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

ORDER M-65

Appeal M-910360

Halton Board of Education

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

The Halton Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a proposal that was developed in conjunction with Apple Canada Inc. (the affected party) for an advanced technology secondary school. The Board denied access to the record pursuant to section 10(1)(a) of the Act. The requester appealed the Board's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Board's decision was sent to the appellant, the Board, and the affected party. Written representations were received from the Board and the affected party.

The sole issue in this appeal is whether the mandatory exemption provided by section 10(1)(a) applies to a four page record which outlines the conceptual framework for the development of a possible project (Record 1), and a one page "Letter of Intent" signed by representatives of the Board and the affected party (Record 2). In its representations, the affected party indicated that it was willing to release Record 2.

Section 10(1)(a) states:

> 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,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

Each part of the following three-part test must be satisfied in order for a record to be exempt from disclosure under section 10(1)(a), (b) or (c) of the Act:

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 types of harm specified in (a), (b) or (c) of section 10(1) will occur.

[Orders 36 and M-10]

Part One

The Board submits that the records contain information that represents trade secrets, and has commercial implications for the affected party.

In Order M-29, Commissioner Tom Wright defined "trade secret" in the context of section 10(1) of the Act:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Board has not provided any evidence in support of its claim that the information contained in the records consists of trade secrets. I have reviewed the records, and I am not satisfied that the information therein is not generally known in the business of computer technology or, for that matter, to the general public. Accordingly, I find that the information contained in the records does not qualify as trade secrets.

The affected party submits that the records qualify as commercial information, claiming that Record 1 provides a blueprint for the formulation of innovative projects, and conveys its strategies and negotiations for advancing education through exceptional, innovative projects. I have reviewed both records and find that the connection between the information contained in the records and the commercial activities of the affected party is too remote to qualify the information as commercial.

In summary, I find that the information contained in the records does not qualify as any of the types of information identified in the first part of the test, and the first part of the test is not met.

Part Two

The affected party and the Board submit that Record 1 was prepared by the Board in consultation with the affected party, and both records contain information supplied to the Board in confidence. The understanding of confidentiality between the two parties is evident in other related documents supplied by the Board and the affected party.

In my opinion, the information contained in the records was the result of negotiations between the Board and the affected party. It may be that, during the course of the negotiations, various information was supplied by the affected party to the Board. Conversely, some of the information that appears in the records may have originated from the Board. However, I am unable to determine from my review of the record which portion of the record reveals information that was supplied to the Board by the affected party, which information is that of the Board, and which information reflects an amalgam of the position of both parties. I find, therefore, that the requirements of the second part of the test have not been met.

Part Three

The Board submits that "the release of the information would prejudice [the affected party's] competitive position". The affected party has indicated a willingness to release Record 2. Accordingly, I find that there is no evidence to establish a reasonable expectation of significant prejudice to the affected party's competitive position, and the third part of the test has not been met in respect of Record 2.

The affected party submits that it's ability to be at the forefront of education is one of it's strengths, and the release of Record 1 would be of great injury to it. The affected party submits that if it cannot rely on the confidentiality of those with whom it works in the educational field, this could seriously injure its competitive position.

I am not satisfied that disclosure of the information contained in Record 1 could reasonably be expected to result in either of the harms described in section 10(1)(a). Neither the Board nor the affected party have provided me with sufficient evidence to establish a reasonable expectation of significant prejudice to the affected party's competitive position, and the third part of the test has not been met.

In summary, neither of the two records meet any of the parts of the test for exemption under section 10(1)(a) of the Act, and do not qualify for exemption under this section.

ORDER:

1. I order the Board to disclose the records to the appellant within 35 days following the date of this order, and **not** earlier than the thirtieth (30th) day following the date of this order.

2. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1, only upon request.

Original signed by: November 19, 1992
Holly Big Canoe
Inquiry Officer