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

# ORDER M-1037

## Appeal M-9700230

## Municipality of Metropolitan Toronto

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## NATURE OF THE APPEAL:

The Municipality of Metropolitan Toronto (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of an agreement dated January 14, 1997, between the Municipality and a named association. The Municipality notified the named association (the association) of the request, pursuant to section 21(1) of the Act. The association objected to disclosure of various parts of the agreement.

Following receipt of representations from the association, the Municipality granted the requester partial access to the agreement. Access to the remaining portions of the agreement was withheld by the Municipality pursuant to section 10(1)(a) (third party information) of the Act.

The requester appealed the decision to deny access.

The requester represents a company which provides services similar to those of the association and which had previously entered into a similar contract with the Municipality.

The record at issue consists of the withheld portions of pages 4, 5, 6 and 7 of the agreement and pages 13, 14 and 15, being Schedules A and B to the agreement. The Municipality has withheld access to the information in the record on the basis that disclosure would affect the interests of a third party (section 10(1)).

This office provided a Notice of Inquiry to the appellant and the association, both of whom are represented by counsel, and the Municipality. Representations were received from all parties.

In its representations, the appellant states that the decision letter issued by the Municipality was inadequate in that it did not give the reasons why section 10(1)(a) applied to the record nor did it identify who had made the decision. The appellant also requests that it be given access to the representations of the other parties to the appeal.

## PRELIMINARY MATTERS:

### ADEQUACY OF THE DECISION LETTER

The appellant submits that the Municipality's decision letter was inadequate in that it failed to provide any reasons for denying access to the record and failed to provide the name and position of the individual making the decision. The appellant submits that this has resulted in the appellant not knowing the case that it has to meet and prevented it from making informed submissions in this appeal.

Section 22(1)(b) of the Act sets out the requirements of the contents of a notice of refusal to give access to a record. This section reads in part:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> where there is such a record,
>
> (i) the specific provision of this Act under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, ...

I have reviewed the decision letter, which states "[a]ccess is denied in part to portions of records pursuant to section 10[1](a) of the...". In my view, the purpose of the inclusion of the reason for denial and the name and position of the decision maker is to put the requester in a position to make a reasonably informed decision on whether to seek a review of the decision (Orders P-235 and P-324).

In this case, I agree with the appellant that the Municipality's decision letter should have provided him with the **reasons** for the denial of access. A reference to the applicable section of the Act is not sufficient to satisfy the requirement in section 22(1)(b)(ii) of the Act. The decision letter does not provide an explanation of why the exemption claimed by the Municipality applies to the record. Section 22(1)(b)(iii) also requires that the name and position of the decision maker be set out in the decision letter.

In Order M-913, former Inquiry Officer Anita Fineberg found that the decision letter to the appellants was inadequate in that it simply restated the sections of the Act which contained the exemptions the Police were relying on. She also found that no useful purpose would be served by requiring that the Police provide a new, more detailed decision letter.

In my view, the same holds true in the present situation. The decision letter provided by the Municipality does not give the **reasons** for the denial of access nor does it contain the name and position of the decision maker. I note, however, that the appellant does not appear to have suffered any prejudice in its ability to evaluate whether to appeal the decision to deny access or to make adequate representations. Accordingly, I find that no useful purpose would be served by ordering the Municipality to provide the appellant with another decision letter in this appeal.

## EXCHANGE OF REPRESENTATIONS

The appellant seeks access to the representations of the association for the purpose of making "informed submissions" in this appeal.

Section 41 of the Act establishes the Commissioner's authority to hold an inquiry into the issues in an appeal under the Act, and sets out the procedures to be followed. Section 41(13) provides:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

In Order M-796, Inquiry Officer Holly Big Canoe dealt extensively with this issue in the context of a request made under the Act. I have set out her comments on this issue in their entirety.

> The issue of access to representations has been addressed by both former Commissioner Sidney B. Linden in Order 164 and by Commissioner Tom Wright in Orders 207 and P-345. In Order 164, former Commissioner Linden stated that section 52(13) of the provincial Freedom of Information and Protection of Privacy Act, which is similar in wording to section 41(13) of the Act, does not confer a right on a party to an appeal to gain access to the other party's representations. He noted that while section 52(13) does not prohibit the Commissioner from ordering such access in the proper case, he emphasized that it would be an extremely unusual case where such an order would be issued.
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> Former Commissioner Linden also stated that since the Statutory Powers Procedures Act does not apply to an inquiry under the Act, the only statutory procedural guidelines that govern inquiries under the Act are those that appear in the Act. He went on to discuss the procedures respecting inquiries:
>
> > ...while the Act does contain certain specific procedural rules, it does not in fact address all the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.
> > ...
> >
> > Clearly, procedural fairness, requires some degree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed, including the Appeal Officer's Report, allows the parties a considerable degree of such disclosure. However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

In Order 207, Commissioner Wright adopted the reasoning of former Commissioner Linden and noted that:

> If an appellant were provided with access to the [representations] or other information that would disclose the content of the record, before the decision on access was made, the appeal would be redundant.

Access to representations and section 52(13) of the Act were the subject of further discussion by Mr. Justice Isaac of the Ontario Court (General Division) in an unreported decision dated May 16, 1991, in the context of an application for judicial review of Order 167. At pages 11 and 12 of his decision, Mr. Justice Isaac commented:

> I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the Corporation to the Commissioner should be sealed and not disclosed to [the named appellant] for purposes of the application for judicial review. This reason is found in two sections of the Act which, in my view shield such information from disclosure.

