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

ORDER MO-1393

Appeal MA_000164_1

Town of Parry Sound

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NATURE OF THE APPEAL:

This is an appeal under the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), from a decision of the Town of Parry Sound (the Town) denying access to portions of a contract between the Town and a named corporation.

As background to this appeal, the corporation (the affected party) has entered into an agreement with the Town under which it has agreed to develop a waterfront site owned by the Town. The requester (now the appellant) asked for a copy of the lease agreement (including schedules) between the Town and the affected party.

The Town located the agreement in question, notified the affected party of the request and asked for its views. The affected party objected to the release of certain information in the agreement. After receiving the views of the affected party, the Town released the agreement to the appellant with some of the information severed.

In withholding portions of the record from the appellant, the Town relied on the mandatory exemption found in section 10(1) of the *Act* (third party information).

I sent a Notice of Inquiry to the Town and to the affected party, initially, inviting their representations on the issues raised by the appeal. I have received representations from the affected party, but not the Town. The representations of the affected party were shared with the appellant, who has provided representations in response. It should be noted that the appellant has stated in its representations that a portion of the severed information (in Schedule C) is not important to it, since it has been superceded by the terms of the final agreement between the Town and the affected party. Accordingly, I have decided to remove Schedule C to the agreement from the scope of this appeal.

RECORD:

The record identified as responsive to the request is a lease agreement and attached schedules, collectively referred to as the contract. The contract is comprised of 16 pages of main text, and Schedule A (map), Schedule A-1, Schedule A-2 (sketch), Schedule A-3, Schedule A-4, Schedule A-5 (photograph), Schedule B (prospectus), Schedule C (draft proposal submitted by developer), Schedule D-1 (outline of development), Schedule D-2 (sketches), Schedule D-3 (plan of boat slippage), Schedule E-1 (developer's right of first refusal), Schedule E-2 (developer's option to purchase), Schedule F-1 (reacquisition of the site and acquisition of the development by the Town), Schedule F-2 (further to F-2), Schedule G (environmental constraints) and Schedule H (obligations of the Town to provide utility services).

The portions of the contract which the Town released in their entirety are: Pages 1, 2, 5-9 and 14- 16 of the main text and Schedules A, A-1, A-2, A-3, A-4, A-5, B, cover page and pages 1 and 2 of Schedule C, Schedules D-1, D-2, E-2, page 2 of F-1, and Schedules F-2, G and H.

The portions of the contract which have been released only in part are: Pages 3, 4 and 10-13 of the main text and pages 3 and 4 of Schedule C, Schedule E-1, and page 1 of Schedule F-1. The information which has been withheld on these pages consists of: the amounts payable by the affected party to the Town as annual rent; the basis for calculation of those amounts; restrictions on subleasing or subcontracting; the size of area required for parking at the site; the assignment of responsibility for environmental contamination; terms for the reacquisition of the site and acquisition of the development by the Town; amounts originally proposed by the affected party as annual rent; terms originally proposed by the affected party relating to sale of the development to the Town; and details of the developer's right of first refusal on sale of the site by the Town.

As I have indicated, the information withheld from Schedule C is no longer in issue.

CONCLUSION:

I have concluded that the applicability of the exemption under section 10(1) of the *Act* has not been established and order disclosure of the record, with the exception of Schedule C.

DISCUSSION:

Section 10(1) of the *Act* 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, 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;
>
> (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; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 10(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. In Order PO-1805 Senior Adjudicator David Goodis, discussing the purposes of the provincial equivalent to section 10(1), stated that this provision was designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions".

Although, as stated in other orders, one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of information which, while in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace.

In applying section 10(1), previous orders have held that in order to support an exemption from disclosure under this section, institutions or affected parties must establish 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 subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Part 1: Type of Information

On my review of the record, I am satisfied that all of the information which has been severed from the document constitutes either commercial or financial information, since it pertains to the terms of a commercial contract between the Town and the developer.

Part 2: Supplied in Confidence

The second part of the three-part test set out above in turn encompasses two components: it must be shown that the information was "supplied" to the institution, and that the supply of the information was "in confidence".

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects, once again, the purpose in section 10(1) of protecting the informational assets *of the third party*. As stated 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) (the Williams Commission Report), which provided the foundation of this *Act*:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating

> to commercial matters generated by government itself. The fact that the commercial information derives from a non_governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind (pp. 312-315) [emphasis added].

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 (see, for instance, Order PO-1698, dealing with the provincial equivalent of section 10(1)).

The affected party submits that the information in question was "supplied" to the Town in confidence. However, he also refers to having *negotiated* the agreement in "in camera" meetings with the Town. The appellant has not addressed the specific issue of whether the information was "supplied" within the meaning of section 10(1), although it submits in general that terms of a lease negotiated with a municipality must be available to the public.

After considering the representations of the parties and reviewing the record at issue, I am satisfied that the information withheld from the contract between the Town and the affected party was not "supplied" by the affected party within the meaning of section 10(1) of the *Act*. There are many differences between the original proposal by the developer, as contained in Schedule C, and the final terms of the contract. The original proposal was the starting point from which the parties entered into a process of negotiation, resulting in the final terms. Further, some terms of the final contract, such as the provisions relating to environmental contamination, are not addressed in the original proposal at all.

It should be noted that some specific monetary figures agreed to between the Town and the affected party in the contract are the same as those proposed by the affected party originally. For instance, Schedule F-1 to the contract sets out the guidelines for determining the price the Town shall pay if it exercises a right to purchase the development. The guidelines include amounts to be paid, for instance, per boat slip, per square foot of floor space in constructed buildings, per square foot of parking lot improvements, and other aspects of the development. Some of the amounts are the same as that originally proposed by the affected party; some differ or are new. I find that the amounts agreed to in Schedule F-1 should be treated as a package, the whole of which was determined after negotiations between the affected party and the Town. Although some elements of the package may correspond to proposals by the affected party, it would be artificial to treat these separately in the absence of anything to suggest that they were negotiated entirely separately.

In Confidence

Since I have found that the information at issue was not "supplied" by the affected party, it is not necessary to decide whether there were expectations of confidentiality in respect to this information since both elements of part 2 of the test have to be met.

Part 3: Reasonable Expectation of Harm

Again, since I have found that the information at issue was not "supplied" by the affected party, the second part of the three-part test for exemption under section 10(1) has not been established, and it is not necessary to consider whether harm is likely to flow from disclosure of the information.

However, I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the "intimate details of our operation (costs and constraints) to our direct competition." There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the "informational assets" of the affected party and not of the Town. In these circumstances, the record is not exempt from the *Act*'s purpose of providing access to government information.

In conclusion, I find that the requirements for the application of section 10(1) have not been met and the information severed from the record does not qualify for exemption from disclosure under the *Act*.

ORDER:

1. I order the Town to disclose the record, with the exception of Schedule C.

2. Disclosure is to be made by sending the record, with the exception of Schedule C, to the appellant by March 5, 2001, but not before February 26, 2001.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Town to provide me with a copy of the record which is disclosed to the appellant pursuant to Provisions 1 and 2.

Original signed by: February 5, 2001
Sherry Liang
Adjudicator