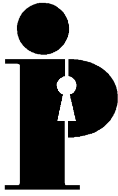

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-258

Appeal M-9200278

Toronto Board of Education

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The Toronto Board of Education (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to:

(a) Copies of all invoices paid to [a named accounting firm] for the years 1989, 1990, 1991 and January to May 21, 1992, including invoices paid under Account No. 61342 [invoices pertaining to forensic and investigative audits].

(b) Copies of all invoices paid to [a named company] for the years 1991 and 1992 to May 21, 1992.

(c) Copies of all invoices paid to [a second named company], including invoices paid to [two individuals] for private investigative services provided to departments under the direction of the Comptroller of Buildings and Plant for 1991 and 1992 to May 21, 1992.

The Board issued a decision granting partial access to the records responsive to part (a) of the request and, pursuant to section 8(3) of the Act, refused to confirm or deny the existence of records responsive to the remainder of the request. In addition, the Board stated that if such records did exist, access would be denied under sections 8(1)(a), (b), (e), (f), (i) and sections 12 and 13 of the Act.

The requester appealed the Board's decision.

During mediation, the Board withdrew the claims for exemption based on sections 8(3) and 13 of the Act. It issued an amended decision granting access to three additional records responsive to part (c) of the request, and denying access to other records on the grounds that the records do not exist. It also denied access in total to 19 records responsive to part (a) of the request pursuant to sections 8(1)(a), (b), (e), (f), (i) and sections 12 and 14 of the Act.

During subsequent mediation, all outstanding issues in the appeal were resolved except for the Board's denial of access in total to the 19 records responsive to part (a) of the request. Further mediation was not successful, and notice that an inquiry was being conducted to review the decision of the Board was sent to the appellant and the Board. Representations were received from both parties. The Board did not submit any representations on the application of the exemption provided by section 8(1)(i) of the Act. As this is a discretionary exemption, I will not consider it in this order.

Upon receipt of the representations from the parties, it appeared that disclosure of the information contained in the records might affect the interests of the accounting firm which had prepared the records (the affected party). Accordingly, submissions on the possible application of section 10(1) of the Act were sought from

the appellant, the Board and the affected party.

Representations on this issue were received from the Board and the affected party.

THE RECORDS:

The 19 records at issue consist of 37 pages of invoices submitted to the Board's solicitor for forensic and investigative accounting services provided by the affected party. The records cover the period from June 20, 1990 to January 10, 1992.

The invoices relate to services rendered by the affected party with respect to three investigations:

Investigation 1: Records 1-6 and 10-18 in their entirety, and parts of Records 7 and 8;

Investigation 2: Record 9; and

Investigation 3: Record 7-item 4, Record 8-items 3, 5, 6 and 7, and Record 19 in its entirety.

ISSUES:

A. Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.

C. Whether the discretionary exemptions provided by sections 8(1)(a), (b), (e) and/or (f) of the Act apply.

D. Whether the discretionary exemption provided by section 12 of the Act applies.

E. Whether the mandatory exemptions provided by sections 10(1)(a), (b) and/or (c) of the Act apply.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

In his representations, the appellant indicates that some of the records may contain his personal information. I have carefully reviewed all the records at issue and find that they do not contain any personal information relating to the appellant.

It has been established in a number of previous orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not "personal information"(Orders P-326, P-333 and P-377). In this appeal, some of the individuals' information arises in the context of their professional capacity, either as employees of the affected party or employees of the Board and, in my view, is not "personal information" as defined in the Act.

The records do contain personal information relating to other identifiable individuals. The appellant has stated that he is not interested in obtaining access to this information. Accordingly, I have highlighted the names and other personal identifiers of these individuals on the copies of the records I have provided the Board with this order. These portions of the records are not at issue in this appeal and should not be disclosed to the appellant.

Because of the manner in which I have disposed of Issue A, it is not necessary for me to consider Issue B.

ISSUE C: Whether the discretionary exemptions provided by sections 8(1)(a), (b), (e) and/or (f) of the Act apply.

