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

ORDER M-712

Appeal M_9500596

Metropolitan Separate School Board

NATURE OF THE APPEAL:

The Metropolitan Separate School Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to any documentation which would establish the amount of money or compensation payable to the Board by a named developer (the Developer) with respect to a particular project.

The Board located four records and denied access to them in their entirety on the basis of the following exemptions in the Act:

- closed meeting - section 6(1)(b)
- valuable government information - section 11(a)
- economic and other interests - sections 11(c), (d) and (e)
- solicitor-client privilege - section 12

The requester appealed the denial of access and raised the issue of the application of section 16 of the Act, the so-called "public interest override".

A Notice of Inquiry was sent to the Board, the appellant and the Developer. As it appeared that disclosure of some of the information might affect the interests of the Developer, the parties were asked to comment on the application of the mandatory third party information exemption (section 10(1) of the Act). Representations were received from all three parties.

The records at issue and the exemptions claimed for each are as follows:

1. Board Report dated June 19, 1995 - sections 6(1)(b) and 11(a), (c), (d) and (e).
2. Notes to file dated June 12, 1995 - sections 11(a), (c), (d) and (e).
3. Letter dated June 16, 1995 from the Board's solicitors to the Developer's solicitors - sections 11(a), (c), (d) and (e) and 12.
4. Letter dated June 20, 1995 from the Board's solicitors to the Developer's solicitors - sections 11(a), (c), (d) and (e) and 12.

DISCUSSION:

PRELIMINARY ISSUE

SCOPE OF THE REQUEST AND APPEAL

The appellant requested access to the following:

> Copies of correspondence, agreements or other documentation establishing any amount of compensation or monies payable to the Metropolitan Separate School Board by [the Developer] in relation to the development of the site [description] in the City of Scarborough.

Throughout this appeal, the appellant has emphasized that she is "primarily interested" in receiving access to the dollar figure the Board will receive from the Developer. In her submissions, the appellant reiterates that, in her view, disclosure of the "monetary figure" or "dollar figure" would not satisfy any of the exemptions applied by the Board. In addition, she states that:

> The information which I seek and which, under section 4(2) of the Act could be severed from the records, is the amount of compensation or monies paid or payable to the Metropolitan Separate School Board by [the Developer].

However, in her most recent conversation with the Appeals Officer assigned to this file, the appellant objected to the narrowing of the scope of the appeal to eliminate certain records. Accordingly, all four records are at issue in this appeal and I will consider the application of the exemptions to the documents in their entirety.

CLOSED MEETING

In order for the Board to apply section 6(1)(b) of the Act, it 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.

The appellant has suggested that "... the Board was routinely required to cite the section under which the meeting was held at the beginning of the session in order for section 6(1)(b) to apply". I note that municipal councils are required to show that in-camera meetings held after January 1, 1995 were authorized by a resolution of the council. However, this requirement does not apply to closed meetings of a school board.

The Board states that its agreement with the Developer was discussed at the July 13, 1995 Private Session Meeting of its Administrative Services and Budget Committee. It has included a copy of the agenda and minutes of this meeting. Based on this information, I am satisfied that the meeting took place and thus the first part of the section 6(1)(b) test has been satisfied.

The minutes also make it clear that this meeting was held in the absence of the public. The Board submits that section 207(2) of the Education Act is the authority to hold the meeting behind closed doors. This provision states, in part, that:

> A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject matter under consideration involves,
>
> (a) the security of the property of the board;

(e) litigation affecting the board.

Based on the evidence before me, including the Board report itself, I am satisfied that the matters discussed during the meeting fall within the ambit of section 207(2)(e) of the Education Act. Accordingly, I find that the second part of the section 6(1)(b) test has been met.

The third part of the test requires the Board to provide evidence that the disclosure of the record would reveal the actual substance of the deliberations of the meeting. In Orders M-184 and M_196 former Assistant Commissioner Irwin Glasberg defined the term "substance" as the theme or subject of a thing" and the word "deliberations" to mean "discussions conducted with a view towards making a decision".

