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

FINAL ORDER MO-1590-F

Appeal MA-010249-1

Toronto District School Board

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NATURE OF THE APPEAL:

The Toronto District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the representative (the appellant) of a ratepayers' association. The request was for copies of various records relating to the lease of a school property by an identified tenant. The request specified the types of responsive records that may exist including a lease, offer to lease, memorandum of understanding, letter of agreement, Board Staff reports, Board calculations and analyses of value, appraisals, agreement in principle, minutes of Board meetings, Board resolutions, and minutes of the Facilities Committee meetings. Some of the meeting minutes and reports were further specified by date.

The Board located responsive records and granted access to the minutes of two public meetings of the Board dated August 30, 2000 and November 22, 2000, respectively. The Board further directed the appellant to its website in order to obtain copies of the agenda of more recent public Board meetings and indicated that the minutes of public Board meetings will be posted on the website when they become available.

The Board denied access to the remainder of the records, namely minutes of Board meetings held in private session and information pertaining to the lease of the school. In denying access the Board relied on the following sections of the *Act:*

- Section 6(1)(b) – closed meeting;
- Section 7 – advice or recommendations;
- Section 10 – third party information; and
- Section 11 – economic or other interests.

The appellant appealed the decision, in part, on the following grounds:

- The appellant attended at least one of the "closed" meetings of the Board thus preventing the Board from relying on section 6(1)(b);

- The appellant requested a copy of "any supporting appraisals" provided to the Board, which information would fall within the exception to section 7 in section 7(2)(c);

- Since the records pertain to the disposition of a "valuable public asset", section 10(1) is not available. Moreover, the Board has not confirmed that the provisions of section 10(2) have been adhered to;

- The Board will suffer no adverse effect from disclosure of the details of the transaction pursuant to section 11 since the value of the lease and its duration are already on the public record.

During mediation, the appellant acknowledged receipt of copies of meeting minutes from the two publicly held Board meetings referred to above. However, he expressed dissatisfaction with being referred to the Board's web site for a number of the responsive records. The Board agreed

to provide the appellant with hard copies of those responsive records found on the Board's web site.

Further mediation could not be effected and this appeal was moved into adjudication. I sought representations from the Board and the tenant (as a third party), initially. Both parties submitted representations in response. I subsequently sought representations from the appellant and provided him with a Notice of Inquiry and the non-confidential portions of the Board's representations. The appellant did not respond to my request for representations.

RECORDS:

The records at issue comprise seven documents consisting of:

- Minutes of the Committee of the Whole, dated August 30, 2000, November 22, 2000 and June 13, 2001 (Records 2, 6 and 12, respectively);
- Reports dated August 30, 2000 and November 22, 2000 (Records 3 and 7, respectively);
- An appraisal dated October 19, 2000 (Record 4); and
- An agreement to lease dated February 22, 2001 (Record 8).

DISCUSSION:

CLOSED MEETING

The Board submits that the exemption in section 6(1)(b) applies to all of the records at issue. Sections 6(1)(b) and 6(2)(b) provide:

> (1) A head may refuse to disclose a record,
>
> > (b) that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.
>
> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> > (b) in the case of a record under clause (1)(b), the subject-matter of the deliberations has been considered in a meeting open to the public;

In order to qualify for exemption under section 6(1)(b), the Board must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; and

2. that a statute authorizes the holding of this meeting in the absence of the public; and

3. that disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102, M-219 and MO-1248]

Requirements one and two – *in camera* meeting

The first and second parts of the test for exemption under section 6(1)(b) require the Board to establish that a meeting was held and that it was properly held *in camera* (Order M-102).

The Board submits:

> The [Board] was entitled to hold in-camera meetings to consider leasing the Humber Heights property. Section 207(1) of the *Education Act* allows the [Board] to hold an in-camera meeting of the [Board] when the Board is considering the acquisition or disposal of a school such as the Humber Heights property. Ontario Regulation 444/98 under the *Education Act* further specifies that both sales and leases of property are considered to be dispositions under the *Education Act*.

