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

RECONSIDERATION ORDER MO-2060-R

Appeal MA-040375-1

Toronto Catholic District School Board

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NATURE OF THE APPEAL:

The Toronto Catholic District School Board (the Catholic Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a lease between the Catholic Board and the Toronto District School Board (the TDSB) for the use of a school building.

The Catholic Board notified the TDSB of the request, and the TDSB objected to disclosure.

The Catholic Board denied access to the record on the basis of the exemptions at sections 6(1)(b) (closed meeting), sections 11(c) and (d) (economic interests) and section 10(1)(a) (third party commercial information) of the *Act*.

The requester (now the appellant) appealed the decision.

I commenced an inquiry into the appeal by sending a notice of inquiry setting out the issues to be decided to the Catholic Board (as the institution) and the TDSB (as an affected party). I received representations from both school boards.

In its representations, TDSB submitted that it should be permitted to make submissions on all three of the exemptions at issue, since it too is an institution under the *Act*, and is therefore not a "true" affected party. The TDSB stated:

> [Our] ability to preserve the confidential nature of [our] own information ought to be no different here than if the request had been made directly to [us].

The TDSB's representations did, in fact, address all three of the exemptions at issue.

I decided it was not necessary to seek representations from the appellant.

In my Order MO-1935, I ruled that the TDSB was not entitled to make submissions on the application of the exemptions at section 6 and 11 of the *Act*. I stated:

> . . . [The TDSB] is simply an affected party, and is entitled to be notified and given the opportunity to make submissions only on the application of the mandatory exemptions in the *Act*.
>
> Accordingly, I will accept the representations of the [TDSB] with respect to the application of the mandatory exemption in section 10(1)(a), which is intended to protect the informational assets of third parties. I will not, however, treat the [TDSB] as if it were the institution that received the request from the appellant and will not [consider] its submissions on the application of the discretionary exemptions to the record.

After considering the representations of the Catholic Board on all three exemptions, and the representations of the [TDSB] on the section 10 exemption, I found that none of the exemptions

applied. Accordingly, by Order MO-1935 (the order), I ordered the Catholic Board to disclose the record to the appellant.

The TDSB then commenced an application for judicial review with respect to the order, and I stayed the order pending the outcome of the application.

In its application, the TDSB states (among other things) that I erred in finding that:

- the TDSB is not an "institution" as defined in section 2(l) of the *Act* for the purpose of "opposing the request for information";
- the TDSB is not an interested party and, therefore, could not rely on the discretionary exemptions in sections 6(1)(b) and 11(c) and (d)

Having reviewed the TDSB's application, I have decided to reconsider my decision on my own initiative for the reasons set out below.

GROUNDS FOR RECONSIDERATION

This office's reconsideration procedures are set out in section 18 of the *Code of Procedure*. In particular, section 18.01 states:

> The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.

The arguments raised in the TDSB's application have persuaded me that I erred in not considering the TDSB's representations on sections 6(1)(b) and 11(c) and (d) of the *Act*. This error constitutes a fundamental defect in the adjudication process.

The request was made to the Catholic Board, and the Catholic Board made an access decision. The appellant appealed the Catholic Board's decision to this office. Therefore, from a procedural perspective, the Catholic Board is the sole "institution" as referred to in the request and appeal process sections of the *Act* [see sections 17-23, 39-44]. Accordingly, I did not err in maintaining that the Catholic Board is "the institution" for process purposes, and that the TDSB is an affected party.

However, in the unusual circumstances of this case, the TDSB, as an affected party, is entitled to provide submissions on the application of sections 6(1)(b), 11(c) and 11(d). Given that the TDSB, like the Catholic Board, is both a "board" and an "institution" under the *Act*, the wording

of these exemptions gives rise to an interest that differs somewhat from the interests usually advanced by affected parties.

Section 6(1)(b) applies to a record that reveals the substance of deliberations of a meeting of "a council, board, commission or other body" if a statute authorizes the holding of that meeting in the absence of the public. Clearly, the TDSB is a "board" for the purpose of section 6(1)(b) despite the fact that it is not the institution which received the request initially.