Mr. Justice Isaac went on to quote sections 52(13) and 55(1) of the provincial Act. The latter provision prohibits the Commissioner and his staff from disclosing information which comes to their knowledge in the performance of their duties.

In the circumstances, I conclude that the appellant has no right of access to the records which were sent to the IPC during the inquiry stage of the appeals process.

I agree with the above comments. I find that this is not the "extremely unusual" case where an order for the exchange of representations should be issued. In my view, an exchange of representations in the circumstances of this appeal, would provide the appellant with the very information it is seeking in the access request, the protection of which is at issue in this appeal. Accordingly, I will not order the exchange of representations.

## DISCUSSION:

### THIRD PARTY INFORMATION

The Municipality and the association claim that section 10(1)(a) of the Act applies to the record. For a record to qualify for exemption under this provision, the Municipality and/or the association 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 one of the harms specified in (a) of section 10(1) will occur.

[Order 36]

All three parts of the test must be satisfied in order for the exemption to apply.

**Type of Information**

I have carefully reviewed the information in the record. The record outlines the structure, methodology, operation and maintenance of the provision of a comprehensive program for managed care related to prescription medication. In my view, the information relates to the provision of services which have monetary value in the marketplace and therefore, qualifies as commercial information for the purposes of section 10(1) of the Act. The first requirement of the exemption has been met.

**Supplied in Confidence**

To satisfy part two of the test, the Municipality and/or the association must establish that the information in the record was **supplied** to the Municipality and secondly, that such information was supplied **in confidence**, either implicitly or explicitly.

Previous orders have addressed the question of whether the 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 have been the same as that originally provided by the third party. Since the information in an agreement is typically the product of a negotiation process between the institution and the third party, that information will not qualify as originally having been "supplied" for the purpose of section 10(1) of the Act.

The Municipality states that, as a matter of practice and policy, all proposals are received in confidence and consistent with this, requests for proposals (RFP) all require that the proponents identify proprietary information. The RFPs also contain a statement that the proposals are received in confidence subject to the disclosure requirements of the Act. The Municipality states that in the present case, the association's proposal was not received in response to a RFP but that there was an implicit expectation of confidentiality.

The Municipality submits that the proposal formed the basis for the contract which is a direct reflection of the original proposal provided to the Municipality. Essentially, the proposal offered the Municipality a significant saving in prescription costs through providing the services described in the agreement. The Municipality submits that the information in the agreement reflects that provided earlier in the proposal and that there was an implicit expectation that this information would be maintained in confidence.

I accept the submissions of the Municipality and find that the information in the record was supplied to the Municipality implicitly in confidence.

**Harms**

In order to meet this part of the test, the Municipality and/or the association must show how disclosure of the information in the record could reasonably be expected to result in the harms described in section 10(1)(a) of the Act. This section provides:

> 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,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiation of a person, group of persons or organization.

The Municipality submits that the association is in the business of offering programs and services designed to reduce costs to government institutions and organizations. The Municipality submits that it is a highly competitive field with various groups offering a range of similar services and commitments to certain levels of savings. The Municipality states that competitors in possession of the information in the record could incorporate the information in their own service delivery programs and thereby achieve a competitive edge over the association in other bidding processes.

The Municipality points out that while institutions need to control costs, a high level of guaranteed savings is only one factor in evaluating a proposal as savings cannot be achieved at the expense of health. Therefore, the means by which the service provider reduces costs is a significant factor in the selection process. For this reason, the information in the record constitutes valuable information, which, in the possession of competitors, could reasonably be used to improve the competitor's chances and thereby harm the association's competitive position.

The association submits that disclosure of the information to the appellant would prejudice the association's ability to enter into similar agreements with respect to managed care. The association points out that the appellant could very easily improve its competitive position by developing programs that are patterned on the information in the record.

I have carefully reviewed the information in the record and I am satisfied that disclosure of the information in the record could reasonably be expected to prejudice significantly the competitive position of the association. As all three parts of the test have been met, I find that the information in the record is exempt under section 10(1) of the Act.

**PUBLIC INTEREST IN DISCLOSURE**

The appellant submits that a compelling public interest exists in the disclosure of the record. The appellant alleges unfair competition and conspiracy. In this regard, the appellant submits that the agreement between the Municipality and the association may have prevented taxpayers from realizing a substantial savings in their drug prescription costs.

The appellant relies on Order M-956 and quotes:

> One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern...Accordingly, ...,there is a basic public interest in knowing more about the operations of government.

Previous orders of the Commissioner have established that in order to satisfy the requirement of section 16, there must be a **compelling** public interest in disclosure and this compelling public interest must **clearly** outweigh the **purpose** of the exemption (Orders P-512 and P-607).

In Order P-984, Inquiry Officer Holly Big Canoe defined "a compelling public interest" as follows:

> "Compelling" is defined as "rousing strong interest or attention"(Oxford). In my view,, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has, to make effective use of the means of expressing public opinion or to make political choices.

I agree with the above definition and approach and adopt it for the purposes of this appeal. I have carefully considered the representations of the parties and I have reviewed the information at issue. I note that a large part of the agreement has already been disclosed to the appellant. In my view, disclosure of the remaining information in the record would not shed light on the operations of the Municipality in its dealings with the public. Nor, in the circumstances of this appeal, would it serve to inform the public about the activities of the Municipality or provide a means whereby the public can express an opinion or make political choices.

Accordingly, I find that a compelling public interest does not exist in the disclosure of the information that I have found to be exempt under section 10(1)(a) of the Act.

## ORDER:

I uphold the decision of the Municipality.

Original signed by: November 20, 1997
Mumtaz Jiwan
Inquiry Officer