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

ORDER MO-2394

Appeal MA08-12

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 the following information:

> As part of our environmental site assessment process regarding the above-referenced matter, on behalf of our Client … we are requesting information in the City of Toronto's files regarding the **Community Benefits Agreement Negotiated by the City of Toronto with all Local Communities (including but not limited to Cities, Towns, Townships, Counties, Private Land Owners in the vicinity of Green Lane Landfill Site and First Nations) and Organizations Regarding the City of Toronto's Purchase of the Green Lane Landfill Site** located on Parts of Lots 21, 22 and 23, Concession III, Township of Southwold, County of Elgin, Ontario. We are requesting all information regarding this matter (both present and dormant) including the executed, final versions of the **Community Benefits Agreements** (or any similar agreements) from the City of Toronto. We are also interested in recent land acquisitions (2000 to present) by the City of Toronto in the vicinity of the Green Lane Landfill Site. [Emphasis in original.]

The City located two records responsive to the request:

- "Host Community Agreement" between the Corporation of the Township of Southwold and the City, dated April 2, 2007.

- "First Nations Community Benefits Agreement" between the Oneida First Nation of the Thames, the Chippewas of the Thames First Nation, and the City, dated April 2, 2007.

The City then issued third party notices to the Township of Southwold and a law firm (which presumably represented the two First Nations in their negotiations with the City), pursuant to section 21 of the *Act*. It invited them to submit representations as to whether the Agreements should be disclosed to the requester. The Township agreed to disclose its Agreement with the City to the requester. The law firm did not submit any representations to the City.

The City issued decision letters to the third parties and the requester, stating that it had decided to disclose the Agreements in their entirety to the requester. The Agreement between the Township of Southwold and the City was disclosed to the requester. However, the law firm, which stated that it was representing the Oneida First Nation of the Thames, appealed the City's decision to disclose the First Nations Community Benefits Agreement. Consequently, this is a third party appeal.

In its appeal letter, the law firm claims that the mandatory exemption in section 10(1) (third party information) of the *Act* applies to the First Nations Community Benefits Agreement. In addition, it states that, "Our client considers the proposed unilateral disclosure of the Agreement by the City of Toronto an affront to its jurisdiction and takes the position that any requests for disclosure of the Agreement should be directed to the Chief and Council of [the] Oneida [First] Nation of the Thames."

During mediation, the requester agreed to disclose to the third party appellant the fact that he is seeking access to the Agreement on behalf of another First Nation. The requester also claimed that there is a compelling public interest in the disclosure of the Agreement. As a result, the public interest override in section 16 of the *Act* was added as an issue.

The appeal letter filed by the law firm states that the Oneida First Nation of the Thames is appealing the City's decision. This letter makes no reference to the Chippewas of the Thames First Nation. However, the law firm informed the mediator that it is also representing the Chippewas of the Thames First Nation in this appeal. Consequently, although the Oneida First Nation of the Thames is formally the appellant, I decided to treat the Chippewas of the Thames First Nation as an affected party, which would entitle it to submit representations in the same manner as the appellant. This appeal was not resolved during mediation and was moved to the adjudication stage of the appeal process for an inquiry.

I decided to start my inquiry by seeking representations from the third party appellant, the affected party and the City. I invited both the Oneida First Nation of the Thames and the Chippewas of the Thames First Nation (through their law firm) to submit representations on all issues in the Notice of Inquiry that was issued to them. I also invited the City to provide representations that outline its reasons for deciding to disclose the record at issue.

In response, the City submitted representations to this office stating that, "The City submits that no exemptions under [the *Act*] apply to this document. The Agreement was not supplied to the [City] in confidence and there is no potential harm to the City if the record is disclosed."

The law firm submitted representations on behalf of the appellant (the Oneida First Nation of the Thames), but these representations did not make any reference to the position of the affected party (the Chippewas of the Thames First Nation) on the issues in this appeal. Consequently, I sent a letter to the law firm to clarify this matter.

The law firm sent a response letter confirming that it also represents the affected party in this appeal. It further stated that, "[the] Chippewas of the Thames First Nation [objects] to disclosure of the record at issue and they agree with and support the submissions made … on behalf of the Oneida First Nation of the Thames." In this order, I will refer to the appellant and the affected party collectively as the "two First Nations."

I then sent a Notice of Inquiry to the requester, along with a complete copy of the representations submitted by the City and the law firm representing the two First Nations. The requester submitted representations in response.

Next, I sent the requester's representations to the City and the law firm representing the two First Nations and invited them to submit reply representations. The City submitted a brief letter stating that it continues to believe that the record at issue should be disclosed to the requester. The law firm representing the two First Nations did not submit any reply representations.

