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

ORDER MO-1645-F

Appeal MA-020099-1

Toronto District School Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Toronto District School Board (the Board), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to certain records relating to a public school in Toronto and the anticipated lease of that school to another party, including:

> [a] copy of the **demographic analysis** of the surrounding community prepared by Facility Services of TDSB in relation to the closure of [a named public school] and the determination of the long-term requirements for student accommodation in the community as required by the **Administrative Procedures under G.05 of the Policy of TDSB** for Leasing of Surplus Properties. [emphasis in original]

The Board located records responsive to the request and provided access to some of them, but denied access to the demographic report prepared by a consultant, based on the application of the discretionary exemptions in sections 7 (advice or recommendations) and 11 (economic interests of an institution) of the *Act*, and the mandatory exemption in section 10 (third party information).

The appellant appealed from the decision of the Board. During the course of mediation through this office, certain issues were narrowed or clarified. The only record in dispute is the demographic analysis prepared for the Board by a consultant. The Board indicates that it is relying on sections 7(1), 10(1) and 11(a), (c), (d), (e), (f) and (g) with respect to this record.

I sent a Notice of Inquiry to the Board, initially, and to an affected party (the consultant), inviting them to submit representations on the facts and issues raised by this appeal. I received representations from both. The Board objected to the sharing of its representations with the appellant and, in Interim Order MO-1612-I, I ruled on the Board's request to withhold them.

I subsequently provided the appellant with portions of the Board's representations, and he has submitted representations in response.

CONCLUSION:

I find that sections 11(c) and (d) applies to exempt the record from disclosure. I reject the application of the section 7(1) exemption in the circumstances of this appeal, as well as the application of sections 10(1), 11(a), (e), (f) and (g).

RECORD:

The record is a 31-page document prepared by a consultant for the Board, entitled "First Draft Toronto District School Board Closures: Demographic Profiles and Projections", and dated February 23, 2000. It consists of text, graphs and tables analysing the potential for future public student enrolment in the neighbourhood of a number of school facilities. It also includes an Appendix describing the methodology used by the consultant.

DISCUSSION:

ADVICE OR RECOMMENDATIONS

Section 7(1) of the *Act* provides:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Section 7(2) provides for certain exceptions to the above, stating that despite subsection (1), an institution shall not refuse to disclose a record that contains, among other things, factual material, a statistical survey, or the results of field research.

The Board submits that the consultant was retained to provide the Board with advice regarding the projected future demographics of seven school areas and the length of leases which could be entered into. It asserts that the information in the records qualifies as "advice", in that it related to a suggested course of action, and was intended to assist the Board in developing a strategy for negotiating leases for the properties.

Addressing some of the exceptions to section 7(1) found in section 7(2), the Board submits that the advice of the consultant was based on its assessment of the facts contained in the early portion of the report, and that those facts are part and parcel of the advice given. The portion of the report providing a recommendation is inextricably linked with the earlier analysis relating to the demographic trends in the seven areas assessed. Further, the Board states that the report does not constitute a "statistical survey" in that it represents the results of expert analysis applied by the consultant to raw data published by Statistics Canada. Finally, the Board submits that the information in the report cannot be considered the results of field research.

The affected party, the consultant, also submits that it believes that release of the report could "inhibit the free flow of advice or recommendations" in the future. It states that it supplied the information to the Board in confidence.

The appellant submits that the Board's mission, to enable all students to reach high levels of achievement and to acquire the knowledge, skills and values they need to become responsible members of a democratic society, cannot be accomplished if it cannot provide optimum and sufficient school places in the community after closure of the public school in his neighbourhood. The appellant submits that the community ought to have the opportunity to review the demographic study, in order to assess whether it continues to be valid three years after its creation.

Analysis

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of the section 13(1) exemption in the provincial *Act* (the equivalent to section 7(1) in this *Act*). He

stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure (Orders 24, P-1363 and P-1690).

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)).

