



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

ORDER MO-1228

Appeal MA-990004-1

City of Ottawa



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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the City of Ottawa (the City). The request was for access to copies of records from 1996 to the date of the request relating to the redevelopment of Landsdowne Park.

The City granted the appellant access to a number of responsive records, but denied access to a 109-page January 1998 record titled “Self-Contained Appraisal Report on Landsdowne Park, Ottawa, Ontario” (the Report). The appellant appealed the City’s decision. As part of the mediated settlement of that appeal, the appellant received a revised decision letter respecting the Report and two additional responsive records (located subsequent to the City’s initial decision).

The City’s new decision was to apply the following exemptions to the three records:

- advice or recommendations - section 7
- third party information - sections 10(1)(a), (b) and (c)
- economic and other interests - sections 11(a), (c) and (d).

The appellant continues to pursue access to the Report, and believes that additional records responsive to his request exist.

I sent a Notice of Inquiry to the City, the appellant, the construction company which prepared the report, and one other company whose interest’s could be affected by the outcome of this appeal. Representations were received from the City and the two companies.

RECORDS:

Access was denied to the three records as follows:

- Record 1 - the last five pages of a six-page fax transmittal dated September 29, 1997, exempted under sections 10(1)(a), 10(1)(b) and 10(1)(c)
- Record 2 - a two-page piece of interdepartmental correspondence from October 28, 1997, exempted under sections 7(1), 10(1)(a), 10(1)(b) and 10(1)(c)
- Record 3 - the Report described above (109 pages) exempted under sections 7(1), 10(1)(a), 10(1)(c), 11(a), 11(c) and 11(d).

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Section 11(d)

The City submits that section 11(d) applies to Record 3 (the Report). To establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests.

The City indicates:

In February, 1997 Ottawa City Council approved a unique partnering process for the Revitalization of Lansdowne Park. The City sought a partner to provide innovative business ideas which would maximize the financial benefits to the City while respecting the character and needs of the Park and the surrounding area.

The City of Ottawa elected to obtain the services of a Real Estate Appraiser and Consultant to carry out a comprehensive appraisal of the Lansdowne Park site to determine an appropriate market value per unit of development based on the development proposals being considered for the site.

The purpose of the appraisal in question was in short to establish a benchmark for the City to assess its contribution and/or return from the potential redevelopment of the site.

The City also indicates that the Report was requisitioned specifically with the intent that it would form the basis for instructions to City staff in negotiating the final agreement should Council decide to proceed to that stage with the recommended developer.

The City submits that the recommended proposal and developer for the Revitalization Project has not yet been approved by Council nor has a decision yet been made to sell any portion of the Park at a particular price. The City submits that until Council has met and approved the sale of the property and the sale has been closed, disclosure of the Report could be expected to prejudice the financial interest of the City in attempting to obtain a fair return for the sale of the Park property. Disclosure at this time could also reasonably be expected to adversely affect the negotiations with the developer, according to the City.

The Report contains specific information relating to existing and proposed income generating strategies, various pricing scenarios as they pertain to the recommended and potential uses, and information which reveals potential profit and loss data in relation to the various options for redevelopment. The report also contains specific information on lease rates, lease and sales negotiations strategies and makes reference to potential overhead and operating expenses related to the development proposals which are currently under review by Council. In my view, disclosure of this detailed information at this stage in the process could weaken the City's negotiating position and interfere with its ability to obtain a fair return on its property. Accordingly, I am satisfied that disclosure of Record 3 could reasonably be expected to be injurious to the financial interests of the City, and section 11(d) applies.

THIRD PARTY INFORMATION

The City submits that Records 1 and 2 are exempt under section 10. Other than stating that disclosure could have a “damaging effect” on the affected parties, the City does not specify which

subsection of section 10 it is relying on.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the institution and/or the affected party 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), (b) or (c) of section 10(1) will occur.

