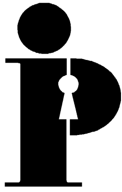

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2217

Appeal MA06-410

City of Pickering

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Pickering (the City) received a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> [T]he memo/letter relating to [a named business's lease with a specified shopping Plaza] that was referred to by [a named] Councillor at the September 11th, 2006 Pickering Council meeting, with regard to the circumstances/considerations associated with [the named business] leaving the [Plaza].

The City identified a two-page Lease Acknowledgement (the Lease) as responsive to the request and denied access to it in a letter dated October 25, 2006. The decision letter did not, however, specifically claim the application of an exemption under the *Act*. The letter stated simply that "this information cannot be released, as it is confidential third party information." The requester, now the appellant, appealed the City's decision to this office.

This office appointed a mediator to try to resolve the issues. During mediation, the City confirmed that the exemption it is relying on to deny access to the Lease is section 10(1)(c) (third party information) of the *Act*.

In addition, the appellant confirmed that the group of Plaza tenants he represents are only interested in obtaining access to the part of the Lease relating to the renewal of the named business's lease in the Plaza. Accordingly, there are only two terms of the Lease that remain at issue and these appear under Item 1. The other terms of the Lease were removed from the scope of this appeal by the appellant.

The mediator contacted the three signatories to the Lease (the affected parties) - the Purchaser, the Landlord and the Tenant - to determine if their consent could be obtained to the release of the information, pursuant to section 10(2) of the *Act*. The Tenant's representative submitted the consent form containing the following handwritten notation: "If the Landlord … consents to disclosure of the Lease acknowledgement, then we have no objection to the release of the renewal information only". However, consent could not be obtained from the other two affected parties.

With no further mediation possible, this appeal was transferred to the adjudication stage of the appeals process where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry outlining the facts and issues to the City and to the three affected parties, initially, seeking representations on the possible application of section 10(1) to the Lease. The Purchaser subsequently contacted this office to request that the inquiry documentation be sent instead to his legal representative and this was done.

In response to the Notice of Inquiry, I received a brief statement from the Tenant, reiterating the conditional consent provided at mediation, but adding the proviso that consent must be obtained from both of the other affected parties, not just the Landlord. Neither the Landlord nor the Purchaser submitted representations. When contacted by staff from this office, the City

indicated that it had nothing further to add to the position it had taken during mediation. The City subsequently sent a letter confirming that no representations would be submitted.

In keeping with the appellant's confirmation as to the scope of the appeal during mediation, this order will only address the application of the mandatory exemption in section 10(1) to the portions of the record relating to lease renewal terms. It should be noted, however, that although the phrases "Lease", "record" and "information at issue" are used interchangeably throughout the order, this should not be construed as expanding the scope of the appeal to include the entire document.

RECORD:

The information at issue is contained in two lines of the two-page "Lease Acknowledgement", dated July 28, 2005.

DISCUSSION:

THIRD PARTY INFORMATION

The City has taken the position in this appeal that it cannot disclose the Lease to the appellant because it contains confidential third party information that is protected by section 10(1)(c) of the *Act*.

Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that one of the specified exemptions in the *Act* applies rests with the institution. In the case of a record withheld pursuant to the third party information exemption, that burden of proof is shared by the third parties resisting disclosure.

In this appeal, none of the parties have submitted representations in support of the application of the exemption. However, because section 10(1) is a mandatory exemption, I must still consider whether it applies to the information at issue.

Section 10(1)(c) states:

> 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,
>
> > result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. This

exemption also 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.

One of the central purposes of the *Act* is to shed light on the operations of government, but section 10(1) serves to limit disclosure of information which, although it may be in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the City or 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.

Failure to establish the requirements of any one part of this test renders the claim for exemption under section 10(1) invalid.

Part 1: type of information

The various types of information listed in section 10(1) have been discussed in prior orders of this office. Although none of the parties have provided representations on the exemption, the Lease itself also serves as evidence which I am obliged to consider. In my view, the only listed type of information that appears to be relevant in the circumstances is commercial information. This term has been defined as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

I adopt this definition for the purposes of this appeal.

Based on my review of the record, I find that the information contained in the Lease reflects a commercial relationship between the affected parties, and falls within the scope of "commercial"

information as the term is defined in section 10(1) of the *Act* and in previous orders. As such, the first part of the test has been satisfied.

Part 2: Supplied in Confidence

The second part of the three-part test encompasses two components: it must not only be shown that the information was "supplied" to the City, but also that the information was supplied "in confidence", either implicitly or explicitly.