RECORD:

The record at issue in this appeal is the "First Nations Community Benefits Agreement" between the Oneida First Nation of the Thames, the Chippewas of the Thames First Nation, and the City, dated April 2, 2007. (Including Schedules "A", "B", and "C".)

DISCUSSION:

THIRD PARTY INFORMATION

The two First Nations, which object to the City's decision to disclose the record at issue to the requester, claim that the mandatory exemption in section 10(1) of the *Act* applies to this record.

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, if 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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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].

Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third

parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

In the circumstances of this appeal, the City decided to disclose the record at issue, but the two First Nations objected to that decision. Consequently, the onus is on the two First Nations to prove that the section 10(1) exemption applies to the record at issue.

For section 10(1) to apply, the two First Nations 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 paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

In order to satisfy part 1 of the test, the two First Nations must prove that the record at issue contains one or more of the types of information listed in section 10(1).

The two First Nations submit that the record at issue contains "financial information":

> The Agreement contains certain financial information, namely provisions for one-time and ongoing payments to [the two First Nations] as an offset against the impacts on their rights and on the environment in and around the two First Nations' communities caused by the use of the landfill site by the City of Toronto.

The requester submits that, "The specific types of information which [qualify] for the exclusion are not found in the Agreement."

I have reviewed the record at issue and agree with the two First Nations that it contains "financial information." The meaning of this term has been discussed in prior orders:

> *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 record at issue is the "First Nations Community Benefits Agreement" between the two First Nations and the City. This Agreement sets out the "benefits" that the City is required to provide to the two First Nations to offset the impact of the City's new landfill site on their communities. The terms of the Agreement include various payments that will flow from the City to the two First Nations. These payments clearly relate to money and refer to specific data.

In short, I find that the record at issue contains "financial information." Consequently, the two First Nations have satisfied part 1 of the section 10(1) test.

Part 2: supplied in confidence

For section 10(1) to apply, the two First Nations must also satisfy part 2 of the three-part test, which is that the information must have been "supplied" to the institution "in confidence," either implicitly or explicitly. Consequently, I will start by determining whether they "supplied" the information in the record at issue to the City. If I find that this information was "supplied" to the City, I will then determine whether it was 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 contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. This approach was upheld by the Divisional Court in the *Boeing* case, cited above.

Orders MO-1706 and PO-2371 discuss two exceptions to the general rule that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). These may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit an accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by a third party to the institution. The "immutability" exception applies to information that is immutable or not susceptible of change.

The two First Nations submit that they "supplied" the information in the Agreement to the City:

> In respect of whether the Agreement or its terms, especially the financial terms, were "supplied", we rely on the exception to finding that "negotiated contract terms" are not supplied, being the exception that their disclosure could reveal and prejudice immutable characteristics. The disclosure of the Agreement will have the effect of setting parameters around perceptions of the Oneida's aboriginal and treaty rights, and how these should be accommodated when these are under consideration in other fora (particularly when the Oneida are relying on these rights to reach agreements with other parties for offset benefits to compensate for impact on these rights). Thus, the effect of disclosure will impact on its distinct aboriginal and treaty rights – immutable characteristics – under Canadian law, and its rights to self-determination and its social and economic rights under international law (immutable characteristics).

To support its submission that disclosing the Agreement will impact their aboriginal and treaty rights under Canadian law, the two First Nations cite the following court decisions: *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 101; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

The requester submits that the contents of the Agreement between the City and the two First Nations were not "supplied" for the purposes of section 10(1) of the *Act*, because the Agreement "appears to contain mutually generated information."

I have carefully reviewed the record at issue and considered the representations of the parties. In my view, the information in the Agreement was not "supplied" to the City by the two First Nations, for the reasons that follow.

As noted above, the Agreement between the two First Nations and the City sets out the "benefits" that the City is required to provide to the two First Nations to offset the impact of the City's new landfill site on their communities. The terms of the Agreement include various payments that will flow from the City to the two First Nations. These contractual terms qualify as "financial information" for the purposes of section 10(1) of the *Act*.

The terms of the Agreement were subject to negotiation between the City and the two First Nations and were, therefore, mutually generated by the parties, which means that this information cannot be considered "supplied" for the purposes of section 10(1) of the *Act*, subject to the two exceptions set out above.

With respect to the first exception ("inferred disclosure"), there is no evidence before me that would suggest that disclosure of any of this information would permit a person to make an accurate inference with respect to underlying non-negotiated confidential information supplied

by the two First Nations to the City. I find, therefore, that the "inferred disclosure" exception does not apply to the information in the record at issue.