The Board claims that sections 8(1)(a), (b), (e) and/or (f) of the Act apply to exempt the records from disclosure. These sections state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (a) interfere with a law enforcement matter;
> >
> > (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(f) deprive a person of the right to a fair trial or impartial adjudication;

Sections 8(1)(a) and (b)

In order for a record to qualify for exemption under section 8(1)(a) or (b), the investigation that generated the records must first satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. This definition reads as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b).

Investigation 1 involved suspected fraud by employees in the Continuing Education Department of the Board. As a result of this investigation, two Board employees were discharged from their employment. The Board submits that this investigation is still ongoing.

With respect to this investigation, the Board submits that:

> ... the internal investigations involving the Metro Toronto Police Fraud Squad are clearly 'investigations ... that could lead to proceedings in a court ... if a penalty or sanction could be imposed in those proceedings'. While the investigation of the Board's Continuing Education Department is not yet completed, charges of fraud under the Criminal Code and a criminal trial in court could result. Further, a penalty or sanction could be imposed as the result of a criminal trial.

The Board also states that "The police were relying heavily on the institution's investigation to assist them with theirs because of the large volume of internal documents and records which were required to be analyzed."

Investigation 2 related to concerns of a Board employee that tampering of some students' transcripts had

occurred. The Board indicates that this investigation is complete.

Potential wrongdoing by members of the Board's maintenance personnel was the subject of Investigation3. In its representations, the Board states that "The police subsequently became involved in the investigation." No one was charged by the police but the subjects of the investigation were discharged from their employment by the Board. They subsequently grieved their dismissal. The Board states that this investigation is still ongoing.

In my view, none of the three investigations conducted by the affected party on behalf of the Board can be characterized as "law enforcement" as this term is defined in section 2(1) of the Act. The Board investigations did not and could not lead to proceedings in a court or tribunal where a penalty or sanction could be imposed.

Past orders of the Commissioner's office have held that internal institution investigations conducted by the institution as an employer do not constitute "law enforcement" investigations (Orders 157 and 192). This is so even where grievance hearings may result, as was the case with respect to Investigation 3 in this appeal. In Order 192, Commissioner Tom Wright commented on the relationship between the investigation at issue in that appeal and the subsequent proceedings:

> ... the institution's internal investigation was not conducted with a view to proceedings in a court or tribunal where a penalty or sanction could be imposed. The investigation which generated the records at issue in this appeal was conducted by employees of the institution in order to determine whether or not the appellant was in a conflict of interest position. The fact that the appellant subsequently filed grievances and those grievance have come before the Crown employees Grievance Settlement Board does not alter my view of the nature of the institution's original investigation. **This investigation was not conducted by or on behalf of the Crown Employees Grievance Settlement Board.** [my emphasis]

In the present appeal, the investigations were not conducted by the Police. References are made throughout the records to "our" investigation, that conducted by the accounting firm on behalf of the Board. At the conclusion of its investigation, the Board could not lay any charges. In my view, the mere involvement or interest of the police in the alleged offences does not transform the Board's internal investigation into a "law enforcement" investigation.

The records at issue, the invoices, were submitted to the Board for payment. They reflect the activities undertaken by the affected party in providing its professional accounting and forensic services to the Board. Accordingly, it is my view that the investigation which generated the records at issue in this appeal does not satisfy the definition of "law enforcement" as found in section 2(1) of the Act. Therefore, sections 8(1)(a) and (b) of the Act cannot apply to exempt the records from disclosure.

Furthermore, as I have stated previously, Investigation 2 has been completed. While the Board submits that both Investigations 1 and 3 are ongoing, it has provided me with no evidence in support of the assertion that the **Board** investigation which generated the records, as opposed to any **Police** investigation, is ongoing. In order for section 8(1)(a) or (b) to apply to exempt the records from disclosure, the investigation must be ongoing (Orders P-285, P-316 and P-403).

Moreover, section 8(1) of the Act provides that an institution may refuse to disclose a record where doing so could reasonably be expected to result in specific types of harms. The exceptions to access set out in section 8(1) of the Act require that there be a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the specific information and the harm which is alleged (Orders M-202 and P-557).

Therefore, even if I were to find that the records at issue in this appeal relate to an on-going law enforcement matter, I have not been provided with sufficient evidence by the Board to establish a clear and direct linkage between the disclosure of the information contained in the records and the alleged harm. This is especially the case as any personal information contained in the records is no longer at issue in the appeal.

