



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1893

Appeal MA-040039-1

City of Cornwall



Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal from a decision of the City of Cornwall (the City), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The decision was made in response to a request for access to all records related to the management of a restaurant by a named company (now the appellant) at the Civic Complex. The request was subsequently narrowed to seek access only to an audit report prepared by the City's auditors in relation to the operations of the restaurant. After identifying the record responsive to the request, the City notified the appellant and asked for its submissions regarding potential disclosure of the record. After reviewing those submissions, the City decided to grant partial access to the record. The appellant appealed the City's decision to grant partial access to this record.

My inquiry into this matter began with a Notice of Inquiry that also encompassed another appeal brought by the appellant, Appeal No. MA-030366-1. The appellant abandoned Appeal No. MA-030366-1 and the file was accordingly closed on June 22, 2004.

I sent the Notice of Inquiry to the appellant, initially, inviting its representations on the facts and issues raised by the appeal. After receiving the appellant's representations, I then sent the Notice to the City and the requester, together with copies of the non-confidential portions of those representations. I received no representations from either the City or the requester.

RECORD:

At issue in this appeal is access to an audit report dated May 9, 2002 and cover memo of May 10, 2002. The report consists of 11 pages of text, plus 7 schedules. In its initial decision, the City granted access to part of the report containing operating statements for a specified period, withholding other portions based on sections 14(1) and 10(1) of the *Act*. Subsequently, it revised its decision and decided to release all of the report, with the exception of Schedule 1 and certain portions, based on section 14(1) only. The portions that the City proposes to withhold are not at issue, as the requester has not pursued an appeal against this decision, and it is therefore not necessary for me to address them in my decision. These portions are identified in the Brief of Documents filed by the appellant.

The appellant objects to disclosure of the report, relying on the provisions of sections 10(1) and 14(1). It has no objection to the disclosure of Schedule 7, which contains the operating budget for the Civic Complex for the years 2000 and 2001.

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1) states:

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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

Where a third party appeals the head’s decision to release a record, the burden of proving that the record should be withheld from disclosure falls on the third party [see Order 42].

This means that the appellant must satisfy each part of the following three-part test under section 10(1):

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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The types of information listed in section 10(1) have been discussed in prior orders. Of most significance to this appeal are the definitions of commercial and financial information:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making

enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The appellant submits that the report contains financial information, relating to its management of the Civic Complex. I agree. The report is a financial review of the appellant's operations at the Civic Complex, prepared by the City's auditors and based, among other things, on review and testing of records, information pertaining to and the results of an internal audit undertaken by the appellant, and interviews with the appellant's employees.

The report also contains commercial information pertaining to the appellant's operations at the Civic Complex and its contract with the City.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The appellant submits that the report discloses significant financial information relating to its management of the Civic Complex. It divides the financial information into three broad categories: (1) internal audit information; (2) internal accounting methods and procedures; and (3) source information. In relation to category (1), the internal audit information, the appellant submits that it conducted an internal audit of its operations and to cooperate with the City's audit, it disclosed information from this internal audit. In relation to category (2), the appellant states that it revealed information to the City about its internal accounting methods and procedures through the City auditors' interviews with the appellant's employees and representatives. Finally, the appellant submits that it provided the City auditors with numerous source documents (category (3)) used to compile the financial statements the appellant was required to give the City under its agreement.

Applying the broad categories of financial information applied by the appellant, I agree that portions of the report contain or reveal financial information supplied by the appellant in that they consist of the appellant's own internal audit information included in category (1), such as Schedules 5 and 6, or source documents included in category (3), such as Schedule 2. Further, to the extent that the text of the report repeats information in these schedules, those portions also contain or reveal financial information supplied by the appellant. These portions are found in the last paragraph on page 5, the first paragraph on page 6, the third paragraph on page 8 and the second paragraph on page 9.

The information in category (2), the appellant's internal accounting methods and procedures, was partly obtained from the appellant's internal auditors. In addition, the City auditors reviewed and tested the appellant's records and interviewed certain employees of the appellant. The information in category (2) is found in the text of the City auditors' report.

Consistent with my findings under category (1), I find that the information provided by the appellant's internal auditors about the internal audit, including its review of accounting methods and procedures, qualifies as having been "supplied" within the meaning of section 10(1). The information supplied in this manner is found in the last paragraph of page 5, the first paragraph of page 6, the last paragraph of page 7, the third and fourth paragraphs of page 8 and the fourth and fifth paragraphs of page 10.

I am not convinced, however, that the portions of the report discussing the results of the City auditors' review and testing of the appellant's records or interviews with the appellant's employees reveal or contain information "supplied" by the appellant.

