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

ORDER M-37

Appeal M-910199

North Bay Hydro

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ORDER

BACKGROUND:

North Bay Hydro (the institution) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all information relating to the classification of the requester's position under the institution's proposed pay equity plan. In particular, the requester was seeking the points given for each category in his position.

The institution denied access to the record pursuant to sections 10 and 11 of the Act. The institution later clarified that it was relying on section 10(1)(a) and sections 11(d), (e), (f) and (g). The requester appealed the institution's decision.

The record was obtained and examined by the Appeals Officer. The record consists of a single page matrix chart entitled "Point Values", which contains a breakdown of the total points allotted for the meter technician position, and a Job Evaluation System Manual. The chart and the manual were prepared by a consulting firm (the affected party), at the request of the institution. The manual is 43 pages in length and includes guidelines for the systematic analysis and evaluation of job content.

During the course of the appeal, the institution completed negotiations with the union representing its employees. By agreement with the union, internal equity was adopted in place of pay equity. The institution agreed that the appellant's original request would cover the internal equity plan. Subsequently, the institution claimed an additional exemption under section 11(c) and, in light of the fact that the negotiations were completed, abandoned its claim for exemption under sections 11(f) and (g).

As settlement of the appeal could not be effected, notice that an inquiry was being conducted to review the decision of the head was sent to the institution, the appellant and the affected party. The Notice of Inquiry was accompanied by a report prepared by the Appeals Officer, intended to assist the parties in making representations concerning the subject matter of the appeal.

Representations were received from the institution, the appellant and the affected party.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether the information contained in the record qualifies for exemption under section 10(1)(a) of the Act.

B. Whether the information contained in the record qualifies for exemption under sections 11(c), (d)or (e) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the record qualifies for exemption under section 10(1)(a) of the Act.

Section 10(1)(a) reads as follows:

> 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 organizations;

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].

Part 1 of the Section 10 Test:

In order to satisfy Part 1 of the test, the record must "reveal" information that is "a trade secret or scientific, technical, commercial, financial or labour relations information". Information contained in a record could "reveal" information "supplied" by an affected party to an institution if disclosure of the record 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 its representations, the institution maintains that the record would reveal both the technical and labour relations information of the affected party. Although the affected party's representations do not address specific types of information, it appears that the affected party feels that disclosure of the record would reveal information that is technical in nature.

From a review of the record, it is my view that it does contain technical information. Therefore, Part 1 of the 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.

In its representations, the institution states that the record was "supplied" to the institution by the affected party. In considering the question of "supplied", I note that the institution hired the affected party to prepare the manual and the chart specifically for use by the institution.

In its representations, the institution also states that the fact that the record is under copyright and was designed solely for use by a trained evaluating committee is evidence that it was "supplied in confidence". The affected party claims that "our materials are copyright and as such are not to be reproduced without our expressed permission."

In Order M-29, dated July 30, 1992, I dealt with the issue of copyright and its relationship to a request for access to information under the Municipal Freedom of Information and Protection of Privacy Act.

In that Order, I noted that providing **access** to information under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. Sections 27(2)(i) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright.

Sections 27(2)(i) and (j) of the Copyright Act read as follows:

> The following acts do not constitute an infringement of copyright:
>
> (i) the disclosure, pursuant to the Access to Information Act, of a record within the meaning of that Act, or the

> disclosure, pursuant to any like Act of the legislature of a province, of like material;
>
> (j) the disclosure, pursuant to the Privacy Act, of personal information within the meaning of that Act, or the disclosure, pursuant to any like Act of the legislature of a province, of like information;

As the Municipal Freedom of Information and Protection of Privacy Act is a "... like Act of the legislature of a province ..." **disclosure** of copyrighted information is not an infringement of copyright.

Since the Copyright Act will not be violated by reproducing records for the purposes of the Municipal Freedom of Information and Protection of Privacy Act, a government institution may not refuse to grant access to a record in its custody or control solely on the basis of a copyright claim. As well, in my opinion, the fact that a record is subject to copyright does not, in itself, indicate confidentiality.

In my view, the institution and the affected party have not established that the record at issue was "supplied in confidence" and accordingly, Part 2 of the section 10 test has not been met and the claim for exemption fails. However, because the representations of the affected party focused on the issue of harm, I will also address Part 3 of the test.

Part 3 of the Section 10 Test:

In order to satisfy Part 3, 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 section 10(1)(a) would occur if the information was disclosed, [Order M-10].

The institution did not make representations on this part of the test. In its representations, the affected party states the following:

> Our firm has developed our approach, processes and job evaluation tools over the past four decades. We have invested significant development and maintenance dollars in our system and they are jeopardized if our copyrighted material becomes part of the public domain. Once an individual has access to our copyright document we have little realistic protection against further distribution or use of our materials by others.

As I stated in my discussion of Part 2 of the section 10 test, providing access to information requested under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. If access to information is provided under the Act, this does not negate copyright protection with respect to further use or distribution of the information. Therefore, I find that the affected party has not provided sufficient evidence to establish that disclosure of the record would give rise to a

reasonable expectation that one of the harms specified in section 10(1)(a) would occur. Accordingly, Part 3 of the section 10 test has also not been met.

In summary, the record does not qualify for exemption under section 10.

ISSUE B: **Whether the information contained in the record qualifies for exemption under sections 11 (c), (d) or (e) of the Act.**

Sections 11(c), (d) and (e) were cited by the institution in withholding the record. As no representations were received with respect to the application of sections 11(d) and (e), these sections will not be considered.

Section 11(c) of the Act reads as follows:

> 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;
>
> ...

In order to qualify for exemption under section 11(c), the record must contain information the disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of an institution.

In Order M-27, dated July 13, 1992, I considered section 11(c) of the municipal Act. In that order, I indicated that the expectation of harm to an institution's economic interests or competitive position, should a record be disclosed, must not be fanciful, imaginary or contrived, but based on reason. Further, I indicated that in order to support a claim under this section, the evidence provided must be detailed and convincing.

In its representations, the institution states:

> Should these documents be made accessible to all employees, the concept of Collective Bargaining would be destroyed and individuals would then begin an individual bargaining process. If this were to take place each employee would have to be trained in use of the evaluating system and a tremendous amount of time would be consumed conducting individual bargaining sessions resulting in an unnecessary economic burden for North Bay Hydro.

However, the institution also states:

> North Bay Hydro and CUPE Local 72 have entered into an agreement allowing individuals who dispute their position evaluation to appeal the decision and present their opinions regarding their individual position. This would be done via the Joint Job Evaluation Committee.

The appellant has also addressed this question in his representations. He states "Under ... our recently ratified contract we have an appeal process for those ... who disagree with the result of internal equity."

Thus, it appears that the institution already has a process in place for dealing with employees' concerns regarding their position evaluations. In addition, as stated by the institution and the appellant in their representations, the institution's employees are members of a union and, therefore, cannot engage in individual bargaining.

Having considered the record and the representations of the institution and the appellant, I am not convinced that section 11(c) applies. In my opinion, disclosure of the record could not reasonably be expected to prejudice the economic interests or the competitive position of the institution.

ORDER:

1. I order the institution to disclose to the appellant the Matrix Chart and the Job Evaluation Manual 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: September 14, 1992
Tom Wright
Commissioner