Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2995

Appeal MA13-116

City of Toronto

January 14, 2014

Summary: The City of Toronto received a request for access to the undisclosed portions of a particular agreement entered into between the city, Metrolinx and the TTC, along with a draft version of the same agreement. The city denied access to the records under the mandatory exemption in section 9(1)(b) (relation with other governments) and the discretionary exemption in section 12 (solicitor-client privilege). In this order, the adjudicator upholds the city's decision to deny access to both the undisclosed portions of the agreement and the draft agreement on the basis that they are exempt under section 9(1)(b), having been received in confidence from an agency of the Government of Ontario.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 9(1)(b).

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for five records relating to several agreements and assessment studies relating to mass transit projects under consideration by the city. At the request stage, the city had discussions with the requester, noting that four of the five records could be found on the city's website, although one, the Master Agreement, was a redacted version.

[2] Accordingly, the requester revised his request to include the one record not found on the website, the draft version of the Metrolinx-City of Toronto-Toronto Transit Commission Master Agreement for Light Rail Transit Projects, and an **unredacted** version of the final Metrolinx-City of Toronto-Toronto Transit Commission Master Agreement for Light Rail Transit Projects.

[3] The city issued a decision denying access to the draft agreement and the redacted portions of the final agreement, claiming the application of the exemptions in sections 6(1)(b) (closed meeting), 9(1)(b) (relations with other governments) and 12 (solicitor-client privilege) of the *Act*.

[4] The appellant appealed this decision. Mediation was not possible and the file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by seeking the representations of the parties who are resisting the disclosure of the records, the city, Metrolinx and the Toronto Transit Commission (the TTC). I received representations from all three parties. In its representations, the city indicated that it was no longer relying on the discretionary exemption in section 6(1)(b). As a result, this exemption is not at issue in this appeal.

[5] I then provided the appellant with complete copies of the representations of the TTC and Metrolinx, along with those of the city with several brief severances of confidential information. The appellant also submitted representations, which were shared in turn with the TTC, Metrolinx and the city. The city and Metrolinx provided me with additional representations by way of reply. Following receipt of the reply representations of the city and Metrolinx, I wrote to these parties posing several questions regarding the circumstances surrounding the creation of that portion of Schedule F to the final agreement which remains at issue in the appeal. I received additional representations from the city only.

[6] In this order, I uphold the city's decision to deny access to a complete version of the Draft Agreement dated October, 2012 and the undisclosed portions of Schedule F of the Final Agreement dated November 28, 2012.

RECORDS:

[7] The sole records at issue in this appeal consist of the complete version of a Draft Agreement dated October, 2012 and three distinct undisclosed portions of a Final Agreement dated November 28, 2012.

ISSUES:

A. Are the records at issue exempt from disclosure under the mandatory exemption in section 9(1)(b) of the *Act*?

B. Are the records exempt from disclosure under the discretionary exemption in section 12 of the *Act*?

DISCUSSION:

A. Are the records at issue exempt from disclosure under the mandatory exemption in section 9(1)(b) of the *Act*?

[8] Section 9(1)(b) states:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
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> > the Government of Ontario or the government of a province or territory in Canada;

[9] The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912].

[10] For this exemption 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.[1]

[11] If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

[12] For a record to qualify for this exemption, the institution must establish that:

1. disclosure of the record could reasonably be expected to reveal information which it received from one of the governments, agencies or organizations listed in the section; and

2. the information was received by the institution in confidence.[2]

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[1] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[2] Orders MO-1581, MO-1896 and MO-2314.

[13] The focus of this exemption is to protect the interests of the supplier, and not the recipient. Therefore, the supplier's requirement of confidentiality is the one that must be met. Some orders refer to a mutual intention of confidentiality [Order MO-1896]. Generally, if the supplier indicates that it has no concerns about disclosure or vice versa, this can be a significant consideration in determining whether the information was received in confidence [Orders M-844 and MO-2032-F].