Accordingly, it is my view that sections 8(1)(a) and (b) do not apply to exempt the records from disclosure.

Section 8(1)(e)

The Board claims that section 8(1)(e) of the Act applies to exempt the records or parts of records consisting of those invoices which relate to Investigation 3: Record 7-item 4, Record 8-items 3, 5, 6 and 7, and Record 19.

The Board submits that:

> Reliance on that provision [section 8(1)(e)] is based on a reasonable expectation that disclosure to the requester might endanger the safety of persons associated with the information contained in the records.

The Board also outlined a number of incidents to support this claim and indicated that affidavit evidence would provide the "best evidence" relevant to the application of this exemption.

I am of the view that, once the non-responsive personal information is removed from these records, section 8(1)(e) will have no application in the circumstances of this appeal. I do not believe that it is possible to, and the Board has not, establish a clear linkage between the disclosure of the remaining information and the harm alleged.

Section 8(1)(f)

The Board submits that section 8(1)(f) applies to exempt those records which relate to Investigation 1. In its representations, the Board states:

> Additionally, the disclosure of Records 1 to 8 and 10 to 18 could affect the rights of the individuals who are being investigated. For example, the disclosure could affect their right to make a full defence at a fair trial by prejudicing the public against them. Alleged fraud involving public funds generally attracts public attention. It is reasonable to expect that such attention would also be attracted with respect to this matter, particularly in light of the recent heightened public sensitivity regarding the economy, fuelled by the ongoing social contract negotiations. Further, premature disclosure could affect their right to be presumed innocent until proven guilty.

The Board has provided me with no evidence to indicate who, if any, of the individuals being investigated have been charged with any offences. Nor am I aware of any other adjudicative proceedings against any of these individuals. Given that the personal identifiers of individuals are no longer at issue in this appeal, the individuals who are being investigated and whose rights the Board asserts would be affected will not be identified in any way by disclosure of the remaining information contained in the records.

In my opinion, the Board has not established any linkage between disclosure of the responsive information contained in the records and the deprivation of any rights of the subjects of the investigation. Accordingly, section 8(1)(f) of the Act does not apply to exempt the records from disclosure.

ISSUE D: Whether the discretionary exemption provided by section 12 of the Act applies.

The Board claims that section 12 applies to exempt all of the records at issue from disclosure. Section 12 of the Act states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use

in litigation (Branch 2).

The Board submits that the records are exempt from disclosure under both branches of the section 12 tests.

Branch 1

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Board must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Orders 49, M-2 and M-19]

Part One

With respect to the first test, the Board submits that:

> ... the communications within the invoices are protected by the common law solicitor-client privilege because they are directly related to the seeking, formulating or giving of legal advice or legal assistance. In addition, the invoices, in their entirety, relate to the obtaining of legal advice and, therefore, are exempt from disclosure under section 12.

The invoices detail the professional services provided by the affected party to the Board and the fees levied therefor. The invoices were submitted to the Board's solicitor who in turn forwarded them to the Board for

approval and payment. In these circumstances, it is my opinion that the records cannot be considered to be "a confidential communication between a client (or his agent) and a legal advisor". The Board's solicitor was merely a conduit for the passing of these documents to his client. The communication originated with the affected party, not a legal advisor of the Board.

Furthermore, the information contained in the records cannot be said to be "directly related to the seeking, formulating or giving **legal** advice". In Order 210, Commissioner Tom Wright made the following comments about the term "legal advice" as used in section 19 of the Freedom of Information and Protection of Privacy Act (the provincial Act), which is similar to section 12 of the Act:

> The term "legal advice" is not defined in the Act. In my view, the term is not so broad as to encompass all information given by counsel to an institution to his or her client. Generally speaking, legal advice will include a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. It does not include information given about a matter with legal implications, where there is no recommended course of action, based on legal considerations, and where no legal opinion is expressed.

I adopt this definition for the purposes of this appeal.

In my view, the information in the records cannot be characterized as "legal advice" in that it was prepared by forensic and investigative accountants. Moreover, no recommended course of action based on legal considerations or legal opinion is expressed.