These portions, in my view, are similar in quality to other parts of the report that contain the City auditors' more general conclusions about the appellant's financial practices and performance under its contract with the City. The results of the City auditors' review and testing of the appellant's accounting methods and procedures may be viewed as derived from information supplied by the appellant, in that it was based on analyses of the appellant's financial records or interviews with employees. The City auditors' more general conclusions about the appellant's financial practices and performance were also derived from information supplied by the appellant in a broad sense, in that all of the raw material for these assessments necessarily originated with the appellant. However, I find it more in keeping with the purpose of section 10(1) to treat all of this type of information as having been generated or produced by the City auditors during the course of their review, rather than as information "supplied" by the appellant. As I have noted, the purpose of section 10(1) is to protect the "informational assets" of third parties. Although undoubtedly the appellant has an interest in the conclusions of the City's auditors, the audit report is rooted in the City's institutional objective of assessing the financial performance under an important City contract.

My finding in this regard is consistent with other decisions that have considered whether reports of government inspectors contain information "supplied" by third parties. In Order 16, former Commissioner Sidney Linden found:

In order to satisfy the second part of the test, the information must have been supplied by the third party to the institution in confidence. In this case the information in the records was not supplied by the third parties to the institution as required by the *Act*. Rather, the institution obtained the information itself through inspections required by statute. The Federal Court of Appeal in the recent decision of *Canada Packers Inc. and Minister of Agriculture et al* (July 8, 1988) addressed the issue of the meaning of "supplied" in the context of the federal *Access to Information Act* S.C. 1980-81-82, c.111. The *Canada Packers* case involved federal meat inspection team audit reports and, speaking for the Court, Justice MacGuigan at pg. 7 states:

"Paragraph 20(1)(b) [of the Federal Act] relates not to all confidential information but only to that which has been 'supplied to a government institution by a third party'. Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed."

This office has applied the findings in the *Canada Packers* decision to a property inspection (Order P-122), environmental inspection (Order PO-1701), pound inspection (Order PO-2197), organizational audit (Order PO-2206) and school inspection (Order P-1614). In the last case, former Adjudicator Laurel Cropley found that information contained in a school inspection report, and obtained by the inspectors through interviews with staff and students, visitation to classrooms, personal observation and inspection of documents and students' work, was for the most part not "supplied" within the meaning of section 17(1) of the provincial *Act*, the equivalent to section 10(1).

In sum, the portions of the report containing the results of the City auditors' review and testing of records or interviews with employees, and their views and conclusions about the appellant's financial practices and performance, are not akin to the type of "informational assets" of third parties protected by section 10(1). I find that this information was not supplied within the meaning of section 10(1).

The text of the report also contains general narrative about the background facts, the contract between the appellant and the City and the City auditors' methods. There is also an Index of Schedules consisting simply of a list of titles. I find that none of this information qualifies as having been "supplied" by the appellant.

Schedules 3 and 4 do not appear to fall within the three broad categories of financial information described by the appellant. Nevertheless, I am satisfied that they contain or reveal financial information supplied by the appellant, in that they contain a budget prepared by the appellant, and a table-form analysis of the budget by the City auditors, respectively. The last two

paragraphs of pages 9 and the first two paragraphs of page 10 of the text contain or reveal information found in Schedules 3 and 4 and should also be viewed as having been supplied by the appellant.

In conclusion, I have found that information in categories (1) and (3), as found in Schedules 2 to 6 and certain parts of the text, contain or reveal information supplied by the appellant within the meaning of section 10(1). Information in category (2) that was given to the City auditors by the appellant's internal auditors was also "supplied" within the meaning of this section. The rest of the report does not meet the second part of the three-part test for exemption under section 10(1), and is therefore not exempt from disclosure under this section. It is unnecessary to discuss this information further under section 10(1); however, below, I will consider whether section 14(1) may apply to exempt some of it.

In confidence

In relation to the information that I accept as having been supplied by the appellant, the appellant must establish that it held a reasonable expectation of confidentiality, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

The appellant refers to the following provision of its contract with the City to support its assertion that the financial information in the report was supplied in confidence:

Section 19 – Confidentiality

- (a) Confidential Information. All financial, statistical, operating and personnel data, including recipes, meal plans, menus, computer software programs and operating procedures relating to, or utilized in, [the appellant's] or the Client's business is the exclusive property of [the appellant] or the Client as the case may be and shall be considered to be confidential information. Each party shall keep such information confidential, shall provide such information only to its employees, agents, independent contractors and representatives on a "need to know" basis and shall not permit its employees, agents, independent contractors or representatives to disclose such information without the express written consent of the other party. [The appellant] acknowledges that as part of the Client's normal budgeting process, all expenditure and revenues associated with the provision of Food Services are part of a public budget document. [The appellant] further acknowledges that the terms and conditions of this Agreement are subject to the *Freedom of Information and Protection of Privacy Act*.

The appellant submits that it supplied its financial information to the City expressly or implicitly under the above confidentiality provision. The auditors created the report based on this

information and presented it at an *in camera* session of City Council. The report has never been disclosed to the general public.