Having reviewed the Board's representations and Record 1, I find that the "theme or subject" of the Board Committee's in-camera meeting was whether or not the Board should accept the agreement with the Developer on the terms and conditions as set out in the document. On this basis, I have concluded that the disclosure of the report would reveal the actual substance of the discussions conducted by the Board and, hence, its deliberations. The third part of the section 6(1)(b) test has, therefore, also been met and Record 1 qualifies for exemption under section 6(1)(b) of the Act.

SOLICITOR-CLIENT PRIVILEGE

The Board claims that Records 3 and 4 are exempt under section 12 of the Act, which states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); **and**

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
   (b) the communication must be of a confidential nature, **and**
   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

(Order 49)

These two records are the correspondence from the Board's solicitors to the solicitors for the Developer. The letters relate to settlement discussions between the Board and the Developer in order to avoid litigation before the Ontario Municipal Board. The words "without prejudice", often used to indicate an intention to invoke the privilege, do not appear on these letters.

Both the Board and the Developer refer to the following observations made by former Commissioner Sidney B. Linden in Order 49 as supporting their position that these records should not be disclosed:

> ... it is possible for letters or communications passing between opposing lawyers to obtain the status of a privileged communication if they are made "without prejudice" and in pursuance of settlement ...

The Developer also submits that the mere use of the words "without prejudice" do not make a letter a privileged document. Rather, "it is the intention of the writer and the content of a letter which govern whether the document is privileged" (Abrams v. Grant (1978), 5 C.P.C. 308 at 309 (Ont. H.C.J.). The Developer states that it is apparent from the content of the letters that litigation was contemplated and that the correspondence was made in furtherance of the solicitor's instructions to implement a settlement. I agree with this characterization of the records.

In this context, I adopt the reasoning of Inquiry Officer John Higgins in Order M-477 in which he stated:

> Usually, disclosure of a document to a party adverse in interest would constitute waiver of privilege, but in my view this does not arise with respect to records pertaining to settlement negotiations.

Accordingly, I find Records 3 and 4 are exempt under section 12 of the Act.

The one record remaining at issue is Record 2, which consists of two pages of handwritten notes prepared by the Board's Senior Co-ordinator of Development Services. The notes are dated June 12, 1995 and contain information about the proposed agreement with the Developer, including the amount to be paid to the Board. I will now consider whether this document is exempt under section 10(1) or 11(a), (c), (d) or (e).

THIRD PARTY INFORMATION

Preliminary Matter

The Developer indicates that because it was not provided with a copy of Record 2 it is unable to provide comments on this record. However, in the covering letter to the Notice of Inquiry sent to the Developer, the Developer was advised to contact the Freedom of Information and Protection of Privacy Co-ordinator of the Board if it had any questions about the nature of the records at issue in the appeal. The Notice itself raised the issue of the application of section 10(1) and advised that the Board and the Developer, as an affected party, had the onus of demonstrating that the harms envisioned by this exemption were present or reasonably foreseeable. In these circumstances, I do not accept the Developer's submissions on this point, and I will consider the application of section 10(1) in this order.

Application of the Exemption

Section 10(1) of the Act states, in part:

> 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.

It is the position of the Board that the information at issue is financial in nature, belongs to both the Board and the Developer and was developed for, and as a result of, negotiations between the Board, its agent and the Developer and its agent. I agree that Record 2 contains financial information.

However, the Board itself acknowledges that the information contained in Record 2 resulted from negotiations between the Board and the Developer. In its submissions, the Developer refers to the "negotiated settlement". Therefore, this information cannot be said to have been "supplied" by the Developer to the Board, and part two of the section 10(1) test has not been met.

The Board submits that it is reasonable to expect that the harms set out in sections 10(1)(a) and (c) would result from disclosure. However, it relies on the Developer to provide "evidence of the

effect of such disclosure on their operations". The only reference in the Board's submissions (in the Background section) to this matter reads:

> If the terms of the negotiated settlement between the MSSB and [the Developer] are publicly disclosed, the settlement could become the subject of protracted debate at the [OMB] hearing, which would defeat the purpose of the settlement.

In my view, neither the Board nor the Developer have provided sufficient evidence to support a claim that any of the harms set out in section 10(1) could reasonably be expected to occur upon disclosure of Record 2. Accordingly, part three of the section 10(1) test has not been satisfied. As all three parts of the section 10(1) test must be met before the exemption applies, I find that Record 2 does not qualify for exemption under this section of the Act.

