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

ORDER MO-1263

Appeal MA-990166-1

City of Toronto

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:

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for the "Phase 3 Environmental Site Assessment and Site Restoration" report regarding a specified address within the City. The record was prepared by a named environmental consultant on behalf of a named developer.

The City denied access to the record in its entirety pursuant to sections 10(1)(a) and (c) of the Act.

The requester (now the appellant) appealed the City's decision and also claimed that there was a compelling public interest in the disclosure of the record pursuant to section 16 of the Act.

During mediation, the named environmental consultant advised the Mediator that the record belonged to the developer. The developer agreed to provide the appellant with an opportunity to review the record, but objected to providing the appellant with a copy. As far as I know, the appellant has not reviewed the record.

I sent a Notice of Inquiry to the appellant, the City and the developer (the affected party). Representations were received from all three parties.

DISCUSSION:

THIRD PARTY INFORMATION

The City claims that the record qualifies for exemption pursuant to sections 10(1)(a) and (c) of the Act and the affected party supports this claim. Therefore the onus is on the City and the affected party to establish the requirements of this exemption claim.

Sections 10(1)(a) and (c) state:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For the record to qualify for exemption under sections 10(1)(a) or (c), the City and 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 City 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 subsection 10(1) will occur.

[Order 36]

In Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.), the Court of Appeal upheld my decision in Order P-373. In that judgement 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]

Requirement One - Type of Information

Only the City provided representations on this part of the test. The City submits that the record contains scientific and technical information and relies on the definitions of scientific and technical information established in Order P-454. In that order, former Assistant Commissioner Irwin Glasberg found:

> ... scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific

> hypotheses or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the Act.
> ...
>
> ... technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

I adopt these definitions for the purpose of this appeal.

The City states that the record is a site evaluation report relating to the field of environmental engineering, prepared by a professional in the field, and describes the operation of a process and equipment. The City further states that the record contains laboratory analyses of soil and water samples and relates to the environmental status of a proposed development site. The City adds that the record contains plans for excavation and clean-up. The City relies on several past orders in support of its position (Orders M-958, M-907, M-1143, PO-1666 and MO-1212).

I accept that the part of the record relating to laboratory analyses consists of "the observation and testing of specific hypotheses or conclusions" and, therefore, qualifies as scientific information.

I also find that the rest of the record contains "technical information". It was prepared by a professional in the field of environmental consultation and testing and describes the operation of various processes and equipment relating to site investigations, site description, site conditions and restoration processes.

Therefore, the first requirement has been established.

Requirement Two - Supplied in Confidence

In order to satisfy the second requirement, the appellant must show that the information was **supplied** to the City, either implicitly or explicitly **in confidence**.

Supplied

Once again, the City is the only party that provided representations dealing with the second requirement of the test. The City submits that the record was supplied to the City's Public Health Unit by the affected party to support its proposal to develop the land for residential housing. I accept this position, and find that the record was "supplied" to the City for the purposes of section 10(1).

In Confidence

In order to establish that the record was supplied either explicitly or implicitly in confidence, the City and the affected party must demonstrate that an expectation of confidentiality existed at the time the record was submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to the City 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 affected party prior to being communicated to the City.

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

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

(Order P-561)

The City submits:

> Public Health states that it has always been its custom and practice to treat all development application information in confidence, particularly environmental site assessment reports and remedial work plans. ... Further, it is a part of Public Health policies and procedures that the assurance of confidentially is explicitly communicated to developers.

The City also states that the affected party communicated its expectation of confidentiality to the City at the time the record was submitted, and points out that the record itself contains an explicit statement of confidentiality.

Based on the representations provided by the City and my independent review of the record, I accept that it was supplied by the affected party to the City on the reasonably-held basis that it would be treated confidentially by the City. This expectation was communicated to the City, either explicitly in the case of the confidentiality clause contained in the record, or implicitly through what I accept to be the customary practice of the City with respect to this type of record; the City has provided representations sufficient to establish that it has consistently treated this type of record in a manner that indicates a concern for its protection from disclosure; I accept that the record was originally prepared for a purpose which would not entail disclosure; and I have no evidence before me to suggest that this record is otherwise disclosed or available from sources to which the public has access.

Therefore, I find that the requirements outlined in Order P-561 are present, and the second requirement for the section 10(1) exemption claim has been established.

Requirement Three - Harms

To discharge the burden of proof under the third part of the test, the City and the affected party 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 17(1) would occur if the information was disclosed [Order P-373].

Sections 10(1)(a) and (c)

The submissions provided by the parties on the potential harms identified in sections 10(1)(a) and (c) are similar, and I will consider these two sections together.

