



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

ORDER M-907

Appeal M_9600377

City of Toronto



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 document entitled "Report on the Final Site Assessment & Excavation Management Plan for the Proposed Development at Davenport Road between St. Clarens and Lansdowne Avenues, Toronto, Ontario". The requester was a representative of a non-profit community organization whose members live in the vicinity of the proposed development. The City located the requested record and denied access to it, claiming the application of the following exemptions contained in the Act:

- third party information - section 10(1)
- economic and other interests - sections 11(c), (d) and (e)

The requester, by his counsel, appealed the City's decision. As it appeared that the interests of the former and current owners of the property being developed (the affected parties) may be affected by the disclosure of the record, a Notice of Inquiry was provided to them, as well as the requester (now the appellant) and the City. Representations were received from the City, the appellant and one of the affected parties (the current owner).

In its submissions, the City withdrew its reliance on the section 11 exemptions. I will not, therefore, address the application of these exemptions to the record.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 10(1) of the Act, the City and/or the current owner who are resisting disclosure must satisfy each part 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), (b) or (c) of section 10(1) will occur.

Part One of the Test

The City and the current owner submit that the record contains scientific and technical information relating to the environmental status of the proposed development's site and the plans for managing the excavation and clean-up of the problems identified in the record. I have reviewed the record and the submissions of the parties and am satisfied that the record contains

information which qualifies as “technical and scientific information” within the meaning of section 10(1) of the Act.

Part Two of the Test

In order to meet this element of the exemption, the current owner and/or the City must demonstrate that the information contained in the record was **supplied** to the City, either explicitly or implicitly, **in confidence**.

The City submits that the record, which was prepared for the former owner by a consulting firm, was supplied to it by the current owner implicitly in confidence and has been treated as a confidential document since its receipt, notwithstanding references to it which were contained in a public planning report on the proposed development.

The current owner describes in great detail the steps taken by the requester to oppose the proposed development and to obtain a copy of the record, first from the City and then in a proceeding before the Ontario Municipal Board. He indicates that the environmental concerns of the neighbourhood have been completely addressed, as evidenced by the comments of the City’s Medical Officer of Health contained in the planning report. For this reason, the current owner wishes to maintain the confidentiality of the record.

I have reviewed the submissions of the parties and the record itself and find that it was supplied to the City by the current owner with a reasonably held expectation of confidentiality. While the expectation of confidentiality is not explicitly stated, I find that because of the nature of the information contained in the record, it was supplied by the current owner to the City with an implicit expectation of confidentiality and that this expectation was a reasonable one.

Part Three of the Test

In order to meet part three of the section 10(1) test, the City and/or the current owner must demonstrate that one of the harms enumerated in sections 10(1)(a), (b) or (c) could reasonably be expected to result from disclosure of the information. The onus or burden of proof lies on the parties resisting disclosure of the record, in this case, the City and the current owner.

The City submits that the disclosure of the record can reasonably be expected to prejudice significantly the competitive position of the current owner pursuant to section 10(1)(a). It argues that information of this sort is closely related to the commercial value of a potential development site and property developers typically regard it as confidential business information relating to the viability of a development site.

The City further submits that the disclosure of this record can reasonably be expected to result in similar environmental studies no longer being supplied to the City where it is clearly in the public interest for such studies to be supplied, under section 10(1)(b). The City is concerned that studies of similar breadth and quality would not be forthcoming given an anticipation of full public disclosure of these documents.

Finally, the City argues that the disclosure of the record would result in undue loss to the current owner within the meaning of section 10(1)(c) as the community organization would obtain a detailed, technical study without any payment being incurred.

The current owner submits that the disclosure of the record could cause irreparable financial harm to his interests. He argues that the community organization represented by the appellant has already undertaken a campaign of "disinformation" against the development and that quotes taken out of context from the report will be used in an attempt to discourage potential purchasers of homes in the development. In addition, the current owner argues that the misinformation disseminated by the community organization has already caused lost sales and distrust of the developer in the area.

Essentially, the current owner is concerned that further harm to potential sales could reasonably be expected to result from the disclosure of the information contained in the record.

The appellant argues that citizen participation in the planning development review process is necessary to ensure that all competing interests are represented and canvassed, particularly where environmentally contaminated sites are concerned. The community organization wishes to ensure that the remediation of the site is performed in a thorough manner and that the property is properly decommissioned.

With respect to the application of section 10(1)(a), I find that the current owner and the City have not provided me with sufficient evidence to demonstrate that significant prejudice to the competitive position of the current owner could reasonably be expected to result from the disclosure of the record. While the current owner has made some allegations about possible prejudice to its ability to sell homes within the proposed development, I find that the harm alleged could not "reasonably be expected" to occur should the record be disclosed.

In my view, it is not realistic to expect that the disclosure of the information contained in the record will result in such information no longer being made available to the City, as contemplated by section 10(1)(b). I find that it is not reasonable to expect that property developers will no longer provide the City with all of the information it requires on environmental issues regarding contamination and remediation of potential development sites. In order to receive planning approval, such information is required to be supplied to the City by developers and property owners.

Similarly, I find that the disclosure of the record to the appellant will not result in an undue loss or gain to the current owner, within the meaning of section 10(1)(c). The appellant is not a competitor of the current owner and will not receive any financial gain or commercial advantage through the disclosure of the record.

For this reason, I find that the City and the current owner have not satisfied the third part of the section 10(1) test. As all three parts of the test must be met, the exemption does not apply to the record in question.

ORDER:

1. I order the City to disclose the record to the appellant by sending a copy to the community organization's counsel by **March 31, 1997**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ March 10, 1997