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

ORDER M-242

Appeal M-9300209

City of Cornwall

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ORDER

BACKGROUND:

The City of Cornwall (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to:

> all information regarding the city contract with the Quebec Nordiques regarding the American Hockey League team coming to Cornwall.

The requester expressed a specific interest in the financial arrangements between the City and the Quebec Nordiques, the profit and loss arrangements and any monies paid or promised to bring the American Hockey League team to the City.

The City identified one record that was responsive to the request. This record consists of an 18-page agreement between the City and the Quebec Nordiques. Attached to the agreement is a one-page schedule.

In its decision, the City denied access to the agreement in its entirety based on the exemptions contained in sections 10(1)(a) and (c), and section 11(c) of the Act. The requester appealed the City's decision.

Efforts to mediate this appeal were not successful and notice that an inquiry was being conducted to review the City's decision was sent to the City, the appellant and to the Quebec Nordiques Hockey Club (the affected person). Representations were received from all parties.

In its request, the appellant submitted that the record should be disclosed to the public because large amounts of taxpayer funds are involved. By implication, the appellant has raised the application of section 16 of the Act (the so-called "public interest override") to the record at issue.

ISSUES:

The issues arising in this appeal are:

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

B. Whether the discretionary exemption provided by section 11(c) of the Act applies to the record.

C. If the answer to Issue A or B is yes, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the exemptions provided by sections 10(1) or 11(c) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: 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 that:

> 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, where 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;
>
> ...

For a record to qualify for exemption under sections 10(1)(a) or (c), the institution and/or the affected person resisting disclosure must demonstrate that each component of the following three-part test has been met:

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 sections 10(1)(a) or (c) will occur.

[Orders M-10 and M-183]

If any part of the test is not satisfied, the exemption under section 10(1) will not apply to the record (Order M-10).

I will first consider part two of the test, which requires that the City and/or the affected person establish that the information contained in the record was **supplied** to the City and secondly that such information was supplied **in confidence** either implicitly or explicitly.

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and an affected person was supplied by the affected person. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the affected person. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act (Orders P-251 and M-173).

Based on the evidence before me, I find that the terms and conditions contained in the agreement were not originally provided by the Quebec Nordiques but were rather negotiated between the parties. For this reason, I am satisfied that the reasoning applied in the line of orders previously referred to also applies to the agreement in the present appeal. I find, therefore, that the information contained in the agreement was not "supplied" to the City for the purposes of section 10(1) of the Act.

Other orders issued by the Commissioner's office have held that information contained in a record would reveal information "supplied" by an affected person, within the meaning of section 10(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-451 and P-472). I have carefully reviewed the agreement and it is my conclusion that the release of the contents of this document would not permit such inferences to be drawn.

For these reasons, I find that the second part of the test for the application of section 10(1) of the Act has not been met.

As stated previously, the failure to satisfy any component of the three part test means that the section 10(1) exemption will not apply. As I have found that the information contained in the agreement was not supplied to the City within the meaning of section 10(1), it is not necessary for me to consider the first or third parts of the test.

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

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

> A head may refuse to disclose a record that contains
>
> information where the disclosure could reasonably be expected to

> prejudice the economic interests of an institution or the competitive position of an institution;

To qualify for exemption under section 11(c) of the Act, the record in question must contain information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of an institution.

In Order P-581, I considered the meaning of the phrase "could reasonably be expected to" which is found in section 18(1)(c) of the Freedom of Information and Protection of Privacy Act. This provision is similar to section 11(c) of the Act. There, I indicated that this phrase requires that there exist a reasonable expectation of probable harm and that the mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm which is alleged. This approach applies equally to the interpretation of section 11(c) of the Act.

In its representations, the City submits that the disclosure of certain clauses found in the agreement (namely clause 3.01 to 3.05, 4.01, 4.02, 10.01, 10.02, 12.03, 14.01 and 14.02) which relate to the payments under the agreement, concessions, the term of the agreement, revenues from the sale of programs and novelties, and television and radio revenues could reasonably be expected to prejudice the economic interests of the City or its competitive position. The City is particularly concerned that, if another municipality should obtain the contents of these provisions, it could unfairly undercut the City's bargaining position and lure the team to some other location.

