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

ORDER P-829

Appeal P-9400568

Management Board Secretariat

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

NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Management Board Secretariat (the Board) for information respecting a Request for Proposal (RFP) that the Board prepared. This proposal related to an office lease for the Ministry of Education's Independent Learning Centre in Toronto. The requester represents one of the property owners who applied unsuccessfully for this lease.

The Board identified three records that were responsive to the request. These consisted of two "records of proposal openings" as well as a leasehold agreement entered into between the provincial government and a named real estate corporation (the landlord). The Board agreed to disclose these documents to the requester in full with the exception of three passages found on Page 7 of the leasehold agreement. The Board's decision to exempt this information was based on the following exemptions contained in the Act:

- third party information - section 17(1)(a)
- economic and other interests of the Board - section 18(1)(c)

The requester appealed this decision to the Commissioner's office and also took the position that additional records which were responsive to the request should exist.

A Notice of Inquiry was provided to the requester/appellant, the Board and the landlord. Representations were received from all parties.

Along with its submissions, the Board identified an eight-page collection of documents entitled "Schedule III" as a further record that was responsive to the request. This group of documents contains an analysis of the bids submitted by six separate property owners in response to the RFP. The Board again made the decision to release the majority of the information contained in these documents subject to certain deletions made under sections 17(1)(a) and 18(1)(c) of the Act.

The Board subsequently provided the appellant with a copy of this package and the appellant has since indicated that he does not wish to challenge the Board's treatment of these documents. In addition, the appellant no longer wishes to pursue the aspect of his appeal relating to the Board's search for responsive records.

The information which remains at issue in this appeal consists of references to certain inducements in the leasehold agreement which prompted the Board to select the landlord's property as the site for the Learning Centre.

DISCUSSION:

THIRD PARTY INFORMATION

The Board and landlord claim that section 17(1)(a) of the Act applies to the inducements found in the leasehold agreement.

For a document to qualify for exemption under this provision, the Board and/or the landlord 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 the harms outlined in sections 17(1)(a) will occur.

Part One of the Test

I have carefully reviewed the relevant portions of the agreement and find that they contain commercial and/or financial information for the purposes of section 17(1) of the Act.

Part Two of the Test

To satisfy part two of the test, the Board and/or the landlord must establish that the information contained in the agreement was **supplied** to the Board 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 a third party was supplied by the third party. 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 third party. Since the information contained in an agreement is typically the product of a negotiation process involving the parties, that information will often not qualify as having been "supplied" for the purposes of section 17(1) of the Act.

In its representations, the Board indicates that it selects its office premises through an open tendering process. In the context of the present RFP, the Board advertised its space requirements in two local newspapers and invited proposals from interested parties. The Board then identified those bids which met its established criteria and invited the parties to present their proposed leases to the institution. A short list of proposals was then selected and the Board ultimately chose the lease which best met its needs.

The Board states that the leases which it receives typically consist of a rental charge per square foot along with an inducement of some sort to encourage the Board to enter into the lease. An example of an inducement would be a rent free period or a package of renovations which are provided without cost.

The Board points out that the decision to include an inducement in a leasehold agreement rests solely with the lessor. For this reason, and in the context of the present appeal, the Board argues that any information about inducements which appears in the lease was not negotiated between the parties but was originally supplied by the landlord.

I have carefully reflected on this issue and have reached the conclusion that the portions of the agreement which refer to the inducements constitutes information which the landlord actually provided to the Board. On this basis, I conclude that this information was supplied to the government agency for the purposes of the Act.

I must now consider whether the information in question was supplied to the Board in confidence.

In its representations, the Board indicates that the inducements provided to the Ontario Government are unique in nature and that the industry practice is to maintain confidentiality with respect to these sorts of incentives. The Board then states that it has always treated inducements in a confidential fashion and that it is implicitly understood by parties involved in the leasing process that inducements are provided and accepted in confidence.

The landlord states that it understood that the financial details of the lease were being provided to the Board in confidence and that this information would not be released to the general public. The landlord also indicates that, if the information on inducements is disclosed, it will have to reconsider whether it should continue to enter into contractual relationships with public bodies.

The appellant, for his part, indicates that he has not seen any documentation in the leasing process which suggests that the information provided to the Board would be kept confidential.

In their representations, neither the Board nor the landlord have commented on the significance of section 6.28 in the leasehold agreement. This provision states that:

> The Landlord acknowledges, agrees and consents to the release by the Tenant of this Lease and **any** information contained herein. [emphasis added]

It should be noted that the lease in question was signed by two senior executives of the landlord's real estate corporation as well as by the Director of the Board's Leasing Services Branch.