Part one of the test under section 9(1)(b)

[14] The city has provided me with lengthy and detailed representations on this issue. The city submits that Metrolinx is clearly part of the Government of Ontario as it was established as a Crown agency by section 3 of its enabling legislation, the *Metrolinx Act, 2006*. I agree, and the appellant does not dispute, that Metrolinx is an agency of the Government of Ontario for the purposes of section 9(1)(b).

[15] With respect to the "received" component of the first part of the test under section 9(1)(b), the city submits the following:

> The City recognizes that the Unredacted Final Executed Master Agreement was created by negotiation, between the parties to the agreement. However, the City submits that release of the previously redacted portions of the Published Master Agreement would disclose the immutable confidential information received by the City and included in the Master Agreement. The City submits that there are no grounds to suggest that the Confidential Metrolinx Draft was not received by the City.

[16] The TTC confirms that throughout the negotiation of the agreements, Metrolinx forcefully argued that the undisclosed provisions in the final agreement and the draft agreement in its entirety are to be treated confidentially and are not to be made public. The TTC's representations do not, however, address the circumstances surrounding how this information came to be incorporated into the agreements or whether the city "received" it from Metrolinx, as contemplated by section 9(1)(b).

[17] For its part, in its original submissions, Metrolinx provides evidence and argument in favour of a finding that the records contain commercial information whose disclosure could reasonably be expected to harm its economic interests. These arguments speak to the possible application of section 18(1)(d) and (e) of the *Freedom of Information and Protection of Privacy Act*, the provincial equivalent to the *Act* which governs requests made to provincial institutions, such as Metrolinx. However, the request which has given rise to this appeal was made to the city under the *Act*. The appellant seeks access to records maintained by the city, not Metrolinx. If the city was of the view that Metrolinx had a greater interest in the record, it could have availed itself of the transfer provisions in sections 18(3) and (4) of the *Act.*

[18] In its original submissions, Metrolinx does not directly address the question of whether the city "received" the information in the records for the purposes of the analysis under section 9(1)(b) in its initial representations. In its reply representations, however, Metrolinx states:

> The records reveal information that was *established and provided by* Metrolinx, which is an agency of the Government of Ontario. Thus, the information was received by the City of Toronto and the TTC.
>
> The information at issue forms a property acquisition/negotiation strategy that provides specific guidelines and instructions *established by Metrolinx for the City of Toronto to follow* when negotiating the acquisition of property on Metrolinx's behalf. As Metrolinx is the institution that will be paying for the property, Metrolinx *established this payment and negotiation criteria and provided it to the City of Toronto and the TTC*. [my emphasis]

[19] The appellant's representations do not address the components of the test set out in the Notice of Inquiry relating to the application of the section 9(1)(b) exemption.

[20] As noted above, following receipt of the reply representations of the city and Metrolinx, I wrote to these parties posing several questions regarding the circumstances surrounding the inclusion of that portion of Schedule F to the Final Agreement, also referred to as the Real Estate Protocols, which remains at issue in the appeal. Specifically, I asked the city and Metrolinx to describe the process whereby the redacted portions of Schedule F to the Final Agreement came to be included in both the draft and the final versions. I also asked these parties to provide me with evidence which would substantiate their contention that the information which has not be disclosed in Schedule F to the Final Agreement originated with Metrolinx, and was, accordingly, received by the city from Metrolinx for the purposes of section 9(1)(b).

[21] In response, the city provided me with evidence to demonstrate that the language which has been redacted from Schedule F to the Final Agreement and the Draft Agreement originated with Metrolinx and was included in the agreements at its insistence. It indicates that the "initial draft of what became Schedule F was drafted by Metrolinx's legal counsel and provided to the city" in an email dated December 13, 2009, a copy of which was attached to its representations. The attachments provided with the city's latest submissions indicate that there was discussion between Metrolinx and the city around the language to be included in the Real Estate Protocols which gave rise to Schedule F. In addition, I find that an earlier version of the language which found its way into Schedule F of the Final Agreement originated in the Draft Agreement that was also provided by Metrolinx to the city for discussion and the ultimate approval of City Council at its meeting of October 30, 2012.

