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

ORDER M-917

Appeal M_9600346

City of Toronto

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NATURE OF THE APPEAL:

The appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the City of Toronto (the City). The request was for copies of the original contract and any amending agreements between the City and a named company (the Company) concerning food concessions in parks in the east end of the City. The appellant also requested copies of the decisions of City Council related to the contract and any of its amendments.

The City granted access to the Council decisions made in sessions open to the public, but denied access to the remaining information on the basis of the following exemptions in the Act:

- closed meeting - section 6(1)(b)
- third party information - sections 10(1)(a) and (c)
- economic interest of the institution - sections 11(c) and (d)

The appellant appealed the denial of access to the contract and the amending agreement.

During mediation, the appellant confirmed that he was not seeking access to Schedule "D" of the contract dated September 3, 1986. With the exception of the four site plans, the appellant is also not seeking access to Schedule "C" of this contract. The records remaining at issue are described in Appendix A to this order.

A Notice of Inquiry was sent to the City, the appellant and the Company. Neither the City nor the appellant submitted any representations to this office. The City also confirmed that it is no longer relying on the discretionary exemptions in sections 6(1)(b), 11(c) and (d) of the Act.

Counsel for the Company (counsel) submitted representations on behalf of his client. In his submissions, counsel raised the application of section 14(1) (invasion of privacy). As this is a mandatory exemption, I will consider it in this order.

As sections 11(c) and (d) of the Act are discretionary exemptions and the City is no longer relying on them, I will not consider them further. Section 6(1)(b) is also a discretionary exemption. However, despite the fact that the City no longer relies on this exemption, counsel submits that the exemption still applies. Therefore, I will consider this as a preliminary issue in the discussion which follows.

DISCUSSION:

PRELIMINARY ISSUE

Discretionary Exemption Maintained By The Company

Counsel submits that because the City initially claimed the application of section 6(1)(b) to the records, it is open to the appellant to maintain that it still applies. In this regard, counsel notes that the terms of the initial contract and the amending agreements were considered during in-

camera proceedings of City Council without discussion in an open forum or public meeting. Thus, counsel states that section 6(1)(b) applies because disclosure of these documents would reveal the substance of the deliberations of a meeting of council that took place in the absence of the public.

Counsel has advised that he is attempting to obtain the necessary documentation from the City to "prove the in-camera deliberations". Counsel has provided me with correspondence from the City advising him to submit a request for this information under the Act.

When counsel first raised this issue during the inquiry, this office provided him with a copy of Order P-1137. At page 11 of that order, I stated:

> The Act includes a number of discretionary exemptions within sections 13 to 22 which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
>
> The Act also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17 of the Act respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
>
> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the Act.

Order P-1137 was decided under the provincial Freedom of Information and Protection of Privacy Act. However, the principles set out above regarding the relationship between discretionary and mandatory exemptions and the respective interests they are designed to protect apply equally in the municipal context and to appeals under the Act. I will apply them to the present appeal.

As indicated, in this case the City initially claimed the application of section 6(1)(b) to the records but has confirmed that it is no longer relying on this exemption. Thus, it is my view that, for whatever reasons, the City has now decided to exercise its discretion in favour of disclosing the records at issue (subject to the mandatory exemption in section 10(1)) and thus has abandoned its reliance on this exemption, as it has done with respect to sections 11(c) and (d).

In his submissions, counsel suggests that the City has perhaps exercised this discretion improperly in that political considerations have been brought to bear. There is no evidence before me to support this allegation.

Based on the principles set out in Order P-1137, the issue is whether this is one of those "unusual cases" in which the Company's interests would not be properly addressed by my consideration of the mandatory exemptions in sections 10(1)(a) and (c) and 14(1) of the Act. Apart from counsel's comment noted above, he has not explained why the circumstances of this appeal make it an unusual case which warrants that the Company's interests be considered not simply under the mandatory exemptions, but also under a discretionary exemption which is usually reserved for the protection of an institution's interests.

Even if counsel were to obtain the documentation he seeks from the City to substantiate the application of the section 6(1)(b) exemption, it is the City that has the discretion to rely on it to deny access to the Company's documents. Counsel would still have to persuade me that there are exceptional circumstances in this appeal such that I should consider the application of the discretionary exemption, in spite of the City's clear indication that it no longer relies on this exemption.

In my view, the purpose of section 6(1)(b) is to allow municipal councils to conduct some of their business and make certain decisions in the absence of the public when they are legally authorized to do so. It is noteworthy that at the provincial level, the analogous exemption (section 12 - Cabinet records) is a mandatory, as opposed to a discretionary exemption. By making section 6(1)(b) a discretionary exemption, the legislators recognized that there will be cases in which councils may wish to disclose information in order to apprise the public of how they conduct their business. Since the City is no longer relying on this exemption, this is clearly one of those cases.

