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

ORDER MO-1513

Appeal MA-010151-2

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 records relating to the Toronto 2008 Olympic bid. Specifically, the requester sought access to:

> All documents, reports and contracts produced since January 1, 1998, by the amalgamated City of Toronto pertaining to the Toronto 2008 Olympics bid, including all correspondence with TO Bid officials or sponsors, and Canadian Olympic Association officials; internal financial reviews/audits of TO Bid budget estimates; correspondence with provincial and federal officials, polling data; if any, and legal contracts pertaining to the bid.

Initially, the City failed to respond to the request and a "deemed refusal" appeal was begun by the requester. This appeal was resolved following the issuance by the City of a decision letter regarding access to records which it identified as responsive. In that decision, the City granted access to a number of records and denied access to a marketing agreement which it had entered into with the National Olympic Committee of Canada (the NOCC). Access to this document was denied under the third party information exemption in section 10(1) of the *Act*.

The requester, now the appellant, appealed the City's decision to deny access to the marketing agreement and requested that the Commissioner's office review the City's decision to determine whether it had conducted a reasonable search for all records which were responsive to the request.

I first provided the City and the NOCC with a Notice of Inquiry, seeking their representations with respect to the issues raised in the appeal. Both parties made submissions which, with one exception, they agreed to share with the appellant. The City objected to the disclosure of a small portion of Page 5 of its representations on the grounds that to do so would disclose a portion of the record at issue in this appeal. I agreed and deleted that portion of the City's submissions in the copy which I provided to the appellant.

The City conducted several additional searches for responsive records following its receipt of the Notice of Inquiry. These searches uncovered a large number of records in the city's Legal Department (7 to 10 boxes of documents), the Audit Services Department and the Economic Trade and Development Office (20 boxes of files).

In a further decision letter dated October 23, 2001, which was received in this office on October 31, 2001, the City provided the appellant with an interim fee estimate of $1,800 and, based on a sample of the records, advised that some of the information contained in them may be exempt from disclosure under sections 7(1) (advice or recommendations), 11 (economic or other interests of an institution), 12 (solicitor-client privilege) or 14(1) (invasion of privacy). In addition, the City advised the appellant that upon payment of 50% of the fee estimate ($900), it would proceed to process his request with respect to the newly-located records. Further, the City advised the appellant that it would begin to proceed with the search only following a 90-day time extension, beginning on January 21, 2002, pursuant to section 20 of the *Act*.

The appellant advised that he wished to proceed with the adjudication of the issue of access to the Marketing Agreement dated May 9, 2001 between the City of Toronto and the National Olympic Committee of Canada, as well as the reasonableness of the fee estimate of $1,800 which the City provided to him. The appellant also indicates that there is a public interest in the disclosure of the information contained in the Marketing Agreement as contemplated by section 16 of the *Act*.

I then provided a Notice of Inquiry to the appellant seeking his submissions on the application of section 10(1) to the Marketing Agreement. In addition, I requested that both the City and the appellant address the fee estimate issue. I did not seek the representations of the NOCC on this issue. Both the City and the appellant made further submissions which were, in turn shared between them. Both the City and the appellant submitted representations by way of reply.

DISCUSSION:

THIRD PARTY INFORMATION

The City and the NOCC take the position that the Marketing Agreement at issue in this appeal is exempt under section 10(1). For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the City and/or the NOCC 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 institution 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 subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly,

> as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

Part 1: Type of Information

The City submits that the Marketing Agreement meets the definition of commercial and/or financial information as it:

> contains information about the design of the proposed marketing plan, strategies and implementation, including cash projections for payments to the NOA, [the NOCC] list of all NOA agreements granting marketing rights to sponsors, suppliers and licensees; sponsor benefits; commercial and indexed prices for advertising based on monthly rates etc.

