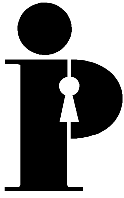

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER M-920

## Appeal M_9600338

## 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 access to a copy of a contract entered into between the City and a named company (the company) in or about December, 1995. The City notified the company pursuant to section 21 of the Act and requested representations with respect to the release of the record.

The company objected to the release of the record, indicating that disclosure would prejudice its competitive interests. The City denied access to the record based on the exemptions in sections 10(1)(a), (b) and (c) of the Act (third party information). The requester appealed the decision to deny access.

Subsequent to the filing of the appeal but prior to the 35-day deadline for raising additional discretionary exemptions, the City issued a second decision letter dated November 29, 1995 to the appellant, indicating that it was also relying on sections 11(a), (c), (d), (e) and (g) to withhold access to the record.

On December 13, 1996, the City issued a third decision letter, this time claiming that section 6(1)(b) of the Act applied to the record.

The record at issue consists of an 18-page agreement between the City and the company, with nine schedules forming part of the contract.

This office provided a Notice of Inquiry to the appellant, the City and the company. As the decision letter of December 13, 1996 falls outside of the 35-day limit granted to institutions to raise additional discretionary exemptions, the institution was asked to provide submissions on the reasons why it is claiming the exemption at this late date and the reasons why the discretionary exemption in section 6(1)(b) should apply, should I decide to consider this exemption. Representations were received from all parties. However, given my findings in this order and the manner in which I have disposed of the issues, I do not need to address the application of section 6(1)(b) to the records.

## PRELIMINARY ISSUES:

### ACCESS TO INFORMATION ABOUT THE RECORD

After the inquiry was commenced, the appellant asked that he be given "a more detailed description" of the record than was contained in the Notice of Inquiry.

After considering all of the relevant material, including the record at issue, the appellant's original access request and the Notice of Inquiry, I declined the appellant's request for additional information about the record.

My decision was based in part on the fact that the appellant's original access request contained details about the record and its contents, which indicated that the appellant had sufficient

knowledge of the record to enable him to make meaningful representations on the issues in the inquiry.

In his main representations, the appellant stated that the inquiry process lacked procedural fairness, and that he should have been provided with a complete and detailed index of the headings and sub-headings of the record. The appellant claims that without this detailed description of the record requested, he has been unable to make proper submissions. In this regard, the appellant refers to *IPC Practices*, Appeals 1, June 1992, guidelines prepared by the Commissioner's office to assist institutions in preparing decision letters which meet statutory requirements.

These guidelines recommend that the decision letter be accompanied by an index of records which contains a description of each record, the exemption claimed and the reason that the exemption applies. The purpose of such an index is to provide a requester with a reasonable amount of information about the records found to be responsive by the institution and the exemption under which each one has been withheld. In the present case, the record requested and at issue in the appeal consists of a single record, the contract executed between the City and a company. This is not a situation where multiple records are found to be responsive to the request, in which case it would be appropriate for the City to prepare an index as described in *IPC Practices*.

Further, as I found above, the appellant, in formulating the request, described the record and its contents in some detail, which indicated that he had sufficient knowledge of the record to enable him to make meaningful representations on the issues in the inquiry. On this basis, I am satisfied that it was not necessary for the City to provide the appellant with an index of the nature sought by the appellant.

## ACCESS TO REPRESENTATIONS MADE DURING THE INQUIRY PROCESS

After the inquiry was commenced, the appellant also asked for the following information: (I) the City's reasons for claiming the discretionary exemptions under sections 6(1) and 11 of the Act late in the process; (ii) the City's reasons why the late claimed exemptions should apply; and (iii) any other material provided by the City in support of its discretionary exemption claims.

In declining the appellant's request, I took into account two relevant statutory provisions. First, section 41(13) of the Act reads:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

Second, section 55(1) of the Freedom of Information and Protection of Privacy Act (the provincial Act) reads:

> The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

I also took into account previous orders of the Commissioner which have held that while section 41(13) [and its counterpart section 52(13) in the provincial Act] does not **prohibit** the Commissioner from ordering access to representations, this would be done only in "an extremely unusual case" ( Orders 164, P-666).