Supplied

The purpose of the requirement that it be shown that the information was "supplied" to the City reflects the value placed on protecting the informational assets of the third party. 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 the *Act*, this purpose was expressed in the following manner:

> . . . [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* signalling 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 that type have been the subject of many past orders of this office in which it has generally been held 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 [Orders PO-2435, PO-2371, and MO-1706].

The circumstances of the present appeal are unique. The Lease was not the product of negotiations between the City and the affected parties. It is, on the face of it, a document signed only by the three affected parties: the Purchaser, the Landlord and the Tenant. It reflects their agreement on the terms of a pre-existing lease arrangement and was provided to the City by one of its municipal officials, a councillor, who appears to have no direct involvement in the leasing

arrangement. Furthermore, there is no evidence before me indicating whether or not the affected parties even knew that the Lease was being provided to the City. Indeed, there is some uncertainty about the circumstances surrounding the Lease coming into the City's possession.

However, there is no dispute that the record originated with the affected parties, who are all non-governmental sources. In my view, even if the Lease did not come into the City's possession directly from one of the affected parties, the spirit of the exemption as articulated in the Williams Commission Report, set out above, leads me to the finding that the record was "supplied" to the City within the meaning of section 10(1).

In Confidence

In order to satisfy the "in confidence" component of part 2, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [Order PO-2043]

In this appeal, the fact that none of the parties submitted representations makes it difficult to make a determination regarding any expectation of confidentiality that may have been held by one or all of the parties. Again, I must turn to the record itself for assistance.

Upon review of the record, there are no clauses addressing its confidentiality. There is a handwritten notation on it that states: "It was submitted in confidence per [named councillor]." I have not been provided with any additional information about that notation, for example: who wrote it; or when it was written (i.e. before or after the access request). However, the municipal councillor who provided the Lease to the City was seemingly not in a position to exert control over the record. Rather, its provision to the City appears to have been incidental to the municipal councillor's official business. I have also taken into consideration that the record was not otherwise available as a publicly-available document, as evidenced by the fact of the access request itself. Considered together, these factors, particularly the handwritten notation on the

Lease, are persuasive. Accordingly, I find that there existed a reasonably-held expectation of confidentiality at the time the Lease was provided to the City.

I have found that the record was "supplied in confidence" to the City for the purposes of the second part of the section 10(1) test, and I must now consider the third part, which is whether there exists a reasonable expectation of harm in the event the information at issue is disclosed.

Part 3: Reasonable Expectation of Harm

Under part 3 of the section 10(1) test, the *Act* will not operate to shield the affected parties' commercial information from disclosure unless it is clear that the disclosure could reasonably be expected to result in harm of the kind described in section 10(1)(c), that is, "undue loss or gain to any person, group, committee or financial institution or agency".

Past orders of this office have established that to meet this part of the test, the City and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm has been held to not be sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. The failure of a party resisting disclosure to provide detailed and convincing evidence, or any evidence at all as in this appeal, will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

As previously noted, although the City and the three affected parties were invited to provide submissions in support of the application of the section 10(1) exemption, none chose to do so. In other words, the parties resisting disclosure have failed to demonstrate a reasonable expectation of harm with disclosure.

One of the affected parties, the Tenant, provided consent conditional upon the same being provided by the Landlord and the Purchaser. In my view, this action is open to interpretation. Specifically, it is open for me to infer from this conditional consent, taken together with the decision not to submit representations in this appeal, that the Tenant is not convinced that harm will result from the disclosure of the Lease renewal terms.

Quite apart from there being no "detailed and convincing" evidence from the City or affected parties, there does not appear to be anything contained in the specific terms of the Lease that remain at issue, or in the overall circumstances of this appeal, to substantiate the claim that disclosure could result in loss or gain to "any person, group, committee or financial institution or agency". The shortfall in the evidence is particularly pronounced when the loss or gain is measured against the requisite qualifier that it be *undue*, as required by paragraph (c).

Based on the foregoing reasons, I find that the parties bearing the onus of doing so have failed to establish a reasonable expectation of harm, nor can it be inferred in the circumstances. Accordingly, I find that part 3 of the test for exemption under section 10(1) has not been met.

In conclusion, as all three of the requirements for the application of section 10(1) have not been met, I find that the information at issue in the Lease does not qualify for exemption under section 10(1) of the *Act*. There being no other exemptions claimed and no mandatory exemptions that apply, I will order the lease renewal information in the record disclosed to the appellant.

ORDER:

1. I order the City to disclose the first two "particulars" of the Lease Acknowledgement, under Item 1, to the appellant by **September 28, 2007**, but not earlier than **September 24, 2007**. For greater certainty, I have marked the portions of the record to be disclosed to the appellant in green highlighter on the copy sent to the City with this order.

2. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original Signed by: August 22, 2007
Daphne Loukidelis
Adjudicator