The appellant acknowledges that consistent with Section 19 of the contract, quoted above, the financial statements and operating budget for the Civic Complex are part of the City's public budget process. However, it submits that the source information from which those documents are produced and the results of the internal audit are not available from sources to which the public has access.

Based on the appellant's submissions, I am satisfied that it supplied the financial information falling within categories (1) and (3), as well as the information in category (2) provided by its auditors, pursuant to a reasonably held expectation of confidence.

However, based on the provisions of Section 19 of the contract, I find that the appellant does not hold a reasonable expectation of confidence in relation to the information in Schedules 3 and 4, as they contain budget information which the appellant has agreed will be available to the public. I therefore find that the appellant has not established that the information in Schedules 3 and 4 was supplied in confidence. As all three parts of the test under section 10(1) must be met, I find that section 10(1) does not exempt Schedules 3 and 4 and the parts of the text referring to information in these schedules from disclosure. No other exemption applies to this information, and I will therefore order it disclosed.

In conclusion, I have found that information falling within categories (1) and (3), found in Schedules 2, 5 and 6 and the paragraphs on pages 5 to 9 noted above, contain or reveal information supplied in confidence by the appellant. Likewise, I find that information in category (2) provided by the appellant's internal auditors was also supplied in confidence. I will now consider whether this information meets part 3 of the three-part test for exemption under section 10(1).

Part 3: harms

To meet this part of the test, the appellant must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The appellant submits that disclosure of the source information in category (3) discloses valuable information pertaining to the pricing and supply of its products and services. Were it to be

disclosed, the highly competitive nature of the food services market would ensure that its competitors would use it to adopt pricing strategies to minimize its competitive advantage and to undercut pricing on future contracts at other sites where it wishes to bid on catering services.

The disclosure of such information, it submits, could assist its competitors in winning contracts currently opened for tender, and help any current or prospective client to obtain concessions from the appellant in negotiating new contracts or re-negotiating current contracts. In sum, the appellant' submits that disclosure of the source information could reasonably be expected to lead to the harms in sections 10(1)(a) and (c).

The appellant makes the same submissions with respect to the potential for harm from disclosure of its internal audit information in category (1). With respect to category (2), the appellant submits that disclosure of this information would give competitors a valuable insight into its cost accounting methods and pricing practices, to the appellant's competitive detriment.

Based on the appellant's submissions and the material before me, I am satisfied that disclosure of the information in categories (1) and (3), as found in Schedules 2, 5 and 6 and the paragraphs of pages 5 to 9 notes above, could reasonably be expected to lead to the harms described in sections 10(1)(a) and (c). The appellant's financial information is presented in significant detail in these parts of the report, and I accept the appellant's submissions as to the potential for use of this information by its competitors, to its detriment. I also accept the appellant's submissions on the reasonable expectation of harm in relation to information supplied by its auditors in category (2). As this information meets all three parts of the test under section 10(1), it is exempt from disclosure.

PERSONAL INFORMATION

In addition to the portions that the City decided to withhold, the appellant asserts that other portions of the report also qualify for exemption under section 14(1). Of these additional portions, I have found Schedule 6 exempt under section 10(1), as well as the relevant portions on pages 5 and 7. What remains at issue under section 14(1) therefore are portions on pages 2, 4 and 8.

Since section 14(1) protects personal privacy, in order to determine whether this exemption may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. Under section 2(1), personal information is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual.

The meaning of "about" the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official

or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The appellant submits that the report discloses the following personal information about its employees who were interviewed in the course of its preparation:

- Names of the employees and their employer
- Email addresses and telephone numbers of certain employees
- Positions or responsibilities held by certain employees with the appellant’s organization

I am not satisfied that the names of the employees on pages 2, 4 and 8 is information “about” these individuals in a personal sense. It is information about these individuals in their employment capacities, and I do not find that it reveals anything of a personal nature about these individuals. As this information does not meet the definition of “personal information”, it does not qualify for exemption under section 14(1).

Conclusion

In general terms, the information that I find exempt from disclosure consists of financial information supplied by the appellant during the course of the City’s audit, through either documentation or the appellant’s internal auditors.

The information that is not exempt includes background information, the results of the City auditors’ review and testing of records, the views and conclusions of the auditors, and other information that I find was not “supplied in confidence” by the appellant, within the meaning of section 10(1).

ORDER:

1. I uphold the decision of the City, in part.
2. I order the City to withhold access to Schedules 2, 5 and 6, and portions of the text of the report. For greater certainty, I have sent the City a copy of the record showing the portions to be withheld in yellow highlighting.
3. I order the City to disclose the record, with the highlighted portions severed, to the requester by sending a copy by **January 31, 2005**, but no earlier than **January 24, 2005**.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me a copy of the record disclosed to the requester.

Original signed by: _____

Sherry Liang
Adjudicator

December 24, 2004 _____