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

ORDER MO-1746

Appeal MA-030101-2

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*) for a copy of an agreement entered into between one of its predecessor Boards of Education and a named company (the affected party). The Board initially determined that no responsive records exist. The requester, now the appellant, appealed this decision and Appeal Number MA-030101-1 was opened by this office. During the mediation stage of that appeal, the Board located a responsive record (Record 1) and issued a decision letter to the appellant. In that decision, the Board denied access to the record, claiming the application of various exemptions in the *Act*.

With the issuance of a decision letter by the Board, this office closed its file on Appeal Number MA-030101-1. The appellant appealed the Board's decision to deny access to the record and Appeal Number MA-030101-2 was opened.

During the mediation stage of the appeal, the Board located two additional records (Records 2 and 3) and indicated that these documents, as well as the record initially identified, were exempt from disclosure under the following exemptions contained in the *Act*:

- Closed meeting – section 6(1)(b) – Record 1 only;
- Third party information – sections 10(1)(a), (b) and (c) – Records 1, 2 and 3; and
- Economic and other interests – sections 11(a), (c), (d) and (g) – Records 1, 2 and 3

As further mediation was not successful, the matter was moved to the inquiry stage of the appeals process. I decided to seek the representations of the Board and the affected party initially by sending them a Notice of Inquiry setting out the facts and issues in the appeal. The Board bears the onus of establishing the application of the exemptions in sections 6(1)(b) and 11(a), (c), (d) and (g) while the Board and/or the affected party must demonstrate the application of sections 10(1)(a), (b) and (c).

The Board provided representations in response to the Notice of Inquiry, the non-confidential portions of which were shared with the appellant, along with a copy of the Notice of Inquiry. The affected party did not respond to the Notice. The appellant also submitted representations which I then shared with the Board. The Board submitted additional representations by way of reply.

RECORDS:

The three records at issue consist of:

- Record 1 – Offer to Purchase between the affected party and the Board;
- Record 2 – Letter of Agreement from the affected party to the Board; and
- Record 3 – Sales Centre Lease between the Board and the affected party.

DISCUSSION:

CLOSED MEETING

The Board takes the position that Record 1 is exempt from disclosure under the discretionary exemption in section 6(1)(b), which reads:

> A head may refuse to disclose a record,
>
> > 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.

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]

The Board submits that an *in camera* meeting took place on May 23, 2001 in accordance with section 207(1) of the *Education Act*, which allows school boards to hold meetings in the absence of the public when they are considering matters relating to the acquisition or disposal of real property. It goes on to state that "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*." Based on my review of the representations of the Board and the minutes of the *in camera* meeting, I am satisfied that a meeting of the Board took place and that the *Education Act* and its Regulations authorize the holding of meetings in the absence of the public.

The Board indicates that Record 1 was considered at the *in camera* meeting of the Committee of the Whole and that this discussion is reflected in the private minutes of that *in camera* session. The Board relies on the decision in Order MO-1590-F in which Adjudicator Laurel Cropley applied the section 6(1)(b) exemption to the minutes of an *in camera* Board meeting and to copies of the reports considered at that meeting. The Board acknowledges that Adjudicator Cropley found that a lease agreement was not exempt from disclosure under section 6(1)(b) as it was "not placed before the Board nor was it considered by the Board at an *in camera* meeting." The Board distinguishes the present situation, however, by arguing that Record 1 was, in fact, "placed before the Board *in camera* and considered by them".

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 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.

I have reviewed the contents of Record 1 and find that its disclosure 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. The theme or subject of the discussions at the *in camera* meeting revolved around the contents of Record 1. Accordingly, I am satisfied that the third part of the test under section 6(1)(b) has been met and Record 1 is properly exempt from disclosure under that section.

THIRD PARTY INFORMATION

For section 10(1) to apply, the institution and/or 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 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

With respect to the application of section 10(1) to Records 2 and 3, the Board simply points out that section 10(1) is a mandatory exemption and that the records relate to certain "commercial dealings between the TDSB and a third party". The Board also indicates that it "defers" to the assessment of the third party on the applicability of section 10(1) to the records. I did not, however, receive any representations from the affected party.

I have reviewed the contents of Records 2 and 3 and while they may contain commercial information for the purposes of section 10(1), I have not been provided with any evidence to substantiate a finding that this information was either supplied in confidence by the affected party to the Board or that its disclosure could reasonably be expected to give rise to one of the harms enunciated in section 10(1).

As a result, I find that section 10(1) does not apply to Records 2 and 3.

ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

The Board submits that Records 2 and 3 are exempt from disclosure under the discretionary exemptions in sections 11(a), (c), (d) and (g), which 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;
>
> (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;

The Board states that:

> The TDSB as a result of changes to the *Education Act* has been required to enter the marketplace as both a landlord and a property owner. In doing so, the TDSB is required to enter into negotiations with sophisticated private sector players and is in competition with other private sector landlords and property owners.

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]

In support of its argument that Records 2 and 3 are exempt from disclosure under section 11(a), the Board submits that:

> These records contain commercial information which belongs to the TDSB. For the reasons set out above, the information would have commercial value to a future purchaser if OMB [the Ontario Municipal Board] approval [of the sale of the lands] is not granted.

In my view, both Records 2 and 3 contain information which qualifies as "commercial" information for the purposes of section 11(a). The term "commercial information" has been defined in previous orders relating to similar wording in section 10(1) as follows:

> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

Records 2 and 3 include information relating directly to the selling and leasing of property by the Board. I find that the first part of the test under section 11(a) has been satisfied.

With respect to the second part of the test in section 11(a), in Order PO-1763 Senior Adjudicator David Goodis, after reviewing the reasoning of Assistant Commissioner Tom Mitchinson in Order P-1114, states in reference to the phrase "belongs to":

> Similarly, in 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 merely acts 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 to 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. International Corona Resources Ltd.* (1989), 61 D.L.R. 4th 14 (S.C.C.), and the cases discussed therein].

[Order PO-1736, upheld on judicial review, *Ontario Lottery and Gaming Corporation* v. *Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)]

In a recent decision, Order PO-2226, interpreting section 18(1)(a) of the provincial *Act*, which is the equivalent provision to section 11(a), Assistant Commissioner Mitchinson made the following comments respecting the correct interpretation to be placed on the words "belongs to":

> Applying this reasoning [as outlined above] to the portions of Record 3 that remain at issue here, I find that Sections 3 and 7 of the Put Agreement, or the agreement as a whole for that matter, do not "belong to" the Ministry. The Ministry does not have a proprietary interest in the Put Agreement that requires its protection from misappropriation by another party.

Following these principles with respect to the commercial information in Records 2 and 3, I find that the Board does not have a 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. As such, I find that the information does not "belong to" the Board in the sense contemplated by section 11(a) and this exemption cannot apply to Records 2 and 3.

Sections 11(c) and (d)

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c) and (d) are harms-based exemption claims. 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. [Orders MO-1199-F and MO-1590-F]

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

> To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

These findings apply equally to sections 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 harm" as described in those sections.

The Board submits that:

> Sections 11(c) and (d) serve the purpose of protecting the ability of institutions to earn money in the marketplace. See Order MO-1645-F.
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> In Order PO-1894 Assistant Commissioner Tom Mitchinson considered section 11 [in fact section 18(1)(c) of the provincial *Act*] and accepted 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.
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> In Order MO-1590-F Adjudicator Cropley found that an agreement to lease at issue in that appeal was properly withheld by the TDSB pursuant to section 11(d) because the agreement to lease remained conditional.

The Board goes on to indicate that the sale and lease agreements under consideration in this appeal, Records 2 and 3, may also remain conditional and that harm to the Board's financial interests may result from their disclosure.

The appellant points out that the Board has received a favourable decision from the OMB with respect to its proposed site plan for the subject property and she has provided me with a copy of the OMB decision dated October 30, 2003.

In its reply representations, the Board notes that notwithstanding the OMB's decision, the sale of the subject property remains conditional until such time as the OMB issues its final order and the zoning by-law contemplated by the agreement is in force. It notes that the zoning by-law which would permit the sale to proceed has yet to be drafted, the Official Plan has yet to be amended and that there are other "small matters to be worked out." As such, the Board submits that the sale of the property remains conditional pending the completion of these additional matters.

In Order MO-1590-F, Adjudicator Cropley relied on the reasoning in Order PO-1894 to find that the Board had satisfied the requirements of section 11(d) with respect to an "agreement to lease". She found that:

> 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*.

Based on my review of the contents of Records 2 and 3, I find that because the necessary pre-conditions for the sale and lease of the subject property have not yet been satisfied, they remain conditional. Accordingly, following the reasoning expressed in Orders PO-1894 and MO-1590-F, I find that the disclosure of the contents of Records 2 and 3 could reasonably be expected to place the Board in a disadvantageous position with respect to a potential future purchaser. I find, therefore, that the disclosure of Records 2 and 3 could reasonably be expected to be injurious to the financial interests of the Board and these records are exempt from disclosure under section 11(d).

Because of the manner in which I have addressed the application of section 11(d) to Records 2 and 3, it is unnecessary for me to consider whether these records also qualify for exemption under section 11(g).

ORDER:

I uphold the Board's decision to deny access to the records.

Original signed by: January 30, 2004
Donald Hale
Adjudicator