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

ORDER MO-1282

Appeal MA-990125-1

Township of Guelph/Eramosa

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NATURE OF THE APPEAL:

The Township of Guelph/Eramosa (the Township) received a request for access to information under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The requester sought access to information as follows:

> [I am seeking] a true and certified copy of the Letter(s) of Credit provided to the Township for and pertaining to the municipal serving of the Seaton (Rockwood) Subdivision. I am also requesting a true and certified copy of any Letter(s) of Credit provided to the Township as collateral security for any and all municipal infrastructure works including, but not limited to, the Valley Road pumping station and the construction of a new forcemain from the Valley Road up to the dumping station on Alma Street.

The Township responded to the request by stating that access to the sole responsive record (a two-page letter of credit) was being refused on the basis of section 11(a) of the Act (economic and other interests), "as the records in question contain financial information with monetary value or potential monetary value to the Township."

The requester (now the appellant) appealed the Township's decision to this office. In his letter of appeal, the appellant stated that, in his view, the record does not belong to the Township as required by section 11(a). The requester submitted:

> [A] letter of credit is a banking instrument that names the Developer as the *Principle*, the bank or lending institution as the *Surety*, and the Township as the *Obligee*. The ownership is actually a joint ownership between the Developer and the Lender/Surety company.
>
> This lack of ownership is confirmed by the Township's letter dated March 31, 1999, wherein I am told to ask the owner, Seaton Rockwood Group as represented by [named individual] for a copy of the Letter of Credit. The Township did not [create] or otherwise generate the record, it reviewed it as per the conditions set forth in the By Law covering the subdivision agreement, a public document.
>
> ... in accordance with [Order 87] *monetary* has to conform to the following:
>
> > The information in the record must have an intrinsic value and further that the information in the record must be such that disclosure would deprive the Township of the monetary value of that information.
>
> Clearly, the document in question has no intrinsic value. It can not be sold or transferred to a third party nor can it confer any value to the Township by merely having a copy of it on file. The record is such that it gives direction to the institution should the principle default in their Corporate undertakings as detailed in the Subdivision Agreement.
>
> I believe my understanding of Section 11(a) is consistent with Orders already rendered, namely M-326, M-333, M-654, M-712, M-862, and M-897 ...

I sent a Notice of Inquiry seeking representations on the issues in this appeal to the Township and the appellant. I received representations from the Township only.

Subsequently, I determined that the outcome of this appeal could affect the interests of a third party corporation named in the record. As a result, I sent a supplementary Notice of Inquiry to the Township, the appellant and a third party corporation (the affected person) seeking representations on the mandatory exemption at section 10 ("third party information") of the Act. In response to the supplementary Notice of Inquiry, I received representations from the affected person only.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Introduction

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

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.

[Order 87]

In Order M-654, Adjudicator Holly Big Canoe stated with respect to part 3 of the test for exemption under section 11(a):

> The use of the term **"monetary value"** in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information ... [emphasis in original].

Township's representations

The Township submits:

> The record ... is [a] letter of credit the original of which is lodged with the [Township] as security for the obligations of the developer under the terms of a Subdivision Agreement and a Services-in-Lieu Agreement.

> The record itself has monetary value up to the maximum amount stated therein ... The record therefore is financial information and does have an intrinsic monetary value to the Township.
> The ... letter of credit may be pledged as security by the Township.
> The Township is the "beneficiary" of the ... letter of credit given by the issuing financial institution at the request of the applicant/customer and, therefore, the Township in fact has a proprietary interest in the record. This proprietary interest together with the obligations in respect of the letter of credit as set out in the Subdivision Agreement and Services-in-Lieu Agreement confirm that the record belongs to the institution.
>
> The Township has advised the developer ... of the request for disclosure of the record and the developer has refused to permit disclosure of the record to the appellant.
>
> The appellant has previously been provided with a copy of the Subdivision Agreement which establishes the obligations of the developer to deliver to and lodge with the Township an irrevocable letter of credit ...

The record clearly contains financial information. It indicates that the Township, as beneficiary, may draw up to a particular amount of money on the named financial institution, as issuer, and as requested by the affected person, subject to certain terms and conditions.

Although the Township clearly is the beneficiary of the letter of credit, I do not accept that the information in the record "belongs to" the Township for the purpose of section 11(a). In my view, the Township's submissions on this point fail to account for the distinction between the record itself and the information in the record. The record is evidence of an undertaking by the financial institution to pay certain amounts to the Township, on certain conditions and, as such, it is of value to the Township. The information in the record, however, does not "belong" to the Township in the sense that this term is used in the Act.

With reference to the meaning of the phrase "belongs to", Assistant Commissioner Tom Mitchinson stated in Order P-1281:

> The Ministry submits that the database, the data elements, and the selection and arrangement of the data in the database belong to the Government of Ontario or an institution. The Ministry argues that the term "belongs to" in section 18(1)(a) denotes a standard less than ownership or copyright, but does not clearly articulate what that standard is or how it is applicable here. If these words do mean "ownership," the Ministry argues that, quite apart from any consideration of copyright, it has ownership by virtue of its right to possess, use and dispose of the data as outlined in the various statutes authorizing its collection, retention and use under the [Ontario Business Information System (ONBIS)] system, as well as by virtue of its physical possession of the database and its control of the access and use of the ONBIS system.
>
> I do not accept these submissions. In my view, the fact that a government body has authority to collect and use information, and can, as a practical matter, control physical

> access to information, does not necessarily mean that this information "belongs to" the government within the meaning of section 18(1)(a). While the government may own the physical paper, computer disk or other record on which information is stored, the Act is specifically designed to create a right of public access to this information unless a specific exemption applies. The public has a right to use any information obtained from the government under the Act, within the limits of the law, such as laws relating to libel and slander, passing off and copyright, as discussed below.
>
> If the Ministry's reasoning applied, all information held by the government would "belong to" it and, presumably, the rights to use information belonging to government could be restricted for this reason alone ...