In its representations, the Board refers to Order 126 and submits that the "... privilege covers all communications relating to the obtaining of legal advice, including a statement of account." However, the records in Order 126 which were found to be exempt under the first branch of the common law solicitor-client privilege were the invoices of a solicitor. In this appeal, the records at issue are the invoices of the affected party which is not a solicitor.

Furthermore, in Order M-213, Assistant Commissioner Irwin Glasberg commented on the definition of "legal advice" provided by the Commissioner in Order 210 as it relates to Order 126 as follows:

> I believe these comments [those quoted above from the Order 210 definition of "legal advice"] are helpful in interpreting the scope and meaning of the fourth part of the test under branch 1 of section 12. That is, that the communication in question must be related to seeking, formulating or giving legal advice.

He then proceeded to review the legal account at issue in that appeal and concluded that, because of the non-specific fashion in which the account was drafted, the record disclosed "neither the subject(s) which the law firm was asked to investigate, the strategy used to address these issues nor the results of this exercise".

In my view, the same may be said of the records at issue in this appeal. The information contained in the invoices describes, in a general way, the steps undertaken by the affected party to conduct its investigation. Even if it could be said that the Board has satisfied the third part of the test for the application of the first branch of the section 12 exemption, I do not find that the record has any direct connection with either "seeking, formulating or giving legal advice". It therefore follows that the fourth part of the Branch 1 exemption has not been satisfied either.

The Board has submitted that the "fact of the retainer is just as privileged as the subject matter of the retainer". In their text, Solicitor-Client Privilege in Canada, Mance and Silver state, on page 82:

> In A. and D. Logging Co. v. Convair Logging Ltd. (1967), it was held that privilege does not extend to correspondence which shows only the existence of a solicitor-client relationship. The rationale of the court was that the existence of a solicitor-client relationship is a matter of fact.

In my view, this same rationale applies in the case where an expert such as a forensic auditor has been retained. In addition, I would note that the Board withdrew its reliance on section 8(3) of the Act by which it had initially refused to confirm or deny the existence of the records submitted by the accounting firm. Clearly, the Board cannot now claim a privilege related to the mere existence of records for information it has already disclosed (i.e the fact that an accounting expert was retained and submitted invoices to the Board for services rendered).

To summarize, the Board's submission that the first part of the common law solicitor-client privilege applies to the records fails on two separate grounds. These are that the records (1) are not a communication between a client and a **legal advisor** and (2) are not directly related to seeking, formulating or giving **legal** advice.

Part Two

As far as the second part of Branch 1 is concerned, the Board submits:

> In this case, communications between the third party (the accountants) and the solicitor [the named individual] were made in order to obtain information for the solicitor for use in pending or contemplated litigation ...
> ...

> In all three matters which were the subject of the accountants' inquiry (continuing education, maintenance, student records) litigation was contemplated. This was one of the reasons for retaining the accountants. The Board acknowledges that contemplated litigation was a significant but not the dominant purpose of engaging the accountants.

First, despite the Board's representations, I have been provided with no evidence which indicates that the records were "created especially for a lawyer's brief", which is a necessary component of the "litigation privilege" part of the exemption (Order P-326). I have not been made aware of any pending or contemplated litigation for which the records were prepared. Accordingly, I find that the invoices do not qualify for exemption pursuant to the second part of the common law solicitor-client privilege under Branch 1 of the section 12 exemption.

Branch 2

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 is satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

> 1. the record must have been prepared by or for counsel employed or retained by an institution; and
>
> 2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.
>
> [Order 210]

The inclusion of the term "for use" in section 19 contemplates that the **record itself** will be used either for the provision of legal advice or for litigation (Order 210).

The Board submits that:

> Regardless of whether a "litigation purpose" was the rationale for their retainer, it is certainly true that the accountants were engaged to provide information to assist [the Board solicitor] in giving legal advice. All of the above arguments concerning the second aspect of the common law privilege are equally applicable to this test, with the substitution of references to legal advice for those of litigation.

It also notes that "The invoices from [the affected party] were sent directly to [the Board solicitor] for review ...". The solicitor, in turn, forwarded the invoices to the Board for the purpose of obtaining authorization and payment of the account. Therefore, it is clear from a review of each record that the

invoices themselves were not prepared "for use" in giving legal advice but rather for the purpose of ensuring that the affected party was paid for its services.

