



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-130

Appeal M-9200433

The Corporation of the City of Nepean



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ORDER

BACKGROUND:

The Carleton 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 report entitled, "Analysis of Radio Transmission Towers in Barrhaven-Longfields Area". The Board stated that, based on a legal opinion, the trustees decided that the report would be given to the City of Nepean which would then become the "appropriate authority to release the report to the public."

Subsequently, the Corporation of the City of Nepean (the City) received a request for the same report. The City located the record responsive to the request and denied the requester access to the record pursuant to sections 11(c), (d), and (e) of the Act. The requester appealed the decision.

Mediation was not successful, and notice that an inquiry was being conducted to review the City's decision was sent to the appellant, the City, and the author of the record. Because the record at issue was authored by a third party, the Appeals Officer raised the mandatory exemption provided by section 10 of the Act as an issue in the Notice of Inquiry. Representations were received from counsel for the City and the author of the record.

ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 11(c) of the Act applies.
- B. Whether the discretionary exemption provided by section 11(d) of the Act applies.
- C. Whether the discretionary exemption provided by section 11(e) of the Act applies.
- D. Whether the mandatory exemption provided by section 10(a), (b), and/or (c) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 11(c) of the Act applies.

Section 11(c) of the Act reads:

A head may refuse to disclose a record that contains,

information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

In Order M-27, Commissioner Tom Wright considered the proper application of section 11(c):

... 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, ... in order to support a claim under this section, the evidence provided must be detailed and convincing. 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 42 of the Act.

I agree.

After careful consideration of the record at issue, I am not convinced that the exemption provided by section 11(c) applies. In its written representations, the City maintains that it does not accept nor adopt the opinions expressed in the record, and that disclosure of the record **could** create confusion and uncertainty "particularly if the production is perceived as a report emanating from the City." Further the City states:

Any adverse effect on development of the Longfield's community would prejudice the economic interests of the City.

In my opinion, the City's representations on this point are speculative. I am not persuaded that it is reasonable to expect that either of the harms referred to in section 11(c) will result if the record is disclosed.

ISSUE B: Whether the discretionary exemption provided by section 11(d) of the Act applies.

Section 11(d) of the Act reads:

A head may refuse to disclose a record that contains,

information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

In its written representations, the City states:

Production of the report (albeit a copy) by the City could create erroneous perception that the City did commission or endorse or accept as valid the contents thereof. Such a perception is not fanciful, imaginary or contrived. Moreover, such a perception could reasonably be expected to have a negative impact on development and therefore prejudice the economic interest and competitive position of not only the City but also landowners in the Longfield's community.

Again, the City's representations have failed to give any specific reasons why disclosure of the record could reasonably be expected to create an "erroneous perception" that the City endorses its contents. Further, the representations fail to make the necessary connection between such an erroneous perception, should the situation arise, and any consequences that could prove injurious to the financial interests of the City.

In my view, the exemption provided by section 11(d) does not apply to the record at issue.

ISSUE C: Whether the discretionary exemption provided by section 11(e) of the Act applies.

Section 11(e) reads:

A head may refuse to disclose a record that contains,

positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

For a record to qualify for exemption under section 11(1)(e), the institution must establish that:

1. the record contains positions, plans, procedures, criteria or instructions; **and**

2. the record is intended to be applied to negotiations; **and**
3. the negotiations are being carried on currently or will be carried on in the future; **and**
4. the negotiations are being conducted by or on behalf of an institution or the Government of Ontario.

[Order 87]

In its representations, the City states that it "has successfully negotiated the relocation of the radio towers currently situated in the Longfields area".

Making representations on the section 11(e) exemption, the City states:

... at some point in the reasonably foreseeable future, the City will be obliged to undertake negotiations with an owner regarding certain lands to the south of the Longfields community currently being developed. ... Production of any record, including the report referred to above, at this time, could compromise the City's negotiating position in dealing with the said owner.

The first statement is straightforward enough that the record fails part three of the test. In my view, the City's second statement fails to link specifically how the disclosure of the record at issue, or any record for that matter, could compromise the City's negotiating position with the owner of said lands to the south of the Longfields community.

In my view, part three of the test has not been established. Therefore, the section 11(e) test has not been satisfied and I find that the record does not qualify for exemption under this section.

ISSUE D: Whether mandatory exemption provided by section 10(a), (b), and/or (c) of the Act applies.

Sections 10(a), (b), and (c) of the Act read:

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;

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the City and/or the affected party must satisfy each part of the following three-part test:

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 10(1) will occur.

[Orders 36, M-29 and M-37]

The City's written representations, with regard to part two of the section 10 exemption state:

... the record (the photocopy of the report) was supplied to the City implicitly in confidence.

After careful examination of the record, I have found no indication that the Board or the author of the record supplied the record in confidence to the City. The author of the record indicates that he was told by the Board to keep all information pertaining to the study confidential, and to disclose it only to the Board. The author submits that the record is the property of the Board, and the Board may do with it what it likes. In my view, the second part of the test has not been established, as confidence was stipulated by the receiver

of the information, and not the supplier.

The City submits that the disclosure of the record could be expected to prejudice the interests of landowners and developers in the Longfields community.

In my view, the evidence regarding harm that could result from disclosure of the record is not sufficient to establish the third part of the section 10(1) exemption test. The evidence consists of generalized assertions in support of what amounts to, at most, speculations of possible harm.

Accordingly, I find that the criteria for parts two and three of the test have not been met, and the mandatory exemption provided by section 10 of the Act does not apply.

ORDER:

1. I order the City to release the record to the appellant within 35 days of the date of this order, and not earlier than the thirtieth (30th) day of the date of this order.
2. In order to verify compliance with this order, I order the City to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____
 Holly Big Canoe
 Inquiry Officer

_____ May 13, 1993