The NOCC takes the position that the Marketing Agreement contains:

> The financial terms of each of the COA's (Canadian Olympic Committee) contracts with its Sponsors/Suppliers/Licensees (S/S/L). Such information was negotiated in confidence between the COA and its S/S/Ls and was provided for purposes of this record to facilitate a requirement of the International Olympic Committee (IOC), who is also party to the record.
>
> The above financial information is also very sensitive commercial information. The commercial value of this information is derived by virtue of the fact that the COA's agreements with its S/S/Ls are of an exclusive nature (i.e.-only one entity is permitted to be a sponsor in the product categories sold by the COA.

In Order P-493, the term "commercial information" was defined by former Assistant Commissioner Irwin Glasberg as follows:

> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can

> apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

In a number of orders, the term "financial information" has been defined as:

> . . . information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

I adopt these definitions for the purpose of determining whether the information in the Marketing Agreement may properly be characterized as "commercial" and/or "financial" for the purposes of section 10(1). Based upon my review of the information contained in the Marketing Agreement, I find that it falls squarely within the definition of the terms commercial and financial information. This record refers to very specific contractual information relating to the sponsorship, licensing and supplier agreements entered into between the NOCC and various corporate entities. I find that the Marketing Agreement also describes the financial and marketing strategies and arrangements entered into between these entities and the NOCC for the purposes of linking their products to the Olympic movement. As such, I find that the first part of the section 10(1) test has been satisfied.

Part 2: Supplied in Confidence

Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts will generally not qualify as originally having been "supplied" for the purposes of section 10(1) of the *Act*. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the affected party. In addition, information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution. [Orders P-36, P-204, P-251 and P-1105]

The appellant argues that since the Marketing Agreement is just that, an agreement, "by its very nature, [it]is negotiated between two parties, and therefore there is a public interest in determining the City's approach to this negotiation."

> The NOCC submits that the information contained in the Marketing Agreement was "negotiated in confidence between the COA and its S/S/Ls and was provided for purposes of this record to facilitate a requirement of the International Olympic Committee (IOC), who is also party to the record." It goes on to add that "each of these contracts contain confidentiality clauses which do not permit disclosure of information contained therein." It further indicates that "this information was supplied to the City of Toronto, the COA and the IOC only to facilitate completion of the record and was supplied in confidence to the said parties."

The City takes the position that the information contained in the Marketing Agreement meets the second part of the section 10(1) test because:

> . . . the IOC required the City and the NOA to prepare a joint marketing agreement. The IOC specifically requested that the matters addressed in a memorandum of understanding be folded into the Agreement.
>
> As such, the terms of the Agreement were not "negotiated" i.e., not "determined by give and take" but rather, the Agreement was a formal confirmation of the arrangement between the City and NOA for the marketing aspects of the bid as required by the IOC.
>
> . . . as part of its business, the NOA has established relationships with organizations and companies in the private sector with respect to sponsorships, supplierships and licenses. Under the Bid City Agreement, both the City and TO-Bid acknowledged the necessity to protect these relationships and to recognize that the NOA could not act to diminish such relationships by reason of the financing of the City's Olympic bid. In turn the NOA was to provide the TO-Bid with a list of its official sponsors, licensees etc. and to use its best efforts to promote the opportunity to them of becoming official supporters of the City's Olympic bid.
>
> The City submits therefore that the names of the NOA's sponsors, suppliers etc. and the terms of their commercial and financial relationships/agreements with the NOA, including the categories to be offered and the rights to be granted were "supplied" to the City by the NOA. In addition, information relating to the commercial and index advertising prices was supplied by the NOA.
>
> With respect to the other information contained in the Agreement, since the terms of the Agreement were not "negotiated", it is difficult to determine which detail or details were "supplied" and by whom, but it is the City's view that many of the details were supplied by the NOA since this was the body that had the most formal contact with the IOC who required that they enter into a marketing agreement with the City.

On the issue of confidentiality, the City relies on a confidentiality clause contained in the record itself and further indicates that:

> The NOA also advised the City that the IOC objected to the release of the Agreement. Further, as stated above, the City under the City Bid Agreement had agreed not to jeopardize in any way the relationships that the NOA had with its sponsors and licensees (this would include not disclosing their commercial and financial information without their consent).

