



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

INTERIM ORDER MO-1298-I

Appeal MA-990254-1

City of Toronto



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NATURE OF THE APPEAL:

The appellant submitted a request to the City of Toronto (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a response to a City request for proposals submitted by a named company (the affected party). The City denied access to the responsive records under section 10 (third party information) of the Act.

The appellant appealed the City's decision to this office.

During the mediation stage of the appeal, the Mediator contacted the affected party to determine whether or not it would consent to disclosure of the records at issue. The affected person indicated that it did not consent to such disclosure.

Also during the mediation stage of the appeal, the Mediator identified that the mandatory exemption at section 14 (personal privacy) could apply to some of the records at issue.

I sent a Notice of Inquiry seeking representations initially to the City and the affected party. Both the City and the affected party submitted representations to me in response. The affected party also submitted supplementary representations.

The City requested that I withhold portions of its representations. I accepted this request.

ISSUE:

The affected party initially asked me to withhold all of its main and supplementary representations from the appellant. The affected party later asked that I withhold only specific portions of these representations. The purpose of this interim order is to rule on this latter confidentiality request.

DISCUSSION:

Sharing of representations procedure

In the Notice of Inquiry cover letter to the affected party, I stated:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The *Inquiry Procedure* document states:

In its representations, the first party must indicate clearly, and in detail:

- which information in its representations, if any, the party wishes the Adjudicator to withhold from the second party; and

[IPC Order MO-1298-I/May 4, 2000]

- its reasons for this request (see confidentiality criteria below).

The document later sets out the criteria for withholding representations, as follows:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

The affected party's confidentiality request

The affected party addressed the confidentiality of representations issue as follows:

It is formally requested that these Representations, including the supporting affidavits, **not** be released to the Appellant or any other party. It is the position of [the affected party] that disclosure to the Appellant or others of these Representations would significantly prejudice [the affected party's] competitive position, interfere significantly with contractual or other negotiations undertaken by [the affected party], and result in undue harm to [the affected party] and undue gain in the manners outlined in the body of the Representations.

Accordingly, these Representations are submitted to the Commission in strict confidence and on the strict condition that they not be disclosed to any other party. The submissions of [the affected party] as contained within these Representations are presented in a forthright

and frank manner and are given over to the Commission in an effort to support the position that the Technical Proposal should not be disclosed as disclosure of the record would cause [the affected party] significant harm.

It would be unfair and somewhat ironic for these Representations to be disclosed to another party, especially the Appellant, when the information herein is provided for the purpose of ensuring that the record in the first instance remain confidential and not be disclosed. Furthermore, these Representations highlight competitive positions, weaknesses and anticipated harms as identified by [the affected party], information which would be of keen interest to their competitors and highly prejudicial to [the affected party] if released.

Findings

Having reviewed the affected party's initial and supplementary representations in their entirety, including the enclosures and the revised confidentiality request as set out above, I find that portions of this material fall within one or more of the three confidentiality criteria. The confidential passages are highlighted in yellow on pages 4, 5, 12-16, and 19 of the main representations, pages 2-7 of the first affidavit, page 1 of exhibit "A" and pages 1-4 of the second affidavit, and page 2 of the supplementary representations in a copy of the representations attached to the affected party's copy of this order.

In its revised confidentiality request, the affected party indicated that it had a particular concern with disclosure of the passages highlighted in blue in the attached materials. In my view, none of the information marked in blue is information which itself would be exempt under section 10(1) or under any other exemption in the Act. Further, none of this information would reveal the substance of a record claimed to be exempt, or is otherwise confidential based on the four part "Wigmore" test for confidential communications set out above. This information consists of generalized assertions of law and/or argument, as well as information which is clearly known to the requester in the circumstances.

While the passage on page 9 of the main representations is derived from the record, it does not reveal the "substance" of any record claimed to be exempt, and is highly relevant to the issues in the appeal, particularly the "supplied in confidence" issue under section 10(1). Similarly, the passage on page 17, while derived from the record, does not reveal anything in the nature of "substance" of the record; rather, it discloses mere headings and page numbers.

For the above reasons, I have decided that the portions of the affected party's representations not highlighted in yellow in the attached material should be shared with the appellant. The remaining portions of the material will not be shared with the appellant due to confidentiality concerns.

PROCEDURE:

I have attached to the copy of this interim order which is being sent to the affected party a copy of the affected party's representations. The blue highlighting indicates the additional passages the affected party asked me to withhold from the appellant in its revised request, while the yellow highlighting indicates the passages which I will withhold from the appellant. I intend to send the attached material, with the exception

of the yellow highlighted information, to the appellant, together with a Notice of Inquiry, no earlier than **May 18, 2000**.

Original signed by: _____
David Goodis
Senior Adjudicator

_____ May 4, 2000