VALUABLE GOVERNMENT INFORMATION/ECONOMIC AND OTHER INTERESTS

The Board also submits that Record 2 is exempt pursuant to sections 11(a),(c), (d) and (e) of the Act which state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (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;
>
> (e) 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.

Section 11(a)

In order to qualify for exemption under section 11(a), the Board must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**
2. belongs to ... an institution; **and**
3. has monetary value or potential monetary value.

In my discussion of section 10(1), I found that the information contained in Record 2 is financial information. Therefore, part one of the test has been met.

As I indicated previously, the Board submits that the information belongs to it and the Developer. Leaving aside the issue of whether this situation can satisfy part two of the test, I will consider the Board's submissions that the information has monetary or potential monetary value.

In this regard, the Board submits that disclosure of this information "... would benefit other developers and harm the Board's negotiating position in similar circumstances in the future".

In my view, these concerns are more properly directed to the exemptions in sections 11(c) and (d). The purpose of section 11(1)(a) is to permit an institution to refuse to disclose a record which contains information where disclosure would deprive the institution of the monetary value of the information (Order P-219). In this case, the Board has no intention of publishing or disseminating the requested information in a way that would result in some form of monetary payment and I am not satisfied that the information itself has monetary value. In addition, I have not been provided with evidence to indicate that this information has "potential" monetary value. Accordingly, section 11(1)(a) does not apply.

Section 11(e)

Timing of negotiations is key to the application of subsection 11(e). The inclusion of the phrase "... to be applied to any negotiations **carried on or to be carried on** ..." contemplates on-going or future events. In this case the negotiations between the Board and the Developer have been completed. In a letter dated June 20, 1995, the Board's solicitors advised the Commissioner of Planning and Buildings for the City of Scarborough that discussions between the Board and the Developer had been concluded and that the parties had reached an agreement in principle. Neither the Board nor the Developer has indicated that this agreement was not finalized or that the negotiations were reopened.

Accordingly, I find that section 11(e) does not apply to Record 2.

Sections 11(c) and (d)

The appellant submits that the amount of money the Board received from the Developer would have to be accounted for somewhere in the Board's budget. As the budget is a public document, the appellant questions how section 11(c) or (d) could apply to this information.

The Board has advised that, because it has yet to receive cash or a cheque which could be recorded as revenue or as an account receivable in its financial records, such items have to date been recorded as "contingent assets" and are not recorded in the financial records of the Board until redeemed.

However, the Board has acknowledged that:

> ... the business services department of the Board is working on a register of such "assets" which, when finalized would be a public document. The register will record only the source of the asset and the dollar value. In addition, these "assets" will appear, possibly as a note, on the board's audited financial statements at some future time to be determined in consultation with our auditors.

In view of the Board's plans to make the dollar value of such agreements publicly available, I find that disclosure of this particular information could not reasonably be expected to prejudice the economic interests of the Board, its competitive position or financial interests. Accordingly, the amount the Developer agreed to pay the Board as found in Record 2 does not qualify for exemption pursuant to section 11(c) or (d) of the Act, and I am ordering disclosure of this figure.

The balance of the information in Record 2 consists of notes of the various terms and conditions to be included in the development agreement.

The Board explains that it is the only grant dependent board in Metropolitan Toronto and operates annually with a significantly smaller amount of money per student than do its public school counterparts. It is expected to and does provide an equal quality of education for its students.

Because of this funding imbalance, the Board maintains that it must seek innovative ways in which to improve its financial situation. One of these methods is through the planning process which is at the heart of the development agreement in this appeal.

The Board explains this process as follows:

> Under Part V of the Planning Act - Land Use Controls and Related Administration, councils of local municipalities have the power to adopt zoning by-laws affecting development in their area of control. Under this Act, the local council is required to provide boards, commissions, authorities and other agencies who may have an interest in a particular zoning proposal with information related to the proposal and with the opportunity to make submissions regarding the impact on the institution of the zoning proposal. This provides the Metropolitan Separate School Board with the opportunity to alert council to the accommodation difficulties a particular development may cause the Board. In addition, the MSSB has the power to appeal any zoning by-law or amendment to the Ontario Municipal Board for review.
>
> These powers, while minimal, and used infrequently, provide the Board with the leverage necessary to acquire concessions from developers whose projects, because of their size, will greatly impact accommodation at a particular school site. Our leverage resides in our ability to block speedy approval of a development. Developers will often provide the Board with concessions, either financial or in the form of playground improvements, etc., for the Board's agreement to remove any objection to their proposal. The legal costs as well as the time-lost costs to the developer can be substantial and providing the board with some type of incentive is usually in their own best interests.

