



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

ORDER M-925

Appeal M_9600370

Borough of East York



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NATURE OF THE APPEAL:

The Borough of East York (the Borough) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of an agreement between the Borough and a “financial institution” concerning an installment plan for the payment of realty taxes to the Borough (the agreement).

The Borough notified the other party to the agreement (the affected party) of the request pursuant to section 21 of the Act, and requested comments on the disclosure of the record. The affected party submitted representations to the Borough in which it objected to disclosure of the record. Following receipt of the affected party’s submissions, the Borough issued a decision in which it granted access to the record.

The affected party appealed this decision, claiming that the mandatory exemption provided by section 10(1) of the Act (third party information) applied to the record, and Appeal Number M_9600230 was opened. The Borough subsequently reconsidered its decision, and issued a second decision in which it granted access to Schedule 1 of the agreement, but denied access to the agreement itself (including Schedules 2 - 7) on the basis of section 10(1) of the Act. As a result, the affected party withdrew its appeal and Appeal Number M-9600230 was closed.

The requester then appealed the Borough’s decision to deny access to the agreement and Schedules 2 - 7, and the current Appeal Number M-9600370 was opened.

This office provided a Notice of Inquiry to the requester (now the appellant), the affected party and the Borough. Only the affected party submitted representations in response to this Notice.

The record at issue consists of a fifteen-page agreement between the Borough and the affected party, together with Schedules 2 through 7.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a) and (c) of the Act state as follows:

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, where 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In this case, because the Borough has not provided any submissions, it is the affected party which bears the onus of demonstrating that all three elements of this exemption apply to the record.

Type of Information

The affected party submits that the record contains or that its disclosure would reveal a trade secret and information which qualifies as technical, commercial and financial. The record details the terms of the agreement between the Borough and the affected party related to the services to be provided by the affected party. As such, I find that it contains commercial information and the first element of the section 10(1) exemption has been satisfied.

Supplied in Confidence

To meet this aspect of the section 10(1) exemption, the affected party must demonstrate that the information in question was supplied to the Borough, and that it was supplied in confidence. This part of the exemption will also be satisfied if disclosure of the information would reveal information that the affected party has supplied in the sense that it would permit the drawing of accurate inferences about the information originally provided.

As I indicated above, the record at issue is an agreement entered into between the Borough and the affected party.

Previous orders of this office 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 be the same as that originally provided by the third party. Since the information in an agreement is typically 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.

Furthermore, an affected party does not satisfy the burden of proof on the "supplied" issue when it states that disclosure of the agreement would reveal information it supplied to the institution. It is incumbent on the affected party to identify those portions of the agreement which contain information it provided to the institution, or that would reveal information it supplied (Orders P_1105 and M-917).

In support of its position that the agreement would reveal information supplied by it to the Borough in confidence, the affected party provided a copy of a draft agreement submitted by it to the Borough. The affected party submits that this draft agreement contains the core concepts which have been carried forward and are embodied in the agreement. The affected party also provided an affidavit sworn by the former Director of Revenue for the Borough (the former Director) during the relevant time period.

The former Director states that in his capacity as Director, he was approached by a representative of the affected party with ideas and concepts concerning the establishment and operation of an

installment plan. Following confidential discussions with the affected party, the Borough requested the affected party to submit a draft agreement to govern the design, installation and administration of such an installment plan. The former Director confirms that the draft agreement was submitted to the Borough by the affected party on a confidential basis.

The former Director indicates that the negotiations which followed the receipt of the draft agreement resulted in revisions to the draft agreement, but through all of this, the core concepts contained in the draft agreement were carried forward. The former Director states that throughout the negotiation period and following the execution of the agreement, both the affected party and the Borough maintained all discussions and documentation in confidence. The former Director also states that, with the exception of Schedule 1, the executed agreement has not been made public.

I have reviewed the draft agreement and the agreement to compare the information contained therein. It is apparent that, despite having been amended, portions of the agreement reflect the core concepts regarding the installment plan submitted by the affected party. I am satisfied that disclosure of these portions would reveal information that was supplied in confidence or would permit the drawing of accurate inferences about the information originally provided by the affected party to the Borough.

However, much of the agreement contains standard clauses and clauses generally or specifically relating to the relationship between the Borough and the affected party. I am not persuaded that these latter portions of the agreement are anything other than the result of the usual "give and take" of the negotiating process. Accordingly, I find that this information was not supplied in confidence.

Harms

With respect to the portions of the record which I have found to have been supplied in confidence, the affected party states that it has been and continues to be an innovator in the municipal realty tax and business tax installment plan market. The affected party indicates further that this market is rapidly expanding and has become extremely competitive. Moreover, the affected party states that the appellant represents a company which operates in competition with it.

The affected party argues that its competitive advantage in this market, by reason of the development and innovation of the plan in question, would be substantially prejudiced if a competitor, such as the appellant, were able, without the investment of time, effort and resources, to obtain access to the core concepts of the plan. Accordingly, the affected party submits that its competitive position would be significantly prejudiced if the core concept information were disclosed, particularly to a competitor.

Having reviewed the affected party's representations, and the record at issue, I accept the submissions that disclosure could reasonably be expected to prejudice significantly its competitive position, as required by section 10(1)(a) of the Act. Therefore, I find that the third requirement for exemption has been met regarding these portions of the record. I have

highlighted this information on the copy of the record being sent to the Borough's Freedom of Information and Privacy Co-ordinator with a copy of this order.

Because all three requirements for exemption are satisfied with respect to the highlighted portions of the record, I find that these portions are exempt under section 10(1).

ORDER:

1. I uphold the Borough's decision to withhold the portions of the record which are highlighted on the copy of the record being sent to the Borough's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the Borough to disclose the remaining portions of the record to the appellant by sending him a copy by **May 16, 1997** but not earlier than **May 12, 1997**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Borough to provide me with a copy of the portions of the record I have ordered disclosed under Provision 2.

Original signed by: _____

Laurel Cropley
Inquiry Officer

_____ April 11, 1997