The question of what constitutes "in contemplation of litigation" was considered by former Commissioner Sidney B. Linden. In Order 52, he stated that, in order for a record to qualify as being prepared "in contemplation of litigation", the **dominant** purpose for the preparation of the document must be in contemplation of litigation; **and** there must be a reasonable prospect of such litigation at the time of the preparation of the record - litigation must be more than just a vague or theoretical possibility.

The dominant purpose for the preparation of the records was to obtain payment from the Board for services provided. In my view, the Board has not provided any evidence which would support a finding that the records at issue were prepared in contemplation of litigation or for use in litigation. Moreover, as I have previously indicated, the Board itself notes in its representations that "... contemplated litigation was a significant but not the dominant purpose of engaging the accountants".

The Board also refers to Order 126 as part of its submissions on the application of Branch 2 of the section 12 exemption. It notes that Commissioner Linden found that invoices from and payments to private investigators are exempt from disclosure under section 19 of the provincial Act because they are closely associated with the reports of the private investigators' investigations. The reports were found to be exempt under the litigation branch of section 19 of the provincial Act. However, in this case, I have not been provided with any evidence to indicate that the invoices are closely associated with reports prepared by the affected party or would "reveal" any information contained in these reports. In my view, the requirements of the second branch of the section 12 exemption have not been satisfied.

In summary, I find that section 12 of the Act is not applicable to the records at issue in this appeal.

ISSUE E: Whether the mandatory exemptions provided by sections 10(1)(a), (b) and/or (c) apply.

Sections 10(1)(a), (b) and (c) of the Act state:

> 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;

Although the Board did not initially claim section 10(1) with respect to the records, when the issue was raised in the supplementary Notice of Inquiry by the Appeals Officer, both the Board and the affected party submitted representations resisting disclosure of the records on this basis. Accordingly, the Board and/or the affected party must demonstrate that each part of the following three-part test has been met:

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 sections 10(1)(a), (b) or (c) will occur.

[Orders M-10 and M-183]

If any part of the test is not satisfied, the exemption under section 10(1) will not apply to the record (Orders 36 and M-10).

Part One

Both the Board and the affected party submit that the records contain commercial and financial information. The records relate to the buying and selling of investigative and forensic accounting services. They set out what services were performed, the number of hours worked by the employees of the affected party as well as the total cost of services and expenses charged to, and paid by, the Board. I am satisfied that the records contain commercial and/or financial information. Therefore, the requirements of part one of the test have been met.

Part Two

With respect to part two of the test, the parties resisting disclosure of the records must meet two requirements. They must prove that the information was **supplied** to the Ministry and that it was supplied **in confidence**, either explicitly or implicitly.

As I have indicated previously, the invoices were forwarded to counsel for the Board, which in turn remitted the amount owing.

What is not clear, however, is whether the Board and the affected party negotiated the hourly rates contained in Record 19. Past orders of the Commissioner's office have determined that information that is the product of the negotiation process between an institution and a third party will not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act (Orders 36, 87, 203, P-219, P-228, P-251 and P-263).

However, in the absence of any representations on this issue, I am prepared to accept that the "supplied" part of the test has been satisfied with respect to all of the information contained in the records.

With regard to the issue of whether the information was supplied in confidence, part two of the section 10(1) test requires the demonstration of a reasonable expectation of confidentiality at the time the information was supplied.

The affected party submits:

> All information which is provided to our clients is done so on a confidential basis ...
> ...
>
> We are also obliged by our governing professional body to maintain the confidentiality of client records and information part of which includes the fees we charge for services rendered to our clients. Rule 210 of the Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario provides that "A member or student shall not disclose or use any confidential information concerning the affairs of any client, former client, employer or former employer."

The affected party then goes on to describe the particular policies and procedures dealing with confidentiality which have been developed by its own firm to govern its partners and employees.

In my view, these submissions relate to the confidentiality obligations imposed on employees of the affected party with regard to information about clients and others which comes to their attention in the course of their professional duties. These statements do not relate to the affected party's expectations regarding the Board's treatment of such information.