This is precisely what has occurred in this case. The Board and the Developer have entered into an agreement whereby the Board agreed to withdraw its objections to the proposed development in return for the payment of a sum of money. It is the Board's position that, if the terms of the agreement as noted in Record 2 are disclosed, any future negotiations in similar cases could be jeopardized. That is, developers will be aware of the conditions which the Board has accepted in the past and will not be prepared to offer any additional concessions. The Board has submitted that, in a similar case, a Board trustee leaked information regarding its negotiating position to the developer and the Board's financial benefit was greatly compromised.

Based on the submissions provided by the Board, and its reference to another situation in which disclosure of such information negatively affected its bargaining power, I am satisfied that disclosure of the balance of Record 2 could reasonably be expected to prejudice its economic interests. Therefore, it qualifies for exemption under section 11(c) of the Act.

PUBLIC INTEREST IN DISCLOSURE

The appellant has argued that there is a public interest in disclosure of the requested information. Section 16 of the Act states:

> 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]

Section 16 does not apply to records which qualify for exemption under section 6(1)(b) or section 12. Accordingly, I will confine my discussion of the public interest override to that portion of Record 2 which I have found qualifies for exemption under section 11(c) of the Act.

It has been stated in a number of previous orders that, in order to satisfy the requirements of this section, there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

In her submissions, the appellant maintains that, because the Board is a public body, the information related to the agreement with the Developer should be disclosed. She refers to the purposes of the Act and maintains that disclosure of this information would "open a window into government" and ensure that the public is informed of the decision-making processes of the Board and ensure that the Board is accountable to the public.

The appellant also refers to the Development Charges Act, provincial legislation which permits municipal governments and school boards to collect levies on development, based on a calculated formula, in order to pay for growth-related costs. She asserts that as the Board has not passed a development charges by-law they cannot collect charges under this legislation. Therefore, she maintains that developers and the public cannot rely on a predetermined and approved formula for determining charges paid to the Board. In the absence of a development charges by-law, the appellant argues that it is particularly important that the Board conduct its affairs in an open and accountable manner. Accordingly, she maintains that there is a compelling public interest in disclosure of the requested information.

The Board acknowledges that under Part III of the Development Charges Act it has the legislative authority to establish education development charges. However, it states that it has not done so in this case or any other case to date. It has explained that similar charges have been appealed by developers in York Region as unconstitutional. The Board notes that while lower courts have ruled in favour of the school boards, the matter is now before the Supreme Court of Canada. The Board states that it will not institute such charges until it is certain that they are constitutional.

I appreciate the concerns of the appellant that it is desirable for the Board to conduct its business in an open and accountable manner. However, I believe that the Board's explanation as to why it has not instituted education development charges has merit. While I accept that the dollar amount of the development agreement should be made public (and I have so ordered), I do not agree that disclosure of the notes of the terms and conditions of the agreement will satisfy a compelling public interest which outweighs the purpose of the section 11(c) exemption. In my view, there is a public interest in the Board being able to negotiate the most favourable terms possible in these agreements so as to avoid legal costs before the Ontario Municipal Board. Such beneficial terms inure to the taxpayers in the form of better capital projects for the Board's schools.

Accordingly, I find that section 16 does not apply to the balance of Record 2.

ORDER:

1. I uphold the decision of the Board to deny access to Records 1, 3 and 4 in their entirety and all of Record 2 with the exception of the dollar amount of the agreement.

2. I order the Board to disclose the dollar amount of the agreement by sending this information to the appellant on or before **March 21, 1996** but not before **March 18, 1996**. The Board may disclose this information to the appellant by providing her with a severed copy of Record 2 or by creating a new record containing this information.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the information disclosed in accordance with Provision 2.

Original signed by: February 15, 1996
Anita Fineberg
Inquiry Officer