Similarly, the TDSB qualifies as "an institution" for the purposes of section 11(c) and (d), despite the fact that it was not the institution that received the request.

Since the record at issue is a lease between two institutions, this request could easily have been made to the TDSB. In these circumstances, it is reasonable to approach the issues in this case as if the request could have been made to either institution, and consider the section 6 and 11 exemptions from the point of view of both institutions.

Accordingly, I will consider the representations of the TDSB on the application of these exemptions from its perspective, and make a determination as to whether the record is, in fact, exempt from disclosure.

CLOSED MEETING

General principles

Section 6(l)(b) of the *Act* 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.

For this exemption to apply, the TDSB must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Under part 3 of the test

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

TDSB's representations

The TDSB submits that it was formed as a result of the amalgamation of several predecessor boards of education. One of those boards, the Etobicoke Board of Education, entered into the original lease with the Catholic Board's predecessor, the Metropolitan Separate School Board, in 1983. The record at issue represents a subsequent lease agreement which remains in effect for the subject property that was entered into in 1988.

The TDSB indicates that it is unable to locate the minutes of the *in camera* session of the Etobicoke Board meeting at which the lease was discussed. However, the TDSB has provided me with an affidavit from the former controller of planning and operational services for the Etobicoke Board.

The former controller states that, at the pertinent time, he was involved directly in school property matters, including the leasing of school properties. The former controller states that, at the time the lease was entered into in 1988, the usual practice of the Etobicoke Board was to consider proposed leases in an *in camera* meeting of its property and finance committee, and to prepare a report of the decisions reached at the *in camera* session "summarizing the terms of the proposed lease." The former controller adds:

> On the 3rd meeting of the month, the Etobicoke Board would meet in the presence of the public and confirm the minutes of the private meetings.
>
> I believe that our usual practice was followed with respect to the leasing of [the subject property].

The TDSB further submits that section 51 of the *Education Act*, R.S.O. 1982 authorized the holding of a private meeting of the Etobicoke Board as the lease of a school property involves "the acquisition or disposal of a school site", as required by that section.

The TDSB also submits that, based on the information provided by the former controller, the disclosure of the record "would reveal the substance of the deliberations of the private portion of the Board's Committee meeting" as "the text of the proposed lease itself would be before the Board at the Property and Finance [Committee] in camera meeting." It further submits that

because it was the policy of the Etobicoke Board "to confirm in public the minutes of the private meetings on the 3rd public meeting of every month", no confidential information would be contained in the public minutes and the confidentiality of this kind of information would be protected.

The TDSB relies on my decision in Order MO-1746 in which I found that section 6(l)(b) applied to an offer to purchase which was "placed before" and "considered by" the TDSB at one of its *in camera* meetings. It argues that it has provided evidence to demonstrate that the specific lease agreement in question was put before an *in camera* session of a committee of the Etobicoke Board for its consideration, along with "A report [that] would be prepared by Board staff which would *summarize the terms of the proposed lease*." [my emphasis]

Findings

In Order MO-1590-F, Adjudicator Laurel Cropley considered the application of section 6(1)(b) to an agreement to lease entered into between the TDSB and a named company and found that, in the circumstances of that appeal:

> . . . [The TDSB] 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 [TDSB] states that this record, which is a lease between the [TDSB] and the tenant:
>
> > [I]s simply a reformulation of the business terms discussed and expressly adopted by the [TDSB] at their *in-camera* meeting of November 22, 2000. Disclosure of the lease would also reveal the substance of the deliberations of the [TDSB] 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 [TDSB] 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(l)(b). In the absence of evidence that the lease itself was presented to, and discussed at an *in camera* session of the [TDSB], I find that the lease document is similar to the bottom line of the results of the deliberations that the [TDSB] subsequently reported at the public meeting (which I will discuss further below). On this basis, I conclude that [the Agreement to Lease] does not qualify for exemption under section 6(1)(b).

