



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER M-149**

**Appeal M-9200388**

**City of Brampton**



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# ORDER

## BACKGROUND:

The City of Brampton (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all records in its custody or under its control which relate in any way to a development project known originally as Transportation Place and subsequently as International Landports (Landport). The City informed two affected persons, namely the proponent of the project and a consulting firm which had submitted a report to the proponent, of the request. The affected persons objected to the disclosure of some of the records. The City responded to the request by disclosing some of the records, denying access to those where disclosure was objected to by the affected persons and denying access to some additional records. The City's denial of access to all of these records was based on the exemption found in section 10 of the Act.

The proponent submitted the Landport proposal and supporting reports to City politicians and staff on an informal basis, with the intention of obtaining an initial response from those officials. The proponent has not, to the date of this appeal, submitted a formal application to Brampton for approval of Landport.

Mediation of this appeal was unsuccessful and notice that an inquiry was being conducted to review the City's decision was sent to the appellant, the City, and the affected persons. Representations were received from the appellant, the City and one of the affected persons.

In their representations, the City and one of the affected persons consented to the disclosure of some records they had originally denied access to. These records are identified in Appendix B and should be disclosed to the appellant.

The records remaining at issue consist of correspondence, material describing the Landport proposal and the economic and functional justification for it, consultants' reports relating to certain aspects of the proposal, memoranda prepared by City staff dealing with the proposal and the Minutes of an in camera meeting of City Council. In their representations, the City and one of the affected persons rely on sections 10(1)(a), (b) and (c) of the Act. In addition the City relies on section 6(1)(b) with respect to the Council Minutes, Record 311, and on section 7(1) with respect to Records 279-81 and 286-88. The appellant was notified of the added application of these exemptions, and was invited to submit representations. Written representations were received.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 10(1) of the Act applies.
- B. Whether the discretionary exemption provided by section 6(1)(b) of the Act applies to Record 311.
- C. Whether the discretionary exemption provided by section 7(1) of the Act applies to Records 279-81 and 286-88.

## **SUBMISSIONS/CONCLUSIONS:**

### **ISSUE A: Whether the mandatory exemption provided by section 10(1) of the Act applies.**

The City and one of the affected persons indicate in their representations that they are relying on the exemptions provided by sections 10(1)(a), (b) and (c) of the Act. The appellant states in his representations that the information was not supplied in confidence, and that none of the harms referred to in section 10 are present or reasonably foreseeable.

Sections 10(1)(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;

In order to qualify for exemption under sections 10(1)(a), (b), and /or (c), the City and/or the affected persons 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 must give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of section 10(1) will occur.

[Orders 36, M-10, M-130]

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. Orders which have been issued concerning section 17 of the Freedom of Information and Protection of Privacy Act may therefore provide guidance in interpreting and applying section 10 of the municipal Act.

### **Part 1**

One of the affected persons submits that the records supplied by it to the City consist of "pre-submission technical documentation". These records describe the proposal in some detail and include consultants' reports containing market impact and traffic impact analyses and supporting documentation, proposed work programs and project scheduling, and material generally descriptive of the project and of the team assembled to work on it.

I am satisfied that the consultants' reports, the work programs and schedules and the inter-office memoranda prepared by City staff containing analyses of the consultants' reports and comments on Landport contain information of a technical nature. These records are identified as Records 29, 30, 34, 279-81, 286-88, 334-38, 341, 342, 366, 367, 378, 380-90, 392, 402, 407, 409, 412-14, 428-34, 471, 475 and 480-83.

I have carefully considered the consultant's report which was prepared by the affected person who did not make representations and which comprises Records 328-31. In my opinion, these records contain information that is technical in nature.

The records which give a general description of Landport, the provincial and the general commercial context within which Landport is proposed and a description of the project team, do not contain technical information. These records are identified as Records 35, 36, 348-52, 355, 445, 446 and 463-66.

The City and one of the affected persons submit in their representations that Records 34-36, 348-52, 445, 446, 449, 463-66 and 471 contain financial information.

In Order 80, former Commissioner Sidney B. Linden stated:

... financial information refers to specific data on the use and distribution of money, such as information on pricing practices, profit and loss data, overhead and operating costs.

I agree.

In my view, most of these records do not contain financial information within the meaning of the Act. The only records which, in my opinion, contain financial information for the purposes of section 10(1) are Records 34, 348 (part), 349 (part), 352 (part) and 449. Almost all of the information that is financial relates to trade flows into and out of the province.

In Order 179, former Inquiry Officer John McCamus stated:

It is my view that the concept of "commercial" information should be broadly construed to include ... information "pertaining or relating to or dealing with commerce".

I agree.

I have carefully reviewed the records which do not, as noted above, contain technical or financial information. Of these records, I am of the opinion that Records 348 (part) and 352 (part) contain commercial information as defined above, while Records 35, 36, 349 (part), 350, 351, 352 (part) and 463 do not.

