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

ORDER MO-1370

Appeal MA-000259-1

Toronto Transit Commission

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NATURE OF THE APPEAL:

The Toronto Transit Commission (the TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a contract between an identified third party (the affected party) and the TTC.

After notifying the affected party and considering its views on disclosure, the TTC provided partial access to the six responsive records, and denied access to the remaining portions on the basis that they qualified for exemption under the following sections of the *Act*:

- section 6(1)(b) - in-camera meeting; and
- sections 10(1)(a) and (c) - third party information.

The requester, now the appellant, appealed the TTC's decision.

As a result of mediation, the scope of the appeal was reduced to one clause of Record 1, specifically the undisclosed portions of clause 1.01(j). The other records and the section 6(1)(b) exemption claim are no longer at issue as a result of this narrowing of the request.

I sent a Notice of Inquiry initially to the TTC and the affected party, and received representations in response only from the affected party. I have determined that it is not necessary for me to solicit representations from the appellant before reaching my decision in this appeal.

RECORDS:

The only record remaining at issue is clause 1.01(j)(i) and (iii) of the contract between the TTC and the affected party. This clause identifies the uses permitted by the affected party on the TTC's premises.

DISCUSSION:

Third party information

The TTC and the affected party state that sections 10(1)(a) and (c) apply to the record. These sections read as follows:

> 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 a record to qualify for exemption under sections 10(1)(a) or (c) of the *Act*, the parties resisting disclosure (in this case, the TTC 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 TTC 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) or (c) of subsection 10(1) will occur.

(Orders 36, P-363, M-29 and M-37)

The Court of Appeal for Ontario, in upholding my Order P-373 stated:

> 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 one: Type of information

The affected party's representations do not address this part of the test in detail. The only specific submission is the following statement:

> The specific Use of the retail premises is not generally known in the trade except for the direct observance as a retail consumer of the product sold. Since there is a specific economic value that can be derived from specific knowledge of the Use Clause, the Use Clause itself is a very specific trade secret, which should be held in confidence between Landlord and tenant.

The term "trade secret" was originally defined by former Commissioner Tom Wright in Order M-29, and has been applied in subsequent orders of this Office. He found:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Having reviewed clause 1.01(j), I am not persuaded that the information contained in it qualifies as a trade secret. The information is not a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism", nor does it describe anythingnot generally known in the retail trade or observable by retail customers on a day-to-day basis. For these reasons, I find that the information contained in the undisclosed portions of clause 1.01(j) is not a trade secret for the purposes of section 10(1).

However, I do find that the clause contains commercial information. The information relates directly to the operation of a commercial enterprise by the affected party on premises owned by the TTC. The TTC has entered into a commercial contract with the affected party and, in my view, the terms of that contract, including clause 1.01(j), constitute "commercial" information as defined in many previous orders (see, for example, Order M-493).

Therefore, I find that part one of the section 10(1) exemption test has been established.

Part two: Supplied in confidence

In order to meet the second part of the test, the TTC and/or the affected party must establish that the information at issue was supplied to the TTC by the affected party. The information will be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the TTC (Orders P-203, P-388 and P-393). Previous orders of this Office have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis (Orders M-169 and P-1605).

The affected party's representations on this part of the test focus primarily on the confidentiality aspect. The affected party submits:

> ... it was our understanding at the [request for proposal] level and thereafter that all information contained in the Lease document including the use of the premises would be held in strict confidence by the TTC except for any details which were disclosed by necessity in a public forum. ...

The affected party provided me with a copy of a letter sent to the TTC during the bidding process which asks that any information provided by the affected party in that context be kept in confidence. The affected party maintains that assurances of confidentiality were given by the TTC at that time.

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 10(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 10(1) exemption test (see, for example, Orders P-36, P-204, P-251 and P-1105).