[22] Metrolinx also provided me with additional evidence indicating that the language in the redacted portions of Schedule F to the Final Agreement originated in an email from its legal counsel to his counterpart at the city in December 2009. This language was then modified in subsequent discussions between counsel but remained, for the most part, in the form originally received by the city in the Final Agreement which was executed some three years later.

[23] Based on the evidence provided to me by the city and Metrolinx and a review of the records at issue themselves, it is clear that the information they contain was "received" by the city from Metrolinx within the meaning of that term in section 9(1)(b). As a result, I find that the first part of the test under section 9(1)(b) has been satisfied.

Part two of the test under section 9(1)(b)

[24] In its final submissions, Metrolinx addresses the confidential aspect of the second part of the test under section 9(1)(b), stating:

> Metrolinx has not found evidence of an explicit request to maintain the confidentiality of Schedule F at the time [it] was received by the city from Metrolinx. At the time the draft was first circulated in 2009, it was not clear that the City had committed to making the Agreements public once executed.
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> However, as previously submitted, Article 1 of the Master Agreement defines 'confidential information' to include the procurement process pertaining to any component of the Program. The information redacted from the record is procurement information, as it relates to the procurement of real property. By way of this agreement, it was intended by all parties that such information would be considered and treated as confidential, particularly since disclosure of this information would undermine Metrolinx's negotiating position with potential sellers of property, the impact of which is injury to the financial interests of Metrolinx/the Government of Ontario.
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> Prior to making the Agreements public, Metrolinx requested via email [copies of which were attached] that the other parties withhold specific information contained within Schedule F that would be injurious to Metrolinx's negotiating position and financial interests.

[25] In its reply representations, Metrolinx submits that the information redacted from Schedule F has never been made public and has been treated confidentially by both Metrolinx and the city, as is evidenced by the fact that the city has severed this portion of Schedule F from the version made public pursuant to the City Council resolution authorizing the disclosure of the remainder of the Final Agreement.

[26] Both Metrolinx and the city submit that the cover page to the Draft Agreement clearly indicates that it was submitted to City Council for its meeting of October 30, 2012 meeting with the expectation that members of Council would treat the Draft Agreement as a confidential document that was not to be made public.

[27] The city also provided me with evidence to support its contention that the language in Schedule F and the entire Draft Agreement were provided to it by Metrolinx with an expectation that would be treated as confidential. Again, it submits that this expectation was reflected in Metrolinx's insistence that the redacted portions of the Real Estate Protocols in Schedule F not be disclosed publicly and that the Draft Agreement was never publicly disclosed.

[28] I have carefully reviewed the evidence provided by Metrolinx and the city, particularly the email communications passing between its counsel at the time the Draft Agreement was made available to City Council in October 2012 and those which discussed Metrolinx's reluctance to disclose the redacted portions of Schedule F. Based on my review of this information, I am satisfied that the Draft Agreement and the undisclosed portions of the Real Estate Protocol, Schedule F to the Final Agreement, were received in confidence by the city from Metrolinx.

[29] It is clear that when Metrolinx provided the Draft Agreement to the City Clerk for distribution to City Council, it did so with the expectation that Councillors would treat the complete document as confidential. Similarly, the evidence tendered by the city and Metrolinx which describe Metrolinx's position on the disclosure of the redacted portions of Schedule F to the Final Agreement lead to the conclusion that it expected that these discrete portions of the Real Estate Protocol would be treated in a confidential fashion. I find that the evidence demonstrates that the information that remains undisclosed in the records was received by the city from Metrolinx with an expectation that it would be treated confidentially and not made public. As a result, I find that the second part of the test under section 9(1)(b) has been met and the redacted portions of Schedule F to the Final Agreement and the Draft Agreement in its entirety are exempt under that section.

[30] Because of the manner in which I have addressed the application of section 9(1)(b) to the records, it is not necessary for me to also consider whether they are exempt under the solicitor-client privilege exemption in section 12.

ORDER:

I uphold the city's decision to deny access to the records and dismiss the appeal.

Original signed by: January 14, 2014
Donald Hale
Adjudicator