The Board indicates that *in camera* meetings took place on August 30, 2000, November 22, 2000 and June 13, 2000.

Having reviewed the records and the Board's representations, I am satisfied that *in camera* meetings were held on the dates specified by the Board and that they were properly held *in camera* pursuant to section 207(1) of the *Education Act* (see: Order MO-1558-I re: Ontario Regulation 444/98). Therefore, the first two parts of the section 6(1)(b) test have been met.

Requirement three – substance of deliberations

In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on the term "deliberations":

> In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions

> conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.

The former Assistant Commissioner expanded on his analysis of the interpretation of section 6(1)(b) in Order M-196 as follows:

> The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of the retirement agreement were appropriate and whether they should be endorsed.

The Board states that disclosure of the records at issue would reveal the actual substance of the deliberations of the *in camera* Board meetings. In this regard, the Board notes that the records are either the minutes of the *in camera* meetings in question, which summarize the Board's deliberations, or reports which were submitted to the Board and which formed the basis of its discussions.

Based on my review of the records, I am satisfied that disclosure of Records 2, 6 and 12 would reveal the actual substance of the deliberations of the *in camera* Board meetings since the minutes of these meetings reflect the discussions of the Board on the issues before it at these meetings. Moreover, I am satisfied that the discussions at these meetings focussed on the reports that were submitted to the Board (Records 3, 4 and 7) and that disclosure of these records would either reveal or permit the drawing of accurate inferences as to the substance of those discussions. Accordingly, I find that all of these records meet the third part of the test and thus qualify for exemption pursuant to section 6(1)(b).

With respect to Record 8, the Board does not indicate that this record was placed before, or considered by it at an *in camera* meeting. Nor do the records themselves support such a finding. Rather, the Board states that this record, which is a lease between the Board and the tenant:

> [I]s simply a reformulation of the business terms discussed and expressly adopted by the [Board] at their in-camera meeting of November 22, 2000. Disclosure of the lease would also reveal the substance of the deliberations of the [Board] on November 22, 2000 or at least permit the drawing of accurate inferences regarding those deliberations.

I do not agree. In my view, although certain portions of this record may reflect information that was placed before the Board committee, the majority of the record does not. Taken as a whole, the contents of the lease represent the ultimate decisions arising from the deliberations, but do not reveal the substance of those deliberations to the degree necessary to bring it within the ambit of section 6(1)(b). In the absence of evidence that the lease itself was presented to, and discussed at an *in camera* session of the Board, I find that the lease document is similar to the

bottom line of the results of the deliberations that the Board subsequently reported at the public meeting (which I will discuss further below). On this basis, I conclude that Record 8 does not qualify for exemption under section 6(1)(b).

Section 6(2)(b)

As I noted above, the appellant indicated in his letter of appeal that he had attended at least one of the *in camera* meetings of the Board. This raises the possible application of the exception to the section 6(1)(b) exemption in section 6(2)(b). With respect to whether the subject-matter of the deliberations has been considered in a meeting open to the public, the Board refers to its usual practice:

> The [Board] observed its usual practice that the Board would meet in-camera to discuss the reports submitted to the Board and to arrive at its decision. Once a decision had been reached, the Board would rise and report its decision in public session. That decision is reported in the Public Minutes of the Board …

The Board notes that the report of its decision in public is made without discussion and submits that by doing so, it does not waive the protection of section 6(1)(b).

The Board disputes the appellant's contention that he attended at an *in camera* meeting of the Board, stating that although members of this association may have attended at a meeting of the Board, it would have been a public meeting. The Board confirms that they would not have been permitted at the *in camera* meeting.

In the Notice of Inquiry that I sent to the appellant, I asked him to provide evidence of his attendance at *in camera* meetings of the Board. As I noted above, the appellant did not submit representations.