Applying the line of reasoning in past orders dealing with negotiated contracts, I find that the information contained in clause 1.01(j) was not "supplied" for the purposes of section 10(1) of the *Act*. The clause at issue in this appeal is included in the contract between the TTC and the affected party. Although some of

the terms of the contract, and perhaps the contract as a whole, may have been agreed to with little discussion or without an extensive negotiation process, I find that it nonetheless represents a negotiated arrangement between the TTC and the affected party. I find that the contract was the result of negotiations, however minimal, and that the record was not "supplied" for the purposes of section 10(1) of the *Act* (Orders P-1545 and PO-1698).

As far as the "in confidence" part of the test is concerned, the TTC has provided no representations to substantiate the affected party's claim of confidentiality. However, having found that the information was not "supplied", part two of the exemption test fails whether or not there was an implicit or explicit expectation of confidentiality on the part of the affected party.

Therefore, I find that part two of the section 10(1) exemption test has not been established.

Part three: Reasonable expectation of harm

To discharge the burden of proof under the third part of the test, the TTC and/or 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 10(1) would occur if the information was disclosed (Order P-373).

The words "could reasonably be expected to" appear in the preamble of section 10(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 10(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" (see Order P-373, two court decisions on judicial review of that order in *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 at 40 (Div. Ct.), as well as Orders PO-1745 and PO-1747).

The affected party states that if the information contained in clause 1.01(j)(i) and (iii) is disclosed, it could be used in a manner that would "impugn our ability to receive and merchandise product". The affected party submits:

> Suppliers of [the affected party] base their pricing schedule on such factors as the volume generated from locations, as well as the right of [the affected party] to provide an exclusivity on product (use) as well as remuneration for advertising and display of product (affected by use). Once again, severe restrictions on our financial ability to raise revenue and arrange for delivery of product on behalf of our franchisees could be severely affected

> by the disclosure of the details of [the] use clause especially to current and future suppliers and distributors of product.

In the affected party's view, it should not be forced to reveal details of the "use clause" to its competitors or suppliers, since to do so could "potentially bring irreparable harm on our ability to procure chain wide competitive pricing and display allowances on large volume core items" sold on TTC property.

Having carefully reviewed the actual wording used in clause 1.01(j), I find that the evidence and argument provided by the affected party is not sufficiently "detailed and convincing" to establish a reasonable expectation of probable harm if this information is disclosed.

The appellant is interested only in one particular clause of the contract. As he points out in his letter of appeal:

> ... Not surprisingly, TTC officials [when responding to the appellant's request] made a number of deletions from the information, notably the parts of the contract which talk about rent payments.
>
> I can understand [the affected party's] interest in keeping such information secret.
>
> However, I would like to appeal the TTC's decision to censor Section 1.01(j) which describes how [the affected party] is allowed to use its space in the stations.
> ...
>
> Any commuter passing through the stations can clearly see how [the affected party] is using the spaces. I seek the contract wording which spells this out.

The information in clause 1.01(j)(i) and (iii) is very general in nature, and I agree with the appellant that it would be reasonable for a regular user of the TTC to draw accurate conclusions about the type of information contained in this provision by simply observing the operation of the affected party's business. While it might be possible that certain other information in the contract could attract the protections of section 10(1)(a) or (c), in my view, the harms envisioned by these sections have not been established in regard to the undisclosed information in clause 1.01(j).

Therefore, I find that part three of the sections 10(1)(a) and (c) exemption test has not been established.

In summary, I find that the TTC and/or the affected party have failed to establish both parts two and three of the section 10(1) exemption claim. Therefore, the undisclosed information in clause 1.01(j) does not qualify for exemption and should be disclosed to the appellant.

ORDER:

1. I order the TTC to provide the appellant with a copy of clause 1.01(j)(i) and (iii) of Record 1 by **January 5, 2001**, but not before **December 30, 2000**.

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

Original signed by: November 28, 2000
Tom Mitchinson
Assistant Commissioner