



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-36**

**Appeal M-910302**

**City of Toronto**



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# ORDER

## BACKGROUND:

The City of Toronto (the institution) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all City of Toronto files and documents relating to the construction of storm sewers in a particular area of Toronto. The institution informed the requester that the information contained in 17 of the records responsive to the request might relate to the interests of a third person (the company). Therefore, the company was given an opportunity to make representations regarding disclosure of those records. The company informed the institution that it objected to disclosure of three of the 17 records on the basis of sections 10(1)(a), (b) and (c), 11(a), (c), (d) and (e), and 14(1) and (2)(e) and (h) of the Act.

After receiving the company's representations, the institution decided to release all of the records to the requester. The company's solicitor appealed the institution's decision to grant access to three records.

The three records were obtained and reviewed by the Appeals Officer. They are:

- 1) Minutes of Site Meeting dated March 8, 1991, and attached sheet of figures.
- 2) Letter from the company to the City of Toronto Department of Public Works dated December 5, 1990, and attachment.
- 3) Letter from the company to the City of Toronto Department of Public Works dated June 28, 1990.

Mediation of the appeal was unsuccessful, and the matter proceeded to inquiry. Notice of the inquiry was sent to the institution, the appellant, and the requester, accompanied by an Appeals Officer's Report which is intended to assist the parties in making their representations concerning the subject matter of the appeal.

Representations were received from the appellant and the institution. The institution also provided a copy of a typical "tender package".

## ISSUES/DISCUSSION:

- A. Whether the information contained in the records qualifies for exemption under section 10(1)(a), (b) or (c) of the Act.

- B. Whether the information contained in the records qualifies for exemption under section 11 of the Act.
- C. Whether the information contained in the records qualifies as "personal information" as defined by section 2(1) of the Act.
- D. If the answer to Issue C is yes, whether disclosure of such personal information would result in an unjustified invasion of any individual's personal privacy.

### **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the information contained in the records qualifies for exemption under section 10(1)(a), (b) or (c) of the Act.**

Sections 10(1)(a), (b) and (c) of the Act reads 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 information continue to be so supplied;
  - (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In Order M-10, dated April 21, 1992, I adopted the following three part test, first established under the

provincial Act, which must be met in order for a record to fall within the exemption found in sections 10(1)(a), (b) or (c):

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 section 10(1) will occur.

Each part of the test must be satisfied in order for a record to be exempt from disclosure.

It has been established in a number of previous orders that the burden of proving the applicability of the exemption lies with both the institution and the affected party who has resisted disclosure. (Orders 80, 101, 166, 204, P-228, M-10 and M-29) In this appeal, the institution does not support the position of the appellant and has at all times been prepared to release the records. Therefore, the onus of establishing that the section 10 exemption applies to the records rests entirely with the appellant.

### **Part 1 of the Section 10 Test:**

In order to satisfy Part 1 of the test, the records must reveal information that is "a trade secret or scientific, technical, commercial, financial or labour relations information". Information contained in a record could also "reveal" information "supplied" by an affected party to an institution if disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution but not contained in the record (Orders P-218, P-228 and P-241).

In his representations, the appellant claims that disclosure of the records would reveal information which is financial, commercial, technical or a trade secret. I have reviewed the records and in my view, they do contain technical, commercial or financial information. Therefore, Part 1 of the section 10 test has been met.

### **Part 2 of the Section 10 Test:**

In order to satisfy Part 2 of the test, the information must have been supplied to the institution in confidence,

either implicitly or explicitly.

With regard to this part of the test, the appellant states:

[The company] provided information referred to in the subject documents on an implicit confidential basis, in accordance with traditional confidentiality which has always been accepted by all parties as an essential and reasonable understanding employed in the negotiation and developmental process pertaining to construction and other contracts.

However, in its representations, the institution states:

... [I]t is the City's view that the information was not supplied in confidence ... None of the documents bear any wording which suggest that they were to be treated in confidence. Nothing in the process assured [the company] that these records would not become public. With respect to the minutes of the site meeting, this record was created as a result of a meeting and was not supplied by [the company]. (Orders 87, 179, 203, 204, P-219, P-228, P-241, P-248, P-251 ...)

I have reviewed the records and the representations of the appellant and the institution. I agree with the institution that nothing in the three records themselves, or in the material which relates to the tender process generally, suggests confidentiality. I also agree with the institution that Record 1, the Site Meeting Minutes, was not "supplied" as the minutes were clearly created as a result of discussion between the company and the institution (Order 87).

Therefore, I conclude that the information contained in the records was not supplied in confidence and, in my view, the appellant has not satisfied Part 2 of the section 10 test. Since all parts of the three part test must be satisfied in order for the exemption to apply, I need not consider Part 3 of the test.

The records at issue do not qualify for exemption under section 10 of the Act.

**ISSUE B: Whether the information contained in the records qualifies for exemption under section 11 of the Act.**

The institution did not claim the section 11 exemption. However, in his representations, the appellant takes the position that the documents which comprise the records are protected from disclosure by sections 11(a), (c), (d) and (e) of the Act.

In its representations, the institution states:

The appellant has claimed the economic interests [section 11] exemption. With respect, this is a discretionary exemption which the city may or may not utilize. It is submitted that it is not open to the appellant to rely on this exemption.

In Order M-10, supra, I examined the issue of whether a party other than an institution can rely on a discretionary exemption when an institution has not done so. In that order, I adopted the reasoning of Assistant Commissioner Mitchinson in Order P-257, dated November 29, 1991. At pages 5 and 6 of Order P-257, the Assistant Commissioner 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.

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 11 does not apply to the records.

**ISSUE C: Whether the information contained in the records qualifies as "personal information" as defined by section 2(1) of the Act.**

The appellant cited section 14 of the Act in claiming that the records include the personal information of

three representatives of the company and that the disclosure of the records would disclose the negotiating skills and techniques used by these individuals, which would constitute an unjustified invasion of the personal privacy of these individuals.

In order for the section 14 exemption to apply, the records must contain personal information as that term is defined in the Act. Section 2(1) of the Act defines personal information as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

From a review of the records, it is clear that the individuals whose names appear in the records were at all times representing the interests of the company. The records relate exclusively to the discussions and negotiations concerning the contract entered into between the institution and the company. In my view, this information is not "recorded information about an identifiable individual". The names of the individuals mentioned in the records appear there solely in their capacities as representatives of the company and as such, do not constitute "personal information" as defined in section 2(1), (Orders 80, 113, P-257).

Since I have found that the records do not contain "personal information", it is not necessary for me to consider Issue D.

**ORDER:**

1. I order the institution to disclose to the appellant the Minutes of Site Meeting dated March 8, 1991, and attached sheet of figures, the letter from the company to the City of Toronto Department of Public Works dated December 5, 1990, and attachment and the letter from the company to the City of Toronto Department of Public Works dated June 28, 1990, within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order.
2. The institution is further ordered to advise me in writing within five days of the date on which disclosure was made. Such notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
3. 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, only upon request.

Original signed by: \_\_\_\_\_  
Tom Wright  
Commissioner

\_\_\_\_\_ September 10, 1992