[Order 36. See also Orders M-29 and M-37]

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words “**detailed and convincing**” do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

PART 1

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. For example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

Record 1 is a summary of the assets and liabilities of one of the affected parties, a conceptual project budget, and details of the affected party's corporate structure. Record 2 is a summary of a meeting held with the second affected party in order to review its financial statements and discuss a financing plan for the proposed development. Having reviewed these records, I am satisfied that they contain commercial and/or financial information, and the first part of the test has been met.

PART 2

Supplied in Confidence

Supplied

Record 1 is correspondence sent to the City by the affected party, enclosing documents prepared by or for the affected party. Although not authored by the second affected party, it is clear that the information contained in Record 2 is the same as that originally provided by the affected party. Accordingly, I am satisfied that the information in Records 1 and 2 was supplied to the City by the affected party.

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) 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. [Order M-169]

Both records are explicitly marked "Confidential", and both affected parties and the City submit that these records have been treated consistently in a manner that indicates a concern for their protection from disclosure. In the circumstances of this appeal, I find that the information in Records 1 and 2 was supplied in confidence to the City, and the second part of the test has been met.

PART 3

Harms

To discharge the burden of proof under the third part of the test, the parties opposing disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed. [Order P-373]

The City has not indicated whether it is relying on (a), (b) or (c) of section 10(1), and has not been specific about the type of anticipated harm resulting from disclosure of these records. One of the affected parties has submitted only that the information “falls under the exemption status of Third Party Information”.

The other affected party submits that the information submitted has a commercial and financial implication attached to it, and because the City has not finalized its contract on this file, it is highly improper to disclose any proponent’s material. It submits that this is “a highly competitive process and we do not want any of our material being available to competitive proponents, media nor the public at large.”

Section 10(1)(a) states:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

Records 1 and 2 provide details of corporate structure, potential financial arrangements and potential third party equity partners, proposed market strategies, financing and project budgets of two proponents for a project currently being considered by the City. These details were specifically requested by the City, beyond what was provided in response to the Request for Qualifications, and are directly relevant to the evaluation of each proponent by the City. In my view, disclosure of this information could reasonably be expected to prejudice significantly the competitive position of the affected parties, and the third part of the test for exemption under section 10(1)(a) has also been met. Accordingly, I find that Records 1 and 2 are exempt under section 10(1)(a) of the Act.

REASONABLENESS OF SEARCH

The appellant has indicated in his letter of appeal that he remains unconvinced that all applicable records were located, particularly on the financial and legal aspects of the project. His letter of appeal focuses on the Technical Committee records, and states that the additional records located were primarily duplicates of records he had previously seen. He states that the records he viewed are not the requested records about their proceedings and decision making, such as notes, minutes or records reviewing the proposals and managing the partnership solicitation process.

In cases where a requester provides sufficient details about the records which he or she is seeking and the City indicates that records do not exist, it is my responsibility to insure that the City has made a reasonable search to identify any records that are responsive to the request. The Act does not require the City to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the City must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

Based on the information before me, I am satisfied that the appellant has provided sufficient details about the records which he is seeking. The City has not provided me with details of its efforts to locate the records requested by the appellant, nor provided him with any explanation as to why the records either could not be located or do not exist. Accordingly, I find that the City's search for responsive records was not reasonable, and I will order it to conduct a further search.

ORDER:

1. I uphold the City's decision not to disclose Records 1, 2 and 3 to the appellant.
2. I order the City to conduct a further search for records responsive to the appellant's request and to communicate the results of this search to the appellant in writing by **September 9, 1999**. If responsive records are located, I further order the City to provide an access decision to the appellant in the form contemplated by sections 19 and 22 of the Act, by **September 14, 1999**, without recourse to a time extension.
3. In order to verify compliance with Provision 2 of this order, I order the City to provide me with a copy of any correspondence sent to the appellant pursuant to Provision 2 by **September 21, 1999**. These should be forwarded to my attention, c/o Information and Privacy Commission/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
Holly Big Canoe
Adjudicator

_____ August 19, 1999