In addition, I considered the reasons for judgment in two decisions of the Divisional Court in relation to judicial reviews of orders of the Commissioner. In Gravenhurst (Town) v. Ontario (Information and Privacy Commissioner), [1994] O.J. No. 2782, Mr. Justice Saunders stated:

> The nature of the process under review [the Act] requires the maintenance of confidentiality. There can be no hearing in the usual sense and the statute limits access to representations [s. 41(13)]. In considering the procedure adopted by the Commissioner, this court should accord curial deference in light of the difficult circumstances faced by the Commissioner subject, of course, to the overriding concerns of procedural fairness.

In Rubin v. Ontario (Information and Privacy Commissioner) (May 16, 1991), Toronto Doc. 556/90, Mr. Justice Isaac stated:

> I am also of the opinion that there is an additional reason why that part of the "sealed record" which consists of representations made by the Corporation to the Commissioner should be sealed and not disclosed to Rubin for the purposes of this application for judicial review. This reason is found in two sections of the [provincial Act] which shield such information from disclosure.

Mr. Justice Isaac went on to quote sections 52(13) and 55(1) of the provincial Act.

In all of the circumstances, after considering the competing interests of fairness and confidentiality, I concluded that it would not be appropriate to order that the appellant be provided with access to the City's representations.

In his main representations, the appellant, in effect, reiterated his request for access to the City's representations, either through this office or directly from the City. The appellant did not persuade me that I should alter my decision on this point. Therefore, for the reasons cited above, I maintain my decision that it would not be appropriate in the circumstances to provide the appellant with access to the City's representations.

## APPEAL PROCESS UNDER THE ACT AND THE CHARTER

In his representations, the appellant submits that section 41 of the Act "is an unjustifiable violation" of the requester's [section 2(b)] Charter right to information. The appellant argues that section 41 requires that the appeal process "be a secretive process" in which the requester does not have access to information about the contents of the records or the representations made

against disclosure, and that "this restricts the requester's ability to make meaningful submissions in support of" disclosure. The appellant further argues that section 41 "creates a biased process against people seeking information by setting up a process where one party to the dispute has all the information and the other has none, or only as much as the first party will permit."

Section 2(b) of the Charter states:

> Everyone has the following fundamental freedoms:
>
>> freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The appellant refers to the decision of the Divisional Court in Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197. In this case, the Court considered the submission (at page 203) that:

> ... freedom of the press, provided by s. 2(b) of the *Charter*, entails a constitutional right of access to any and all information in the possession and under the control of government, subject to whatever limitations might be justified pursuant to s. 1 of the *Charter*. It is further submitted that the inquisitorial and secrecy provisions provided for by ss. 52 and 55(1) of the [provincial Act] which, it is argued, precluded [the requester] from making meaningful representations to the [Commissioner], are excessive and not tailored to minimally impact the freedom of the press as defined by counsel.

The Court held (at pages 204-205) that:

> ... it is not possible to proclaim that s. 2(b) entails a general constitutional right of access to all information under the control of government ...
> ...
>
> Had there been established a s. 2(b) violation, we would have found, in these circumstances, the interests reflected in [the] s. 14 [law enforcement exemption] constitute pressing and substantial objectives sufficient to support a *Charter* limitation. We would also have found, on the state of the record before us, that the **institutional design of the statutory mechanisms together with the exemptions in question constitute (1) rational links between the means and the objectives, (2) minimum impairments on the right or freedom asserted, and (3) a proper balance between the effects of the limiting measures and the legislative objectives, recognizing that government need not be held to the ideal or perfect policy instrument**. [emphasis added]

I recognize that in this case the institution has invoked different exemptions from that claimed in the Fineberg case. Nevertheless, the Divisional Court in Fineberg considered the Commissioner's appeal process, and specifically section 52 of the provincial Act (similar to section 41 of the Act ), and found no Charter violation. The appellant has not persuaded me that

the Divisional Court's conclusion in Fineberg is not applicable here. Accordingly, I do not accept the appellant's submissions on this issue.

I note that even if I were to accept the appellant's Charter arguments, pursuant to sections 109(1) and (2) of the Courts of Justice Act, I could not have found section 41 of the Act to be inapplicable, or granted a Charter remedy, since the appellant did not serve a notice of constitutional question on the Attorneys General of Canada and Ontario.

## DISCUSSION:

### THIRD PARTY INFORMATION

For a record to qualify for exemption under section 10(1) of the Act, the parties resisting disclosure, i.e. the City and/or the company, must satisfy each of the following three requirements:

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), (b) or (c) of section 10(1) will occur.