Even though the parties did not specifically refer to this in their representations, I have considered whether any of the remaining records contain a trade secret or scientific or labour relations information. In my view, none of the records contain a trade secret or scientific or labour relations information.

In summary, I have concluded that Records 35, 36, 348 (part), 349 (part), 350, 351, 352 (part), 355, 445, 446 and 463-66 do not contain information of any of the categories set out in Part 1 of the test and therefore fail to qualify for exemption under section 10(1) of the Act. Accordingly, these records will not be considered in determining Parts 2 and 3 of the test.

## **Part 2**

In order to satisfy Part 2 of the test, the information must have been **supplied** by the affected persons to the City **in confidence**.

I am satisfied that the records provided to the City by the affected persons were "supplied" for the purpose of the initial review of the Landport proposal, and that this portion of Part 2 of the test has therefore been met.

With respect to the element of "confidentiality", both the City and one of the affected persons submit that the information was supplied implicitly in confidence. Their position is that there is a clear distinction between making an informal submission in order to obtain initial feedback from municipal officials, and submitting a formal development application under the Planning Act. The City states in its representations:

While we consider the formal Development Application process to be in the public domain and available for any member of the public to view and comment on, we feel very strongly that information that is supplied to us before a Development Application is formally submitted is not. Often a developer will submit an idea or a proposal that is still in draft form and is looking to the City for guidance and assistance in formulating an application. However, between the time this information and a formal application is submitted, the application could be significantly different from the proposal.

Similarly, one of the affected persons states:

As a general comment we would like to emphasize that no development application has yet been made. In such circumstances, there is clearly an implicit understanding that documents released by a proponent/developer to a Municipality prior to an application being made is being done so on an informal confidential basis. The technical information supplied in such circumstances is often preliminary and is done with the intent of exploring the idea or concept on a confidential basis to receive direction and guidance from the Municipality on what applications might be necessary and what concerns, if any, the Municipality might have.

The appellant submits that neither from a description of the documents nor from their very nature could they have been supplied in confidence, but he supplied no argument in support of this contention.

As set out in section 10 of the Act, the confidentiality claimed may be either implicit or explicit. Having reviewed the representations, I am satisfied that the documents submitted to the City were supplied implicitly in confidence.

Records 30, 279-81, 286-88 and 471 were created by the City in response to the documents supplied to it, and contain analyses of the information contained in those documents.

In Order P-218, then Assistant Commissioner Wright held that:

[IPC Order M-149/June 21, 1993]

... information contained in a record would "reveal" information "supplied" by an affected party, within the meaning of subsection 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

I agree, and having reviewed the above-noted records created by the City, I am satisfied that disclosing them would permit the drawing of accurate inferences with respect to the information actually supplied to the City, implicitly in confidence. Part 2 of the test has therefore been met.

### **Part 3**

In Order P-246, Commissioner Wright set out the requirements for meeting the third part of the test as follows:

The third part of the test will be satisfied if it can be demonstrated that disclosure of the information in the records at issue in this appeal could reasonably be expected to result in one of the types of harms specified in (a), (b) or (c) of section 17(1). The onus is on the institution and the affected party to provide detailed and sufficient evidence setting out the facts and circumstances that would lead to a reasonable expectation that harm could occur if the records were disclosed.

The City relies primarily on section 10(1)(b) in its representations, stating that:

Our concern is that if this preliminary information is determined to be public information under MFIPPA developers will not continue to make this information available which will cause delays in processing development applications as staff may have to wait for a development application to be submitted before reviewing the proposal and making suggestions on how the developer should proceed. Developers may no longer put their ideas in writing if they are aware that any member of the public will have access to them.

An affected person also relies on section 10(1)(b), stating that:

... if information such as initial traffic and market studies are considered to be public from first submission, the sharing of thoughts and dialogue, the settlement of terms of reference for completed studies would not occur. In fact, there would be serious reluctance to submit documentation in support of the concept or idea at all, which seriously impairs the ability of

the Municipality to give constructive feedback to the proponent.

and, with reference to these circumstances in particular:

... if it had been understood that the concept and supporting documentation, ie the traffic and market work, could be made public at this preliminary stage, this information would not have been supplied.

The appellant states in his representations that:

None of the harm referred to in Section 10 of the Act is present or reasonably foreseeable, particularly since there are no negotiations under way nor any competition involved.