Assistant Commissioner Tom Mitchinson recently reviewed the meaning of the word "advice" for the purpose of section 13(1) in Order P0-2028. In that order, a provincial Ministry took the position that "advice" should be broadly defined to include "information, notification, cautions, or views where these relate to a government decision-making process". The Assistant Commissioner did not agree, and stated:

> … [the institution's position] flies in the face of a long line of jurisprudence from this office defining the term "advice and recommendations" that has been endorsed by the courts; conflicts with the purpose and legislative history of the section; is not supported by the ordinary meaning of the word; and is inconsistent with other case law.
>
> A great deal of information is frequently provided and shared in the context of various decision-making processes throughout government. The key to interpreting and applying the word "advice" in section 13(1) is to consider the specific circumstances and to determine what information reveals actual advice. It is only advice, not other kinds of information such as factual, background, analytical or evaluative material, which could reasonably be expected to inhibit the free flow of expertise and professional assistance within the deliberative process of government.

I agree with the above analysis and will apply it here.

During the course of responding to the appellant's request, the Board provided him with a copy of its Policy G.05, on the Leasing of Surplus Properties. In the section entitled "Administrative Procedures", the policy states that the Board's "Facility Services will undertake a demographic

analysis of the surrounding community in which the closed school is located and determine the long-term requirements for student accommodation in the community. This analysis will form the basis for establishing the term of the lease agreement." The report at issue in this appeal is the demographic analysis produced under this policy in relation to seven school sites declared surplus in 1999.

I have read the report and considered the representations of the Board. I am not satisfied that the report contains the "advice or recommendations" of the consultant. The report is exactly what it purports to be: a demographic analysis containing long-term projections for future public student enrolment in the seven neighbourhoods. Its genesis is in the Board's need, and obligation under its policies, to obtain demographic data enabling it to make an informed decision about the use of its surplus properties. The report contains a conclusion about the length of leases which could be entered into (on page 25), but this conclusion is not framed in language that characterizes the conclusion as either the advice or the recommendation of the consultant, but as a factual matter based on the demographic projections. In my view, the analysis and conclusions in the report are about matters of fact rather than about matters of policy and fall into the category of "other kinds of information such as factual, background, analytical or evaluative material" discussed in Order PO-2028, above.

If I am wrong, and the specific conclusion of the consultant about the length of leases which could be entered into constitutes "advice or recommendations", I would view all of the information in the record **but for** this conclusion as falling within the section 7(2)(b) exception of "factual material."

In addition to the conclusion about the length of leases, the Board submits that the consultant's discussion on long-term school enrolment also qualifies as "advice". I disagree. In my view, the consultant's analysis of demographic trends, including the discussion on long-term school enrolment, is a factual (though predictive) study, and falls within the "factual material" exception. The report is designed to and does provide the Board with information and not advice.

In conclusion, I find that section 7(1) does not apply to exempt the report from disclosure.

THIRD PARTY INFORMATION

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. This section, or its provincial equivalent, has been described as designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions" (see Order PO-1805).

Although 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 third parties which could be exploited by a competitor in the marketplace.

In applying section 10(1), prior orders have sought to strike a balance between the public policy in favour of public scrutiny of government activities, and third party economic interests. Prior 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]

In this case, the affected party, the consultant who prepared the report at issue, has provided representations. In these representations, it specifically states "it would not be harmed in any way if the report we prepared for the Toronto District School Board in February 2000 was to be released by the Board to any other party".

The consultant also states that it doesn't believe it is its role to decide whether or not the information it provided to its client, the Board, should be shared with other parties. As indicated above, it concurs with the Board's views on the application of section 7(1) of the *Act*.

The Board defers to the affected party's assessment of the issues under section 10(1).

The effect of the affected party's submissions is that part three of the three-part test set out above cannot be met. There is no evidence that disclosure of the record can reasonably be expected to result in one of the harms described in section 10(1). As all three parts of the test must be met in order for section 10(1) to exempt a record from disclosure, it is unnecessary for me to consider the first two parts of that test.