### Type of Information

The City and the company submit that the record contains highly sensitive commercial and financial information and trade secrets and practices related to the delivery of services contracted for by the City. I have reviewed the information in the record and I am satisfied that it qualifies as commercial, financial and technical information for the purposes of section 10(1) of the Act. I find that the first requirement has been met.

### Supplied in Confidence

In order to meet this requirement, the City and/or the company must establish that the information was **supplied** to the City, and further, that it was supplied **in confidence**, either implicitly or explicitly.

Previous orders of the Commissioner have addressed the question of whether the information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must have been the same as that originally provided by the third party. If the information in an agreement is the product of a negotiation process between the institution and the third party, that information will not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act.

However, 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 the institution.

The City states that the record reflects the company's response to the City's Request for Proposal and that it incorporates the information supplied by the company. The City and the company both submit that the record contains information that was supplied to the City, explicitly in confidence. In this regard, the company's concern for the integrity and confidentiality of the information in the proposal and the agreement is reflected in a copy of a letter provided to this office. The letter predates the request and reiterates the company's position that the record contains significant confidential information and was supplied to the City on the understanding that it would not be shared with any other party.

Both the City and the company submit that the record contains specific details of the terms and conditions for the delivery of services by the company. The City points out that the record contains unique terms and proposals that were developed solely for the City by the company. In Order M-169, former Inquiry Officer Holly Big Canoe made the following comments with respect to the issue of confidentiality in section 10(1) of the Act:

> In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

Having carefully reviewed the representations of the City and the company, I am satisfied that the information in the record was supplied to the City by the company and that it was supplied implicitly and explicitly in confidence. The second element of section 10(1) of the Act has been met.

**Harms**

To satisfy this part of the test, the City and/or the company must describe a set of facts or circumstances which would lead to a reasonable expectation that one or more of the harms described in section 10(1)(a), (b) or (c) will occur if the information is disclosed (Order 36). Again, the onus or burden of proof lies on the parties resisting disclosure, in this case, the City and the company.

Both the company and the City submit that disclosure of the information in the record could prejudice the company's competitive position as the computer industry is extremely competitive and successes and failures in this industry continue to be determined, in large part, by achieving a competitive advantage through trade secrets or practices (section 10(1)(a)). The company points out that the record contains not only the terms with the City but also the terms for services to be provided by its sub-contractors. The company submits that disclosure of the record would

enable its competitors to determine the critical elements of the pricing techniques, marketing strategies and operational capabilities and seriously jeopardize its competitive position in the marketplace.

The company submits that its competitive position in the marketplace was achieved through significant investment and disclosure of the information in the records would result in an undue loss to it and an undue gain for its competitors (section 10(1)(c)). The City supports the company's position that disclosure of the information would enable the company's competitors to replicate the company's technologies and services and result in financial loss to the company.

The City submits that disclosure would also result in similar information no longer being supplied to the City where it is in the public interest that this continue to be done (section 10(1)(b)). The City explains that if the information in the record is disclosed, business participants such as the company would be reluctant to respond to the City's requests for proposals and do business with the government because the disadvantages of disclosure would far outweigh the benefits. The City states that this would in turn reduce the number of parties responding to the City's requests for proposals, leading to a more limited choice and higher costs to the City.

I have carefully reviewed the information in the record together with the representations of the parties. I am satisfied that disclosure of the information in the record could reasonably be expected to result in undue loss to the company and significantly prejudice its competitive position.

I find that all three components of the section 10(1) exemption have been met and the record is properly exempt from disclosure under section 10(1) of the Act.

In the circumstances of this appeal, I have also considered the application of section 4(2) of the Act. The purpose of this section is to require institutions to try, wherever possible, to sever records so as to remove those parts that do not fall within the scope of the exemptions under sections 6 to 15. This interpretation is consistent with one of the fundamental principals of the Act, that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. I have carefully reviewed the information in the record and I find that it is not possible to sever the record as even the headings and subheadings contain information on the business strategy and service delivery of the company which is properly exempt under section 10(1). Therefore I find that section 4(2) has no application.

Because I have found that the record is exempt under section 10(1), it is not necessary for me to consider the application of sections 6(1) and 11(1) of the Act..

## ORDER:

I uphold the decision of the City.

Original signed by: ____________________ ______________ April 4, 1997
Mumtaz Jiwan
Inquiry Officer