The TDSB has provided only generalized evidence of the Etobicoke Board's practice at the relevant time. However, I have not been provided with specific evidence, such as meeting minutes, to indicate, on a balance of probabilities, that the Etobicoke board did in fact discuss this lease at an *in camera* session.

Therefore, I am not persuaded that disclosing the lease would reveal the substance of the deliberations of the Board in this case. Accordingly, I find that section 6(1)(b) does not apply to this record.

ECONOMIC AND OTHER INTERESTS

General principles

Sections 11 (c) and (d) state:

> A head may refuse to disclose a record that contains,
>
> (c) information where the 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 purpose of section 11 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)].

The purpose of section 11(c) in particular is to protect 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 [Order P-1190].

TDSB's representations

The TDSB submits that it "has been required to become a landlord and enter into the marketplace to compete with other private sector landlords. Here the [TDSB] has entered into a lease with the [Catholic Board], on specific terms, which have always been kept confidential."

The lease agreement provides for the terms of the lease, its possible renewal and the formula for calculating the applicable rent. The TDSB points out that the Catholic Board remains in possession of the school and that the lease agreement remains in force.

The TDSB argues that if its competitors gained access to the information contained in the record, they would be able to take unfair advantage of this information. The TDSB also refers to two types of harms that could result from the disclosure of the terms of the lease agreement which it has asked that I keep confidential. Essentially, these harms relate to what the TDSB sees as potential economic disadvantages that may follow from the disclosure of the record in its relations with its existing and prospective tenants.

The TDSB also relies on a decision of former Assistant Commissioner Tom Mitchinson in Order PO-1894 in which he discussed the application of sections 11(c) and (d) to the contents of an agreement of purchase and sale prior to the completion of the transaction. In that decision, he found that until such time as the sale takes place, it may not occur, resulting in the need to find a new purchaser. That new purchaser would then have the benefit of seeing the terms upon which the vendor was prepared to sell the property, putting the vendor in a disadvantageous position on any future sale. The TDSB argues that in the case of a lease agreement such as that reflected in the record, the same principles apply should it find itself in a position where it would need to find a new tenant for the school that is the subject of the lease.

Findings

I have reviewed the submissions of the TDSB, including the confidential representations I referred to above. Because significant portions of these representations are confidential, it is difficult for me to provide highly detailed reasons.

However, I find that the disclosure of the record could not "reasonably be expected to" lead to the results specified in either sections 11(c) or (d). Specifically, I find that the TDSB has failed to provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". The evidence tendered by the TDSB respecting harm is not persuasive and is too speculative to trigger the application of these exemptions. The possibility of the competitive, financial or economic harms coming to pass is simply too remote based on the evidence before me.

Specifically, the TDSB has failed to demonstrate how disclosure of the terms of a lease agreement that is now 18 years old could reasonably be expected to prejudice in any real way its economic or competitive interests, as is required by section 11(c). It is difficult to imagine how information as outdated as this could be of any current use to a competitor. Similarly, I find that the TDSB has not provided the kind of detailed and convincing evidence required to demonstrate injury to its financial interests, as is required under section 11(d).

Accordingly, neither section 11(c) or section 11(d) applies.

Because I have found that none of sections 6(l)(b), 11(c) or (d) apply, I will maintain my ultimate decision in Order MO-1935 and order the Catholic Board to disclose the record to the appellant.

Also, because of the existing judicial review application brought by the TDSB, I will provide a time period within which the Catholic Board may not disclose the record, to permit the TDSB to apply to me for a stay of this order should it decide to do so.

ORDER

1. I order the Catholic Board to disclose the record to the appellant no later than **July 27, 2006**, but not before **July 21, 2006**.

2. To verify compliance with provision 1, I order the Catholic Board to provide me with a copy of the material disclosed to the appellant.

Original signed by: June 22, 2006
Donald Hale
Adjudicator