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

ORDER M-221

Appeal M-9300159

Kirkland Lake-Timiskaming Roman Catholic Separate School Board

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ORDER

BACKGROUND:

The Kirkland Lake-Timiskaming Roman Catholic Separate School Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for full disclosure of the monies received by the Board with respect to the amalgamation of the Kirkland Lake and the Timiskaming Roman Catholic Separate School Boards (the two school boards).

The Board denied access to the requested record pursuant to sections 11(c) and (d) of the Act. The requester appealed this decision.

During mediation the Board indicated that it would also be claiming sections 9(1)(b) and 10(1)(a) and (c) of the Act to exempt the record from disclosure.

The record at issue is a letter to the Board from the Assistant Deputy Minister of Education enclosing the Ministry's contribution toward transition costs arising out of the amalgamation.

As mediation was not successful, notice that an inquiry was being conducted to review the Board's decision was sent to the appellant, the Board and to the Ministry of Education and Training (the Ministry). Representations were received from all parties.

ISSUES:

The issues in this appeal are:

A. Whether the mandatory exemption provided by section 9(1)(b) of the Act applies to the record.

B. Whether the mandatory exemptions provided by sections 10(1)(a) and (c) of the Act apply to the record.

C. Whether the discretionary exemptions provided by sections 11(c) and (d) of the Act apply to the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by section 9(1)(b) of the Act applies to the record.

Section 9(1)(b) of the Act states:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> > the Government of Ontario or the government of a province or territory in Canada;

In Order M-128, I set out the following test to determine whether section 9(1) is applicable to the records in an appeal:

> In my view, in order to deny access to a record under section 9(1), [the institution] must demonstrate that disclosure of the record could reasonably be expected to reveal information which [the institution] received from one of the governments, agencies or organizations listed in the section, **and** that this information was received by [the institution] in confidence.

I would note that each element of the two-part test must be met in order to support the application of the section.

The record is a letter from the Assistant Deputy Minister of Education addressed to the Board. According to the Ministry's and Board's representations, this letter, identifying and enclosing the Ministry's contribution toward the transition costs out of the amalgamation of the two school boards, was received by the Board in January, 1993.

Accordingly, it is clear that the disclosure of the record would reveal the information received by the Board from the Government of Ontario. I must now determine whether the information in question was received **in confidence**, which is the final element of the section 9(1) test.

The Board's and the Ministry's representations state that the record at issue represents the outcome of confidential negotiations between the Ministry and the Board in respect of the amalgamation of the two school boards. The Ministry, however, goes on to state that:

> Although the [record] was sent to the board in confidence and within the context of the negotiations, the ministry takes no position at the present time, with respect to the release of the document.

The Board, in its representations, states that the negotiations in respect of the transition costs were carried out in confidence. The record itself, however, is the result of the negotiations and there is nothing contained

in it to indicate that it is of a confidential nature. It does not reveal the details of negotiations which may have been conducted in confidence. It is my view that while the Board says that it received the record in confidence, I have not been provided with sufficient evidence to establish this fact.

Section 42 of the Act provides that the burden of proof that a record, or part of a record, falls within one of the specified exemptions in the Act lies with the head of the institution (Order M-5).

After reviewing the record and the representations provided, I am not satisfied that the record reveals information received by the Board in confidence from the Government of Ontario.

Because each element of the section 9(1) test has not been met, I find that the Board cannot rely on this provision of the Act to withhold the record in question.

ISSUE B: Whether the mandatory exemptions provided by sections 10(1)(a) and (c) of the Act apply to the record.

Sections 10(1)(a) and (c) of the Act state:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In Order M-10, Commissioner Tom Wright 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 party resisting disclosure (Orders 80, 101, 166, 204, P-228, M-10 and M-29).

Part One

The information contained in the record outlines the amount of the Ministry's contribution to the Board for the transition costs of the amalgamation of the two school boards. In my view, this information is "financial" information and Part 1 of the test has been met.

Part Two

In order to satisfy Part 2 of the test, the information must have been supplied to the institution in confidence, either implicitly or explicitly.

Under Issue A, I have already established that, in my view, the information at issue was not received in confidence. For those reasons, I similarly find that the information was not supplied **in confidence** and, accordingly, Part 2 of the section 10 test has not been met and the claim for exemption fails.

As stated above, failure to satisfy any one of the three parts of the test renders the section 10 exemption claim invalid. Accordingly, I find that the information at issue is not exempt under section 10(1) of the Act.

ISSUE C: Whether the discretionary exemptions provided by sections 11(c) and (d) of the Act apply to the record.

Sections 11(c) and (d) of the Act read 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;

(d) information whose disclosure could reasonably be expected to be

injurious to the financial interests of an institution;

In order to qualify for exemption under sections 11(c) and (d) of the Act, the Board must successfully demonstrate a reasonable expectation of harm to its economic interests, competitive position or its financial interests should the information contained in the record at issue be disclosed. The expectation of harm to these interests must not be fanciful, imaginary or contrived, but based on reason. Furthermore, the evidence to support such an expectation must be "detailed and convincing", and the Board must establish a direct link between the disclosure of the record and the alleged harm (Orders 87, M-27, M-37, M-117 and M-202).

In its representations on sections 11(c) and (d) the Board states:

> The information has been acknowledged by the requester to be of use specifically in ... labour negotiations with the institution. The unilateral advantage afforded to the requester by the release of this information would render the institution essentially impotent in its ability to negotiate equally and fulfil its mandate to represent the public in these negotiations.

In my view, the evidence provided by the Board is not sufficiently detailed and convincing to establish a clear and direct linkage between disclosure of the record and the suggested harm. The Board fails to make the necessary connection between the disclosure of the information contained in the record and any specific "use" or "misuse" of it that could reasonably be expected to prejudice or harm the Board's financial or economic interests or its competitive position.

Accordingly, I find that the record does not qualify for exemption under sections 11(c) and 11(d) of the Act.

ORDER:

1. I order the Board to disclose the record to the appellant in its entirety within 35 days following the date of this order and **not** earlier than the 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 record which is disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: November 19, 1993
Asfaw Seife
Inquiry Officer