> Accordingly, the City has always treated the information contained in the Agreement provided by the NOA in confidence, without any time limits or restrictions being placed on this confidentiality.

Based on the submissions of the NOCC and the city, I am satisfied that the financial and commercial information contained in the Marketing Agreement was supplied by the NOCC to the City. The information belonged to the NOCC and the City was not involved in the negotiation of these contracts since they represent the commercial and financial terms agreed to between the sponsors, licensees and suppliers and the NOCC for their participation and exploitation of their connection to the Olympic bid. I have no difficulty in accepting that the information which I have found above to be commercial and financial information was supplied to the City by the NOCC.

Further, particularly in light of the wording of the confidentiality clause contained in paragraph 12 of the Marketing Agreement, I find that this information was supplied to the City by the NOCC with an explicit understanding that it was to be treated in a confidential manner. The wording of paragraph 12 explicitly prohibits any party to the Marketing Agreement from disclosing its contents to any person, other than their own employees or professional advisors. I find that this explicit statement is sufficient evidence of an intention to treat the contents of the Marketing Agreement as confidential. The second part of the section 10(1) test has, accordingly, been met.

Part 3: Harms

To discharge the burden of proof under the third part of the test, the parties opposing disclosure, in this case the NOCC and the City, must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed. [Order P-373]

The words "could reasonably be expected to" appear in the preamble of section 10(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order P-373 and two court decisions on judicial review of that order in *Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)]. [Orders PO-1745 and PO-1747]

The NOCC submits that the disclosure of the information contained in the Marketing Agreement could reasonably be expected to result in prejudice to its competitive position, within the meaning of section 10(1)(a). It submits that because the NOCC is in constant negotiation with existing sponsors, suppliers and licensees for renewal of their agreements and with prospective parties in unsold or new categories, disclosure of the terms contained in the Agreement would

prejudice the NOCC's negotiating position by providing such parties with information they would not otherwise be privy to. In addition, it argues that as a privately funded, not-for-profit association, contingent on its ability to maintain revenue streams from the sale of its intellectual property, disclosure of this information would put at risk its revenue base. Finally, the NOCC argues that the sponsors, suppliers and licensees whose information is contained in the Marketing Agreement would suffer prejudice to their competitive positions if other companies in the same industry were able to access the marketing plans and financial terms outlined in the Agreement.

The submissions of the City reiterate the potential harms expressed by the NOCC in its representations. It should be noted that some of the information contained in the record relates not only to the 1998 Toronto Olympic bid for other, upcoming Games. It argues that the disclosure of the information could reasonably be expected to prejudice the NOCC's negotiating position with current and future sponsors, suppliers and licensees for future Olympic games, beyond those intended to be held in Toronto in 2008.

Based upon my review of the commercial and financial information contained in the Marketing Agreement, I am satisfied that their disclosure could reasonably be expected to result in significant prejudice to the contractual negotiations, current and future, of the NOCC. In my view, the disclosure of this information could reasonably be expected to enable current and future sponsors, suppliers and licensees to use the information to their own advantage in their negotiations with the NOCC, to the detriment of that organization. I find that the City and the NOCC have met the third part of the test for the application of section 10(1) and that the Marketing Agreement is properly exempt from disclosure under that exemption.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that section 16 of the *Act* applies in the present circumstances to effectively "override" the application of the section 10(1) exemption to the Marketing Agreement in question. Section 16 provides:

> An exemption from disclosure of a record under sections 7, 9, 10, 11 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the

> purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

Is There a Compelling Public Interest in the Disclosure of the Record?