The Board submits that the invoices are records which fall within the solicitor-client relationship between the Board's counsel, who received them, and his client, the Board. Because lawyers have a professional responsibility to keep such information confidential, the Board argues that the affected party would "have been implicitly aware that information supplied to the Board via its legal counsel would be held in confidence".

In Issue D, I have determined that the records do not constitute solicitor-client communications. Accordingly, I do not accept the Board's submissions that this characterization of the records supports the

argument that the records were supplied implicitly in confidence by the affected party. Nor is there anything on the face of the invoices themselves to indicate an expectation of confidentiality on behalf of the affected party.

The Board also submits that:

> ... given the work [the affected party] was asked to perform, all information relating to the investigation including the invoices were implicitly supplied in confidence.

Although I am not entirely persuaded that the second part of the test has been established, I will consider the representations of the Board and the affected party on part three.

Part Three

To satisfy part three of the test, the Board and/or the affected party must present evidence that is detailed and convincing, and which describes a set of facts and circumstances which would lead to a reasonable expectation that the harms described in sections 10(1)(a), (b) or (c) of the Act would occur if the information was disclosed (Order 36).

The Board's submissions address the harms in sections 10(1)(a), (b) and (c). With respect to section 10(1)(b), it states:

> ... it is in the public interest that such confidential investigations be undertaken to ensure that employees of public institutions do not commit fraud with respect to public funds or participate in criminal activities involving property belonging to public institutions. In the event that such investigations could not be carried out in confidence their usefulness would be questionable. The likely result is that similar information would no longer be supplied to the Institution in the future. The Respondent submits that even disclosure of the invoices with the details severed would disclose that forensic and accounting investigations had taken place and jeopardize any required future investigations.

I agree that it is in the public interest that such investigations continue to be carried out where necessary. However, it is not clear to me whether the Board's argument is that such investigations would not continue to be undertaken by accounting firms such as the affected party, or if invoices for such investigations would not be submitted to it should the records at issue in this appeal be disclosed.

In my view, the information contained in the records at issue is not **similar** to that which would be included in an investigation report. Furthermore, as this argument was not made by the affected party, I do not feel that I have been provided with sufficient evidence to conclude that companies in the position of the affected party would not continue to undertake such investigations and submit invoices for their services to

institutions should the records at issue in this appeal be disclosed.

The affected party bases its submissions on the harms outlined in section 10(1)(a) of the Act. In its representations, it states:

> The disclosure of fees which [the affected party] charges for its professional services to third parties, particularly in the forensic accounting area, could reasonably be expected to prejudice our competitive position ... If it became known to our competitors they could attempt to undercut our prices and, thereby, gain clients to our detriment. We also believe there is a reasonable expectation that disclosure of such information to the public at large could interfere significantly with our negotiations with other users and potential users of our services.

The Board also submits that the affected party would suffer undue loss and its competitors enjoy undue gain (section 10(1)(c) of the Act) once its fees are known.

I note that the invoices contain global figures with regard to the amounts billed for fees and disbursements as well as the number of hours of work performed by various employees on this file. As I have previously stated, only Record 19 contains more specific information concerning the hourly rates billed by a partner and senior manager of the affected party.

Given the nature of the work performed by the affected party and the industry within which it operates, I am not satisfied that I have been provided with sufficient or specific enough evidence to conclude that disclosure of any of the information contained in the records could reasonably be expected to prejudice **significantly** the competitive position or interfere **significantly** with the contractual or other negotiations of the accounting firm (section 10(1)(a) of the Act). In addition, the Board and the affected party have failed to establish that such disclosure could reasonably be expected to result in one of the types of harms specified in section 10(1)(c) of the Act.

Therefore, I find that the records do not qualify for exemption under section 10(1) of the Act.

ORDER:

1. I order the Board to disclose the records to the appellant in accordance with the highlighted copy I have provided to the Board's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order. The highlighted portions should **not** be disclosed.

2. I order the Board to disclose the severed copies of the records to the appellant within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with this order, I order the Board to provide me with a copy of the records disclosed to the appellant in accordance with Provision 1, **only** upon request.

Original signed by: February 4, 1994
Anita Fineberg
Inquiry Officer