In Order M-169, Inquiry Officer Holly Big Canoe set out a test for determining whether information provided to an institution by a third party had been supplied in confidence for the purposes of the Act. She approached this issue in the following fashion:

> In regards to whether the information was supplied **in confidence**, part two of the test for exemption under [the municipal equivalent of section 17(1) of the Act] requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

In Order P-561, I stated that, in determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

There are two factors in this appeal which support the proposition that the landlord expected that its inducement package would be kept confidential. These are (1) that it was the Board's historical practice not to release information of this type and (2) according to the Board, the non-disclosure of inducements is the standard approach adopted in the commercial real estate industry.

Marshalled against these factors, however, are two competing considerations. First, section 6.28 of the leasehold agreement states in very clear terms that the landlord "acknowledges, agrees and consents" to the release of the contents of the document. There is nothing in the document to indicate that this clause does not also apply to inducements. Second, since the agreement was signed by a sophisticated commercial lessor, I must infer that the landlord entered into the lease with full knowledge of the implications of this disclosure provision.

I have carefully considered the representations of the parties in conjunction with the approach adopted in previous orders. Based on the very clear wording of section 6.28 and the fact that the lease was signed by an experienced lessor, I find that the landlord's expectation of confidentiality cannot be characterized as **reasonable** in the circumstances of this appeal. This means that the Board cannot rely on section 17(1)(a) of the Act to exempt this information from disclosure.

Since I have found that the second component of the section 17(1)(a) test has not been met, it is not necessary for me to consider the third part of the test.

ECONOMIC AND OTHER INTERESTS OF THE BOARD

The Board also claims that section 18(1)(c) of the Act applies to the information which has been withheld from the appellant. For a record to qualify for exemption under this provision, the Board must establish that the document contains information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of the institution.

In addition, for this exemption to apply, there must exist a reasonable expectation of probable harm. At a minimum, the Board must establish a clear and direct linkage between the release of the information and the occurrence of the economic or competitive harm which is alleged.

In its representations, the Board makes the following arguments to support the proposition that it would suffer economic harm if the undisclosed portions of the agreement were released to the appellant:

> Should the value of the lease inducement part of our rental rates become known, other tenants will have an unfair advantage as they will be able to use the knowledge of our rental rates in bargaining with landlords. Landlords will be justifiably reluctant to provide favourable rental rates in the form of inducements to [the Board] when they learn that these inducements are used by other tenants in order to secure better rates for themselves.
> ...
>
> Since most of our competitors are not covered by access to information legislation, the disclosure of our lease inducements would mean that [the Board] would no longer be playing on a level field.

The Board's first argument is that, should it be required to disclose information about the leasehold inducements which it receives, lessors would be less willing to provide favourable incentive packages to the Board. This will result in the Board having to pay higher rental rates which will significantly prejudice the government's economic position.

In assessing this submission, it is important to recognize that lessors generally regard the provincial government as a desirable tenant. I would also take note of the fact that the commercial real estate market in the province is in a depressed state with high vacancy rates. Taking these considerations into account, I believe that lessors will continue to have a strong incentive to rent commercial premises to the provincial government. I do not agree that this motivation will change simply because the contents of leasehold agreements are subject to public disclosure.

The Board's second argument is essentially that, should a another tenant obtain information on the inducements which a lessor offered to the Board, that tenant could potentially undercut the Board's position

in order to secure the commercial space. In practical terms, this would mean that the non-government tenant would have to offer the lessor a higher rental figure. While it is conceivable that such a scenario could arise, the Board has not provided the evidence necessary to establish that this type of competitive harm is probable, particularly in light of the current real estate market.

Finally, the Board argues that, since most of its competitors are not subject to access to information legislation, the disclosure of leasehold inducements would mean that the Board would no longer operate on a level field. While I appreciate this position, I would point out that leases for government premises are obtained with public funds which places an obligation on the Board to make the details of these transactions available according to the provisions of the Act.

For the reasons which I have outlined, I find that the disclosure of information about the inducement package offered to the Board could not reasonably be expected to prejudice the economic interests or the competitive position of the Board under section 18(1)(c) of the Act.

The result is that the information in question should be disclosed to the appellant.

ORDER:

1. I order the Board to disclose Page 7 of the leasehold agreement in its entirety to the appellant within thirty-five (35) days of the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

2. In order to verify compliance with provisions of this order, I reserve the right to require that the Board provide me with a copy of the page which is disclosed to the appellant pursuant to Provision 1.

Original signed by: January 9, 1995
Irwin Glasberg
Assistant Commissioner