Accordingly, section 10(1) does not apply.

ECONOMIC AND OTHER INTERESTS

Introduction

Sections 11(a), (c), (d), (e), (f) and (g), applied by the Board in this case, read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (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;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result

> in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

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 the record, rather than the consequences of disclosure." [Order MO-1199-F]

Section 11(a)

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

> 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]

Type of information

None of the parties have made submissions on whether the information in the record is a trade secret, financial, commercial, scientific or technical information. On my review, the only categories of information into which this information may arguably fall are "scientific" and "technical" information.

In Order P-454, former Assistant Commissioner Irwin Glasberg defined the term "scientific information" as used in section 17(1)(a) of the provincial *Act* (third party information) as

> 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 hypothesis 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*.

In the same order, he also defined "technical information" as

> 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 am satisfied that these definitions are also applicable in considering the provisions of section 11(a) of the *Act*.

As I have indicated, the Board has not made submissions on whether the information in the records meets the definition of "scientific information". It describes the report as "a sophisticated analysis of demographic trends in particular regions in Toronto."

I will first consider whether, as a demographic analysis, the report contains "scientific information". A review of organizations and educational institutions that promote or teach demographic analysis suggests that demography is part of the social sciences. The *Concise Oxford Dictionary*, 8th ed., defines "demography" as

> the study of the statistics of births, deaths, disease, etc., as illustrating the conditions of life in communities.

I accept that demography can be considered as an "organized field of knowledge", engaged in by individuals specializing in demographic research. What appears to be distinctive about demography as a discipline is that it specializes in forecasting. Using models, demographers arrive at projections of demographic change that can be employed by private and public sector policy makers. Being primarily concerned with forecasting, demographers do not appear to engage in the "observation and testing of specific hypothesis or conclusions", as discussed in the definition of "scientific information" in Order P-454. This is confirmed by my review of the record at issue, which does not present the results of the observation and testing of any specific hypotheses or conclusions, but rather, the results (as projections) of the application of demographic models. I therefore conclude that the record at issue does not contain "scientific information" within the meaning of section 11(a).

I am supported in this conclusion by the analyses in Orders MO-1476 and PO-1732, which found that polling data and land remediation data, respectively, failed to qualify as "scientific information" under the *Act*.

I find as well that the information in the record does not fall within the generally recognized description of "technical information" set out in Order P-454. It is neither an applied science nor a mechanical art, and does not relate to the construction, operation or maintenance of any structure, process, equipment or other thing.

As I have concluded that the information in the record does not fall within one of the categories of information described in section 11(a), it is unnecessary to consider whether the information meets the other components of the test for exemption under this section.

Sections 11(c) and (d)

Prior orders have stated that section 11(c), or its provincial equivalent, serve the purpose of protecting the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions. [see Order P-1190]

Sections 11(c) and (d) both include the phrase "could reasonably be expected to." In Order PO-1747, Senior Adjudicator David Goodis provided the following guidance in interpreting the words "could reasonably be expected to":

> 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.)].

Senior Adjudicator Goodis' statement applies equally to sections 11(c) and (d) of the *Act*. Accordingly, in order to establish the requirements of these exemptions, the Board must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" as described in these sections.

The Board states, on page 5 of its submissions, that the report contains "the advice which was given to the TDSB regarding the number and length of the leases it could reasonably seek to negotiate." For confidentiality reasons, I am unable to refer to the next portion of the Board's submissions. In general, the Board states that it ought not to have to release information which discloses the strategy behind its bargaining position. Based on the Board's submissions on sections 11(c) and (d), and in particular, certain factual assertions relating to its specific activities at this time, the details of which I am unable to disclose, I accept that disclosure of the report could reasonably be expected to prejudice its economic interests and be injurious to its financial interests. I also note that although there may be circumstances where the differences between "economic interests" and "financial interests" may be meaningful, these differences are not relevant to the outcome in this appeal.

