v. Toronto Life (1988) 28 C.P.C. 11 (Ont. H.C.)).
>
> ...
>
> It is also [the owner's] position that the reports attract solicitor client privilege of both [the owner] and of the City of North York. It is (the owner's) position that counsel for the City of North York used the reports as part of its fact-finding for the purpose of giving legal advice leading to the dismissal of the appeal to the District Court.

The owner goes on to indicate that there has been no express waiver by

either the owner or the institution of the confidence with which these reports were impressed, and that the provision of the reports by the owner was determinative in settling the matter both before the Property Standards Committee and the District Court.

In Order P-257, dated on November 29, 1991, Assistant Commissioner Tom Mitchinson considered the issue of whether or not a party other than an institution can rely on a discretionary exemption when an institution has not done so. At pages 5 and 6 of Order P-257, supra, Assistant Commissioner Mitchinson, stated as follows:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1) [sections 10 and 14 of the municipal Act], it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released. ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. ... In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.
>
> [IPC Order M-10/April 21, 1992]

In my view, this appeal is not one of those "rare occasions" when an exemption not raised by the institution should be considered. Accordingly, section 12 does not apply to the record.

ORDER:

1. I order the institution to disclose to the appellant the record at issue.

2. I order that the institution not disclose the record at issue until thirty (30) days following the date of the issuance of this Order. This time delay is necessary to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/ Ontario and/or the institution within this thirty (30) day period, I order that the record in issue be disclosed within thirty-five (35) days of the date of this Order.

3. The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

4. In order to verify compliance with this order, I order the head to provide me with a copy of the record which is disclosed to the appellant pursuant to provision 1, upon request.

Original signed by: April 21, 1992

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Tom Wright
Commissioner