The appellant submits that there exists a *bona fide* public interest in the disclosure of the information contained in the Marketing Agreement because both "the Province of Ontario and the City of Toronto agreed to assume significant financial liability for the Games and because the marketing agreement pertains directly to the revenue-generating capacity of the Olympics". For this reason, the appellant argues that there is a clear public interest in "determining whether the taxpayers have been adequately protected under the terms of this agreement or whether a disproportionate benefit accrued to corporate sponsors, the NOCC etc." The appellant goes to add that "because individuals and firms associated with TO-Bid either have strong political connections with the mayor or city departments via municipal contracts, I believe there is an overriding public interest in bringing to light the full extent of those relationships, which would include sponsorship agreements with the NOCC etc."

The appellant concedes that in light of the fact that TO-Bid was unsuccessful in its efforts to secure the 2008 Summer Olympics for Toronto the urgency behind his request has been somewhat diminished. I note, however, that interest in the Olympics generally and the possible bids pending for future Winter Games by other Canadian cities, remains high. There exists a high degree of public interest in the behind-the-scenes goings on with respect to all aspects of the Olympic movement, as evidenced by the recent judging controversies at the Salt Lake City Games. The record at issue, however, deals mainly with certain marketing issues surrounding the possible award of the Summer Games to Toronto for 2008. The record does not address the types of issues identified by the appellant as being of significant interest to the public. For example, the record does not address the potential liability of the provincial, federal or municipal governments for any short-fall which may occur in the conduct of the 2008 Games.

In my view, there does not exist any compelling public interest in the disclosure of the information contained in this record. While there exists a public interest in many aspects of the Olympic movement and the involvement of all three levels of government in bids to secure future Games, I do not agree that this interest extends to the disclosure of the information in the Agreement which is at issue in this appeal. For this reason, I find that section 16 has no application in the present appeal.

FEE ESTIMATE

The City submits that, following the issuance of the initial Notice of Inquiry by this office, it conducted additional searches of its record-holdings which resulted in the identification of some 7-10 boxes of records in its Legal and Audit Services Departments and approximately 20 boxes of records (some 20,000+ documents) in the Economic Development, Culture and Tourism Department's Olympic Office. It submits that it will require three hours of search time to identify responsive records from each of 20 boxes of records, for a total of $1,800, calculated at $30 per hour.

The City submits that the search is required in order to identify responsive records as the appellant has indicated that he is not seeking access to any public documents. In addition, the appellant was advised by the City that the exemptions in sections 7, 10(1), 12 and 14(1) may apply to many of these records. In addition, the City argues that it will be required to remove any records which originated with TO-Bid as the appellant indicates that he is seeking only records which were generated internally by the City.

Based on the representative sample undertaken by the City, it will also be required to carefully examine the records from each source identified in order to ensure that duplicates are not included and that consistency in the approach taken to disclosure is maintained. Finally, the City submits that the records maintained in its Olympic Office have yet to be compiled in a regularized records management system and are not listed or properly and comprehensively filed. Only a small portion of its record-holdings relating to the 2008 bid have been indexed by the City's Olympic Office. Accordingly, the City submits that it will require three hours to carefully review the contents of each box of records in order to ensure that all responsive records will be identified and located.

The appellant suggests that, based on the indices provided to him by the City with its representations, it will not be necessary for the City to review the contents of many of the boxes, which clearly contain only public documents, particularly those which originated with City committees and City Council.

I have reviewed the representations of the City and the appellant with respect to the appropriateness of the fee estimate. Based on the information contained in the indices provided to me by the City, I am satisfied that in order for it to identify all responsive records, the City is required to conduct a search of virtually all of the boxes of documents which it has listed, as well as a number of additional record-holdings of the Olympic Office which remain not-yet catalogued. In my view, the City's estimate of 3 hours for each box of records is reasonable, given the sheer volume and complexity of the documents to be examined. I am satisfied that the City's fee estimate of $1,800 is reasonable and uphold its decision in this regard.

ORDER:

1. I uphold the City's fee estimate of $1,800 and dismiss that part of the appeal.

2. I uphold the City's decision to deny access to the Marketing Agreement under section 10(1)(a) and find that there does not exist a compelling public interest in the disclosure of this record under section 16.

Original signed by: February 19, 2002
Donald Hale
Adjudicator