My finding here is consistent with the conclusion reached by Adjudicator Laurel Cropley in similar circumstances in Order MO-1590-F, as well as those in orders such as PO-1894 and PO-1887-I, concerning the sale of land by a provincial institution. Accordingly, and based on the facts contained on page 5 of the Board's submissions, I find that sections 11(c) and (d) apply to exempt the record from disclosure. These exemptions are discretionary, and I am further satisfied that the Board has exercised its discretion appropriately in the particular circumstances before it.

Although it is not necessary, I will also consider the other factors cited by the Board in its application of sections 11(c) and (d). The Board asserts that its actions are continually scrutinized in a highly political and emotional environment, and it is not unreasonable to expect that specific interest groups would use the report against the Board's interests. Again, I am unable to specify the exact nature of the interference the Board asserts might follow from disclosure of the report, as contained on page 5 of the Board's submissions. I do not find this submission persuasive in any event. Even accepting that the Board's actions are taken in a highly charged environment, and are subject to lobbying and challenge, I am not convinced that the report would in itself add significantly to the ability of any interest group to prejudice the Board in its efforts to carry out its economic strategies.

The Board also refers to two other harmful consequences that could be expected to result from disclosure of the report, that is, the unwillingness of private enterprise from entering into additional agreements, and the reluctance of consultants to enter into further retainers with the Board. Again, I am not persuaded by the Board's submissions here. I find the harm referred to either speculative or, in the case of the consultants, contradicted by the position taken by the consultant who prepared the very report at issue in this appeal.

Section 11(e)

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; and

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to any negotiations; and

3. the negotiations must be carried on currently, or will be carried on in the future; and

4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

In Order M-862, former Inquiry Officer Holly Big Canoe described the terms in section 11(e) as "referable to pre-determined courses of action or ways of proceeding". She distinguished between background information that may have formed the basis for positions taken during negotiations, and the positions themselves, and found that such background information is not exempt under section 11(e).

Similarly, I am not convinced that the record before me contains "positions, plans, procedures, criteria or instructions" intended to be applied to negotiations. The demographic analysis in the record may well have informed or provided the basis for the positions taken by the Board in lease negotiations. However, the record does not itself represent the "positions, plans, procedures, criteria or instructions" applied by the Board.

Section 11(f)

In order to qualify for exemption under section 11(f) of the *Act*, the Board must establish that the record satisfies each element of the following:

1. the record must contain a plan or plans, and

2. the plan or plans must relate to:

   (i) the management of personnel or

   (ii) the administration of an institution, and

3. the plan or plans must not yet have been put into operation or made public.

[Order P-229]

In Order P-348, former Commissioner Tom Wright made the following finding under the provincial equivalent to section 11(f) of the *Act*:

> The eighth edition of The Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". In my view, the record cannot properly be considered a "plan". It contains certain recommendations which, if adopted and implemented by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan. Therefore, in my view, the record does not qualify for exemption under either section 18(1)(f)...

I find that the record does not contain a plan relating to the management of personnel or the administration of the Board, and does not qualify for exemption under section 11(f). The record is in the nature of a research study, providing background information to the Board. It does not set out or purport to set out a plan for the Board to follow. Accordingly, section 11(f) does not apply to exempt the record from disclosure.

Section 11(g)

In order to qualify for exemption under subsection 11(g) of the *Act*, an institution must establish that a record:

1. contains information including proposed plans, policies or projects; and

2. that disclosure of the information could reasonably be expected to result in:

    i) premature disclosure of a pending policy decision, or

    ii) undue financial benefit or loss to a person.

Each element of this two-part test must be satisfied. [see Order P-229]

My finding under section 11(f) is applicable here; the record does not contain a proposed plan, policy or project. Accordingly, this exemption does not apply.

In conclusion, the record is exempt under sections 11(c) and (d) of the *Act*; none of the other exemptions claimed by the Board apply.

ORDER:

I uphold the decision of the Board to withhold the record under sections 11(c) and (d) of the *Act*.

Original Signed By: May 7, 2003
Sherry Liang
Adjudicator