The Landport proposal, if not abandoned by the affected persons, will eventually be the subject of formal applications under the Planning Act for approval, if required, of amendments to the City's official plan and zoning by-law and of a site plan. These applications will require the filing of supporting material, including technical reports, which information will eventually be made public. The pre-application review procedure in which the City and the affected persons are engaged is not a statutory requirement. It is an informal procedure initiated by the affected persons, although with the encouragement of the City, to obtain an initial, informal response from City officials to a development proposal as to the appropriateness of the proposal and as to any problems that these officials might see with it. It is clearly considered useful by both the City and the affected persons as a means of identifying and responding to problems before a formal application is made. I am satisfied that, as the parties implicitly intend the procedure to be informal and confidential, and as the affected persons are not required by statute to provide information at this stage of a development proposal, the disclosure of the information supplied by the affected persons could reasonably be expected to result in similar information no longer being supplied to the City.

With respect to the second requirement in section 10(1)(b), I am of the view that it is in the public interest that such information continue to be supplied. It is clearly in the public interest that a formal application for development approval, and the supporting documentation for such an application, be made available for public scrutiny and review. In my opinion, the public interest is not adversely affected, and can reasonably be expected to be served, through an informal review by public officials that can lead to the submission of an improved formal application, and a streamlined application process.

I am of the opinion that the prospect of disclosure of the records remaining in issue, both those supplied to the City by the affected persons and those created by the City, would give rise to a reasonable expectation that the injury specified in section 10(1)(b), would occur. Having come to this conclusion, it is not necessary for me to consider the application of sections 10(1)(a) or (c).

In summary, I am of the opinion that the records listed in Part 1 of Appendix C meet all three parts of the



test and qualify for exemption under section 10(1). The records listed in Appendix A fail to meet one or more parts of the test.

**ISSUE B: Whether the discretionary exemption provided by section 6(1)(b) of the Act applies to Record 311.**

This record is the Minute of an in camera meeting of City Council which includes discussion and recommendations relating to the Landport proposal. As the City has agreed to release the recommendation portion of the Minute, it is only the portion of this record containing discussion that is in issue.

Section 6(1)(b) of the Act states:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order to qualify for exemption under section 6(1)(b), the City must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; and
2. that a statute authorizes the holding of this meeting in the absence of the public; and
3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Order M-64]

In my view, the requirements for exemption under section 6(1)(b) of the Act have been established: a meeting of the council was held on May 28, 1990; section 55(1) of the Municipal Act authorizes the committee of the whole to meet in-camera; and the City has provided sufficient evidence to establish that disclosure of the record would reveal the actual substance of deliberations of this in-camera meeting, in the circumstances of this case.

I must now determine whether section 6(2)(b) of the Act applies to the record. This section reads as

[IPC Order M-149/June 21, 1993]

follows:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if, in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public;

I have not been provided with any evidence to indicate that the subject matter of the record has been considered in a meeting open to the public and, accordingly, I find that section 6(2)(b) does not apply. Therefore, I find that the record qualifies for exemption under section 6(1)(b) of the Act.

Section 6(1)(b) is a discretionary exemption. I have reviewed the City's reasons for exercising discretion in favour of denying access to part of this record, and I find nothing improper in the circumstances of this appeal.

**ISSUE C: Whether the discretionary exemption provided by section 7(1) of the Act applies to Records 279-81 and 286-88.**

In Issue A, I found that Records 279-81 and 286-88 are exempt from disclosure under section 10(1). Accordingly, it is not necessary for me to consider this issue.

**ORDER:**

1. I order the City to disclose 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, the records listed in Appendix A.
2. I order the City to disclose to the appellant, within 15 days of the date of this order, the records listed in Appendix B.
3. I uphold the City's decision to deny access to the records listed in Appendix C.
4. In order to verify compliance with this order, I order the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ June 21, 1993

**APPENDIX A**

The following records are to be disclosed in their entirety:

Record numbers 35, 36, 350, 355, 445, 446, 463-66

The following records are to be disclosed, except for the areas highlighted on the copies to be sent to the institution with this Order:

Record numbers 348, 349, 351 (duplicate of 349), 352

**APPENDIX B**

The City and an affected person have consented to the disclosure of the following records in their entirety:

Record numbers 31, 32, 316, 317, 346, 347, 353, 354, 356-65, 368-77, 379, 391, 393, 395-401, 403-06, 408, 410, 411, 415-27, 435-44, 447, 448, 450-62, 467, 468-70, 472, 476-78

The City and an affected person have consented to the partial disclosure of the following records, with the parts to be exempted highlighted on the copies to be sent to the institution with this Order:

Record numbers 311, 392, 402

**APPENDIX C**

The following records are not to be disclosed:

Record numbers 29, 30, 34, 279-81, 286-88, 311 (exempted part - see Appendix B), 328-31, 334-38, 341, 342, 348(part), 349(part), 352(part), 366, 367, 378, 380-90, 392(part), 394, 402(part), 407, 409, 412-14, 428-434, 449, 471, 475, 480-83

The highlighted parts of the following records are not to be disclosed:

Record numbers 311, 348, 349, 352, 392, 402