The appellant submits:

> First, on grounds of principal (sic), the named document is the conclusive environmental report which has been prepared regarding the land in question. The land has been developed for residential use. Prior to its development, the land should have been environmentally secured. This document, and its accessibility, are our proof as residents that protocol has been followed, and that our homes are safe. (emphasis in original)
>
> Second, on grounds of practicality, the lands in question have, for approximately the past 100 years been used for industrial purpose. The present residential development sits on a site that has previously housed two different metal foundries (where metals and heavy metals have been used and stored), a motor oil and subsequently a transportation company (where oils were used and stored in tanks), and a metal stamping company. The potential for contamination from such industry is significant.
>
> I am aware that initial testing indicated several safety exceedences (sic) on this site, and that significant decontamination was required. Access to this environmental report provides conclusive assurance of procedure being followed and safety being achieved.

The City's submissions include the following statements in support of its position that disclosure could reasonably be expected to prejudice significantly the affected party's competitive position and/or result in undue loss to the affected party:

> Information forming part of the planning and development process, including environmental site assessment reports, is closely related to the commercial value of a site...
>
> The development of potential sites for residential housing is a highly competitive business...

> The City's decision to deny access to the report is based on concerns expressed by [the affected party] that disclosure of the report would cause financial harm to its interests because dissemination of the report's findings out of their original context would negatively affect the value of the properties in the development and cause mistrust of the developer in the area.
>
> ...
>
> The City submits that although potential buyers' concerns may be unfounded..., if it is perceived that something is wrong, based on a misunderstanding, either of the technical or scientific information or the cautions placed on the report's findings, [the affected party] could be at a substantial disadvantage when competing with other developers.
>
> ...
>
> ...the City submits that there is a demonstrable potential for lost sales revenue for its development at the [specified] site and possibly for future developments at other sites, if inferences are made that the developer has developed on a "questionable" site and may do so elsewhere.

The affected party's representations do not support any of the potential harms identified by the City. In fact, the affected party appears to agree to the disclosure of the contents of the record, and has concerns simply with providing the appellant with a copy. The affected party's representations are restricted to the following statements:

> We have received your letter dated October 13, 1999 and have spoken to [the appellant] on a number of occasions including today in order to provide him with an opportunity to review the environmental report. He has however been unable to meet me at any convenient time.
>
> We expect he will find the time to meet in the near future. In the meantime we oppose any disclosure of these records by your agency.

I do not accept the City's position that disclosure of the record could reasonably be expected to prejudice the affected party's competitive position in the marketplace, or result in undue loss to the affected party. The need for remediation efforts to deal with potential environmental contamination on the property developed by the affected party is a known fact. As the City explains in its representations:

> Environmental Site Assessments and Remedial Work Plans are an integral part of the City's planning and development process. It is not a separate process and is carried out as part of official plan amendment, rezoning, and site plan approval.
>
> The purpose of an environmental site assessment and remedial work plan is to ensure

> that the environmental quality of a proposed site is appropriate for the proposed land use and does not constitute a hazard to health or the environment.
>
> An application for a site where there may be environmental concerns may require the submission of detailed site information, including a plan for remedial or clean up of the site. Such plans are generally carried out by qualified environmental consultants. Developers are asked to submit such reports to Public Health for its review. ...
>
> In the present case, [the affected party] wished to develop residential housing on vacant lands situated at [a specified address]. Previous site investigations (Phase I and Phase II assessments) conducted by another company identified some environmental concerns. [The named environmental consultant] was then asked to complete further investigations and to remediate the site prior to its development for residential use. The report details the work done by [the named environmental consultant].

Successful remediation of environmental contamination was a prerequisite for residential developmental approval on the site owned by the affected party. The development is underway, so was presumably approved by the City, and I fail to see how disclosure of the report which was used by the City as the basis for granting this approval could reasonably be expected to result in harm to the affected party. On the contrary, it could be argued that disclosure would in fact enhance the affected party's reputation, as a developer that has presumably complied with the public standards set by the City for decontamination of commercial or industrial lands for residential use. In any event, based on the City's representations, and the absence of any concerns for competitive harm or loss expressed by the affected party, I find that the parties resisting disclosure have not provided the level of "detailed and convincing" evidence required to establish either of the harms outlined in section 10(1)(a) or (c) (see also Orders PO-1688, PO-1707 and PO-1732-F).

Therefore, I find that the record does not qualify for exemption under either sections 10(1)(a) or (c) of the Act. Because of this finding, it is not necessary for me to consider the possible application of section 16.

ORDER:

1. I order the City to disclose the record in its entirety, by sending the appellant a copy, by **January 28, 2000** but not before **January 21, 2000**.

2. In order to verify compliance with the terms of this order, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by December 21, 1999
Tom Mitchinson
Assistant Commissioner