Therefore, based on the Board's submissions, and in the absence of representations from the appellant, I am satisfied that the subject matter considered at the *in camera* meetings has not been discussed at a meeting open to the public. Therefore, the section 6(2)(b) exception does not apply. Accordingly, Records 2, 3, 4, 6, 7 and 12 are exempt from disclosure pursuant to section 6(1)(b) of the *Act*.

ECONOMIC AND OTHER INTERESTS

The Board claims that sections 11(a), (c), (d) and/or (e) apply to records 2, 3, 4, 6, 7 and 8. Since I have already found that Records 2, 3, 4, 6 and 7 are exempt pursuant to section 6(1)(b), I will only consider the application of these provisions to record 8.

Sections 11(c) and (d)

I will begin with sections 11(c) and (d), which provide:

A head may refuse to disclose a record that contains,

> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

The Section 11 Exemption in General

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c), (d) and (g) all take into consideration the **consequences** which would result to an institution if a record was released. They may be contrasted with sections 11(a) and (e) which are concerned with the **type** of record, rather than the consequences of disclosure. [Order MO-1199-F]

In Order PO-1747, Senior Adjudicator David Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the [provincial *Freedom of Information and Protection of Privacy*] *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, 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.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

These findings apply equally to section 11(c) or (d) of the municipal *Act*, which both include the phrase "could reasonably be expected to". Accordingly, in order to establish the requirements of either of these exemptions, the Board must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" as described in those sections.

The Board notes that:

> The [Board], as a result of changes to the *Education Act*, has been required to enter the marketplace as a landlord. In so doing, the [Board] is entering into negotiations with sophisticated private sector players … and is in competition with other landlords in Toronto. The [Board] is now an institution which is

> required by the government to earn money in the marketplace through leasing or selling property.
>
> … In its role as landlord competing in that marketplace, the [Board] cannot and should not be required to effectively disclose its position halfway through the business process.

In Order PO-1894, Assistant Commissioner Tom Mitchinson came to the following conclusions regarding similar types of records:

> Having reviewed the records, I am satisfied that information which relates to the terms of the conditional agreement of purchase and sale, which has not yet closed, qualifies for exemption under section 18(1)(d) of the *Act* [the provincial *Act* equivalent of section 11(d)]. I am also satisfied that records containing information about the possible uses or value of the property also qualify for exemption under this section. I accept that until the purchase and sale of the property has been finalized, it is possible that the sale will not take place, and that the ORC may have to find a new purchaser for the property. If that were to occur, disclosure of the terms negotiated between the ORC and the current prospective purchaser could place the ORC in a disadvantageous position with future potential purchasers. Furthermore, disclosure of prospective uses and the value placed on the property by various parties could similarly be disadvantageous. Given that the ORC is charged with the responsibility for the proper administration of the land holdings of the Government of Ontario, I find that premature disclosure of this type of information could reasonably be expected to be injurious to the financial interests of the Government of Ontario.

In my view, these comments are similarly applicable to the circumstances in the current appeal. Accordingly, I find that Record 8 qualifies for exemption under section 11(d) of the *Act*.

EXERCISE OF DISCRETION UNDER SECTIONS 6(1)(B) AND 11(D)

The appellant has suggested that certain aspects of the Agreement have already been made public. This suggestion is confirmed by the tenant in its representations. Despite this, the vast majority of the information contained in the records is dissimilar from that which has been made public. In my view, the appellant has not provided sufficient evidence to satisfy me that the information in the records is in the public realm.

Based on the Board's submissions, taken as a whole, I am satisfied that the concerns expressed regarding premature disclosure of information relating to its economic interests in the matter to which the records relate reflect the considerations it entertained in the exercise of its discretion in favour of non-disclosure. I find that the Board's exercise of discretion in this regard has taken into account appropriate and relevant considerations and it should not be disturbed on appeal.

ORDER:

I uphold the Board's decision.

Original signed by: November 26, 2002
Laurel Cropley
Adjudicator