Similarly, in his earlier Order P-1114, the Assistant Commissioner stated:

> Individuals, businesses and other entities may be required by statute, regulation, by-law or custom to provide information about themselves to various government bodies in order to access services or meet civic obligations. However, it does not necessarily follow that government bodies acquire legal ownership of this information, in the sense of having copyright, trade mark or other proprietary interest in it. Rather, the government merelyacts as a repository of information supplied by these external sources for regulatory purposes.

The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, Lac Minerals Ltd. v. Int. Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein].

In my view, the information in the record is clearly different in nature from the type of information described above. The Township cannot be said to have acquired an ownership interest in the information in an intellectual property or confidential business information sense. There is nothing in the material before me to indicate that the Township has expended money or applied skill and effort to develop the information, or that there is an additional "value-added" component to it, which might suggest that it "belongs to" the Township. While this information is not now generally known, it cannot be said to have the necessary quality of confidence about it where the Township has not demonstrated that it will be deprived of any

monetary value in the information as a result of its disclosure (Order M-654). The material before me does not establish that disclosure of the information in the record could reasonably be expected to result in the Township not being able to rely on the terms of the letter of credit to receive payment from the financial institution.

On this basis, section 11(a) cannot apply. This conclusion is consistent with the purpose of the "economic interests of government" exemption as articulated in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980, vol. 2 (Toronto: Queen's Printer, 1980) (at pp. 312-313, 318-319):

> It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.
>
> . . . . .
>
> There are a number of governmental institutions (in particular, Crown corporations) engaged in the supply of goods and services on a competitive basis. For example, the activities of the Ontario Urban Transportation Development Corporation Limited have been briefly described in a Commission research paper. The purpose of establishing the corporation was to create a publicly-funded corporate vehicle which could assume development risks associated with the improvement of conventional public transportation technologies and the design of new high quality transit systems. While the Corporation's primary objective is to assist in meeting the needs of the province of Ontario for developments in the field of transportation technology, it is also hoped that the corporation will be able to market its expertise and products on a competitive basis in other jurisdictions. In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.

Thus, the thrust of this exemption is to protect the government's competitive position in the marketplace, and is not designed to shield from public scrutiny the keeping of public accounts, including evidence of security on projects.

THIRD PARTY INFORMATION

Introduction

I will now consider the application of the exemption at section 10(1) of the Act to the information at issue.

Section 10(1) of the Act reads, 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, where 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;

In order for a record to qualify for exemption under sections 10(1)(a), (b) or (c) of the Act, each part of the following three-part test must be satisfied:

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 17(1) will occur [Orders 36, M-29, M-37, P-373].

To discharge the burden of proof under part three of the test, the parties resisting 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 [Orders 36, P-373].

This three-part test and the statement of what is required to discharge the burden of proof under part three of the test have been approved by the Court of Appeal for Ontario. That court recently affirmed Order P-373, stating:

> 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].

The analysis set out below follows the Commissioner's traditional tests considered and found reasonable by the Court of Appeal in Ontario (Workers' Compensation Board).

Type of information

For the reasons set out above under the section 11(a) discussion, I find that the record contains financial information.

Supplied in confidence

Supplied

The affected person submits that the information at issue was supplied to the Township by letter dated March 15, 1999. The Township's submissions under section 11(a) also indicate that the affected person supplied the record to it. However, the material before me indicates that the contents of the record were agreed upon after negotiations between the affected person and the Township.

In Order PO-1698, Assistant Commissioner Mitchinson stated with respect to the "supplied" requirement in the provincial counterpart to section 10(1) of the Act:

> Because the information in a contract is typically the product of a negotiation process between two parties, the content of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 17(1) of the Act. Records of this nature have been the subject of a number of past orders of this Office. In general, the conclusions reached in these orders is that for such information to have been "supplied," it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected

> party. If disclosure of a record would reveal information actually supplied by an affected party, or if disclosure would permit the drawing of accurate inferences with respect to this type of information, then past orders have also found that this information satisfies the requirements of the "supplied" portion of the second requirement of the section 17(1) exemption test (see, for example, Orders P-36, P-204, P-251 and P-1105).

In my view, because the information in the record was arrived at through a negotiation process, it does not meet the "supplied" requirement of section 10(1). Although it is not necessary for me to do so, I will consider whether the third requirement of harm has been met in this case.

Harms

To discharge the burden of proof under the third part of the test, the parties resisting 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 this section would occur if the information was disclosed [Order P-373].

The affected person provides background information about the appellant's involvement in, and opposition to, the development project to which the letter of credit relates. The affected person submits that it fears the appellant will take certain actions upon disclosure of the record with an intent to undermine and/or delay the project, which would result in the affected person suffering monetary harm. The affected person states that this fear is particularly acute, given the current status of the project.

In my view, although the affected person has provided some detailed information, it has failed to draw a logical connection between disclosure of the particular information in the letter of credit and a reasonable expectation of the alleged harm. In my view, even without the record, the appellant could take the type of actions about which the affected person is concerned. In addition, I am not satisfied that even if these actions were taken, the harm alleged could reasonably be expected to result. On this basis, I conclude that section 10(1) does not apply in the circumstances.

ORDER:

1. I order the Township to disclose the record to the appellant no later than **April 5, 2000**, but no earlier than **April 10, 2000**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Township to provide me with a copy of the material provided to the appellant.

Original signed by: March 6, 2000
David Goodis
Senior Adjudicator