



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

ORDER M-675

Appeal M_9500651

City of Toronto



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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of a lease between a named company (the Company) and the City. After notifying the Company of the request under section 21 of the Act, the City decided to grant the requester partial access to the record. The Company appealed the City's decision to disclose the lease to the requester. This resulted in Appeal M-9500575. During the course of mediation of that appeal, the requester narrowed the request to include only the information contained in clause 13(a) and Schedule "C" of the lease. These portions of the record define how the leased property can be used by the Company.

The City then revised its decision and denied the requester access to clause 13(a) and Schedule "C", claiming the application of the following exemption contained in the Act:

- third party information - section 10(1)

Appeal M-9500575, the Company's third party appeal, was closed as the issue under appeal was then moot. The requester (now the appellant) appealed the City's decision to deny access, resulting in the current appeal. A Notice of Inquiry addressing the issues in the current appeal was provided to the appellant, the City and the Company. Representations were received from all of the parties.

DISCUSSION:

THIRD PARTY INFORMATION

The City originally claimed the application of sections 10(1)(a) and (c) of the Act to exempt the record at issue from disclosure. The City refers only to section 10(1)(a) in its representations. For a record to qualify for exemption under sections 10(1)(a) or (c), the City and/or the Company which is resisting disclosure must satisfy each 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 City 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 (a) or (c) of section 10(1) will occur.

Failure to establish the requirements of any part of this test will render the section 10(1) exemption claim invalid.

Part One

In order to meet part one of the test, the City and/or the Company must establish that disclosure of the information contained in the record would reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

The City states that the severed portions of the record contain commercial and technical information as they deal with the uses permitted at the premises which are the site of the subject lease.

The Company states that the undisclosed portions of the record contain commercial and/or financial information because these provisions relate to commercial considerations and uses for the building.

Based on the representations and my review of the record, I find that the information at issue qualifies as commercial information.

Part Two

The second part of the test has two elements. First, the party resisting disclosure must establish that the information was supplied to the City and second, that it was supplied in confidence, either implicitly or explicitly.

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and an affected party was supplied by the affected party. In general, the conclusion reached in these orders is that such information has been supplied to an institution if the information contained in the record is substantially the same as that originally provided by the affected party. In addition, information contained in a record would "reveal" information "supplied" by an affected party, within the meaning of section 10(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to an institution.

Since the information contained in an agreement, such as the permitted uses in a lease, is typically the product of a negotiating process between the institution and a third party, that information may not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act.

The Company submits that:

The Record did not form a non-negotiable part of the lease but rather was the result of extensive negotiations between the City and our client.

The City indicates that:

The information respecting the uses was negotiated by the City and the lessee [the Company] as part of the lease negotiation process.

The Company and the City make it quite clear that the information in the lease agreement pertaining to the permitted uses of the premises came about as a result of negotiations between

them. I find that the information at issue was the result of negotiations between the City and the Company and does not consist of information "supplied" by the Company to the City within the meaning of section 17(1). In addition, I cannot conclude that the disclosure of the information at issue would permit the drawing of accurate inferences about information actually supplied to the City by the Company. Accordingly, the institution and affected party have failed to satisfy the second part of the section 17(1) test.

As part two of the test has not been satisfied, sections 10(1)(a) or (c) of the Act do not apply to exempt the record from disclosure. As no other exemptions have been claimed by the City and no other mandatory exemptions apply, clause 13(a) and Schedule "C" of the lease should be disclosed to the appellant. Because of the manner in which I have disposed of the issues in this order, it is not necessary for me to consider the possible application of the "public interest override" in section 16 of the Act, which was raised by the appellant.

ORDER:

1. I order the City to disclose clause 13(a) and Schedule "C" of the lease agreement to the appellant by **January 24, 1996**, but not earlier than **January 19, 1996**.
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: _____

Donald Hale
Inquiry Officer

December 20, 1995