The City puts its case as follows:

> ... [W]e lost our Ontario Hockey Association Junior A Team to Newmarket, Ontario ... There are many examples of municipalities pursuing a professional sports franchise for their City; ... any advantage such a competitor can obtain is a very real threat to the ... city which holds the franchise. By losing such a franchise the economic spin off benefits would be lost.
>
> ... [T]he financial interests of the City are not only those directly related to the hockey operations (i.e., revenue and expenses), but such interests are also applicable to the entire community in that the players must obtain accommodation ... will spend their earnings in local stores, will attract fans from outside the City limits who will also spend money in the City ...

The appellant contends, on the other hand, that the disclosure of the information contained in the agreement would not prejudice the City's competitive position. The appellant points out, in this respect, that it had no difficulty in obtaining and subsequently publishing the details of an American Hockey League contract involving the Toronto Maple Leafs and its hockey franchise in St. John's.

I have carefully reviewed the clauses which the City has exempted from disclosure under section 11(c) of the Act along with the representations provided to me. I am satisfied that the disclosure of those portions of clauses 3.01, 3.02, 3.03, 4.01, 12.03, 14.01 and 14.02 which reveal the specific financial terms of the agreement could reasonably be expected to prejudice the City's competitive position and/or its economic interests. Accordingly, I find that these components of the agreement are exempt from disclosure. I am not persuaded, however, that the release of the remaining portions of these clauses, or the other clauses which the City has sought to exempt, would produce the same results. Hence, these parts of the record should be disclosed to the appellant.

I have enclosed with the copy of the order sent to the City a highlighted copy of the record. The highlighted portions indicate those parts of the record which should not be disclosed to the appellant by virtue of the section 11(c) exemption.

Section 11 of the Act is a discretionary exemption. On this basis, I have also considered the City's representations respecting its decision to exercise its discretion to rely on this provision. I find nothing improper in the determination which has been made.

ISSUE C. If the answer to Issue A or B is yes, whether there is a compelling public interest in the disclosure of the record which clearly outweighs the purpose of the exemptions provided by sections 10(1) or 11(c) of the Act.

Under Issue B, I determined that some of the information found in the agreement falls within the ambit of section 11(c) of the Act and is, therefore, exempt from disclosure.

That being the case, I must now go on to consider the argument implicitly raised by the appellant that this information should be disclosed pursuant to the public interest override found in section 16 of the Act. This provision states as follows:

> An exemption from disclosure of a record under sections 7, 9, 10, **11**, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In order for section 16 of the Act to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this compelling interest must clearly outweigh the purpose of the exemption (Orders M-6 and M-173). Based on the facts of this appeal, I must, therefore, determine whether there is a compelling public interest in the disclosure of the information in the Agreement which clearly outweighs the purpose of the section 11(c) exemption.

I have carefully reviewed the contents of the agreement and the representations provided by the parties. As a preliminary matter, I accept that the public has a genuine interest in scrutinizing the terms of agreements

where public funds are expended. In the present case, I have ordered large portions of the agreement to be released which should facilitate this process.

For the purposes of section 16 of the Act, however, and based on the evidence before me, I cannot reasonably characterize the public interest in this case as compelling. Nor am I prepared to say that this particular interest clearly outweighs the purpose of the section 11(c) exemption which is to allow a municipal institution to protect information whose disclosure could reasonably damage its economic interests.

For these reasons, I find that section 16 of the Act does not apply to the information which has been withheld from disclosure.

ORDER:

1. I uphold the City's decision to withhold the highlighted portions of clauses 3.01, 3.02, 3.03, 4.01, 12.03, 14.01 and 14.02 of the agreement.

2. I order the City to disclose to the appellant the remaining portions of the agreement and the one-page schedule attached to the agreement.

3. I order the City to disclose the portions of the agreement identified in provision 2 within 35 days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

4. In order to verify compliance with this order, I order the City to provide me with a copy of the agreement as disclosed to the appellant, **only** upon request.

Original signed by: January 7, 1994
Irwin Glasberg
Assistant Commissioner