With respect to the second exception ("immutability"), I am not persuaded by the two First Nations' submission that this exception applies in the circumstances of this appeal. They submit that disclosing the information in the Agreement "could reveal and prejudice immutable characteristics." They then define these immutable characteristics as including their treaty rights under Canadian law and their social and economic rights and right to self-determination under international law.

The immutability exception applies to the specific information in a contract, such as financial information, not to certain rights that a party may have under national and international law. It applies to information that is not susceptible of change and, therefore, cannot be negotiated. I find that the contractual terms contained in the Agreement between the City and the two First Nations were negotiated and clearly susceptible of change. This includes the provisions in the Agreement that cover the dollar amount of certain payments that the City is required to provide to the two First Nations for various matters. I find, therefore, that the "immutability" exception does not apply to the information in the record at issue.

In short, I find that the information in the Agreement was the product of a mutual negotiation process between the City and the two First Nations. It cannot, therefore, be said that the two First Nations "supplied" the information in this Agreement to the City. Consequently, I find that the two First Nations have failed to satisfy part 2 of the three-part section 10(1) test. Although they submit that they "understood implicitly that the Agreement would be confidential," it is not necessary to consider the "in confidence" element of part 2 of the three-part test, because I have already found that the two First Nations have failed to satisfy the preliminary requirement that they "supplied" the information in the Agreement to the City.

In their representations, the two First Nations also submit that the harms contemplated in part 3 of the three-part section 10(1) test could reasonably be expected to occur if the information in the Agreement is disclosed to the requester. However, the two First Nations must satisfy all three parts of the section 10(1) test to establish that the record at issue is exempt from disclosure. If they fail to meet any part of this test, the section 10(1) exemption does not apply. Given that I have found that the two First Nations have failed to satisfy part 2 of the three-part test, the record at issue does not qualify for exemption under section 10(1) of the *Act*. It is, therefore, not necessary to consider whether they have satisfied part 3 of the section 10(1) test.

Throughout their representations, the two First Nations argue that this office should treat this appeal differently than other appeals that come before this office. For example, they submit that:

> … this appeal is not the typical commercial situation contemplated by the *Act* and, therefore, our client should not be bound by prior decisions of the Information and Privacy Commission. We submit that the Commission should give appropriate

> weight to our client's aboriginal and treaty rights in considering the submissions herein.
>
> ….
>
> … the usual tests applied by the Information and Privacy Commission should not apply to our client and the Commission's understanding on this matter should be broadened to account for our client's unique rights and to recognize the Oneida Nation of the Thames' unique position as an aboriginal people under Canadian and international law.

I acknowledge the unique position of First Nations in Canada and particularly the duty of the federal and provincial governments to consult with First Nations before making decisions that may have an impact on them. In the circumstances of this appeal, the access request for the Agreement was submitted to the City. In accordance with the notification requirements in section 21 of the *Act*, the City sent a letter to the law firm that represents the two First Nations and invited it to submit representations as to whether its clients had any concerns about disclosure of the Agreement. The City did not receive any response and decided, therefore, to disclose the Agreement to the requester.

At that point, the Oneida of the Thames First Nations (through their law firm) appealed the City's decision to disclose the Agreement. During the adjudication stage of the appeal process, I invited both the Oneida First Nation of the Thames and the Chippewas of the Thames First Nation (through their law firm) to submit representations on the issues in this appeal. I received representations on behalf of the appellant (the Oneida First Nation of the Thames) but these representations did not make any reference to the position of the affected party (the Chippewas of the Thames First Nation) on the issues in this appeal. Consequently, I sent a letter to the law firm to clarify this matter, and it sent a response letter confirming that, "[the] Chippewas of the Thames First Nation [objects] to disclosure of the record at issue and they agree with and support the submissions made … on behalf of the Oneida First Nation of the Thames."

In my view, both the City and this office have fulfilled their duty to consult with the two First Nations by providing them with the opportunity to present their views as to whether this record should be disclosed. The law firm representing these First Nations submitted representations, which I have carefully considered and taken into account in reaching my decision in this appeal.

There may well be circumstances in which First Nations should be treated differently in an access-to-information context than other parties, but those circumstances do not exist in this appeal. The full disclosure of the Agreement is a matter of public accountability. Both aboriginal and non-aboriginal persons have the right to scrutinize the terms of the Agreement to ensure that elected officials and public servants have acted responsibly and in the public interest.

In short, I find that the record at issue does not qualify for exemption under section 10(1) of the *Act*, and it must be disclosed to the requester.

ORDER:

1. I uphold the City's decision to disclose the record at issue to the requester. The appeal is dismissed.

2. I order the City to disclose the record at issue to the requester by **March 26, 2009** but not before **March 19, 2009**.

Original signed by: February 19, 2009
Colin Bhattacharjee
Adjudicator