Accordingly, I find that this is not a case in which there are unusual circumstances which require that I consider the Company's interests other than under the mandatory provisions of sections 10(1)(a) and (c) and 14(1) of the Act. Therefore, I will not consider the application of section 6(1)(b) to the records at issue in this appeal.

PERSONAL INFORMATION

Counsel submits that section 14(3)(f) of the Act applies in the circumstances of this appeal. This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

For this section to apply, the information at issue must be "personal information" as defined in section 2(1) of the Act. In that section, "personal information" is defined, in part, to mean "recorded information about an identifiable individual".

Counsel's submissions are not clear as to whose personal information he considers to be contained in the records. Counsel appears to be claiming that the information relates to the General Manager and the "principals" of the Company.

All the records before me refer to the Company, both in its initial and changed names, as the entity with which the City contracted. The individual to whom the Company's submissions refer as the "General Manager" has signed all the documents in his capacity as President of the Company. None of the records identify who the principals of the Company might be. There is no evidence before me that the financial information contained in the records is other than that of the Company.

On the basis of the above, I find that the records do not contain personal information. Thus, section 14(3)(f) of the Act has no application in the circumstances of this appeal.

THIRD PARTY INFORMATION

Sections 10(1)(a) and (c) of the Act state as follows:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In this case, because the City has not provided any submissions, it is the Company which bears the onus of demonstrating that all three elements of this exemption apply to the records.

Type of Information

Counsel submits that the records contain financial and commercial information. I agree. The records detail the terms of the agreements between the City and the Company related to the services to be provided by the Company. They contain financial information related to the Company's overhead and operating costs. Certain portions of the records also contain technical

information in the form of architectural drawings and site plans. Based on the type of information contained in the records, I find that the first element of the section 10(1) exemption has been satisfied.

Supplied in Confidence

To meet this aspect of the section 10(1) exemption, the Company must demonstrate that the information in question was supplied to the City, and that it was supplied in confidence. This part of the exemption will also be satisfied if disclosure of the information would reveal information that the Company has supplied in the sense that it would permit the drawing of accurate inferences about the information originally provided.

The initial agreement between the City and the Company was entered into as a result of the Company being the successful bidder in a tender let by the City's Department of Purchasing and Supply. It is clear that some of the records at issue were originally part of the tender documents which the City provided to the prospective bidders. In particular, portions of Record 2, and Records 3 and Record 5 in their entirety all originated with the City and cannot therefore be considered to have been supplied by the Company.

Accordingly, this information cannot qualify for exemption pursuant to sections 10(1)(a) or (c) of the Act.

Records 1 and 6-10 are all contracts entered into between the City and the Company.

Previous orders of this office have addressed the question of whether the information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the third party. Since the information in an agreement is typically the product of a negotiation process between the institution and the third party, that information will not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act.
Furthermore, an affected party such as the Company does not satisfy the burden of proof on the "supplied" issue when it states that disclosure of the agreements would reveal information it supplied to the institution. It is incumbent on the affected party to identify those portions of the agreements which contain information it provided to the institution, or that would reveal information it supplied (Order P_1105).

Counsel himself states in his submissions that "... The initial contract and all ensuing amending agreements have been negotiated ...". He makes numerous references to the nature of the "negotiations" which have taken place between the City and his client with respect to the issues which have arisen between them and which have resulted in the various amendments to the agreements which are the records at issue. I have no evidence before me that any of the specific terms in the executed contracts between the parties are anything other than the result of the usual "give and take" of the negotiating process as described by counsel.

In these circumstances, I do not find that the information in Records 1 and 6-10 was supplied by the Company to the City.

The only records remaining for consideration under this exemption are those submitted by the Company as part of the tender process itself, namely, parts of Record 2 and the site plans in Record 4. I must now determine if this information was "supplied in confidence".

Counsel submits that:

> When the Licensee [the company] contracted with the City it did so on the assumption that the ensuing Contract was a private matter between a family owned Canadian private corporation and an institution. The private arrangements and in particular the profit/loss to be generated by the Licensee is a private matter and as such by implication it was never intended that **the contract and its various amendments** would be disclosed to the general public.
>
> The **Contract** between the Licensee and the City is a private contractual arrangement. **Although the tender was awarded under a public process open to anyone**, upon awarding the tender a contract was negotiated between the respective solicitors and City staff in confidence. [my emphasis]

In addition to counsel's submissions noted above indicating that the tender was awarded in a public process, I note that page 3 of Schedule "A" to the tender document states:

> Note For Those Desiring Tender Information After Tenders Are Opened:
>
> Usually tenders are opened at a meeting of the City of Toronto Executive Committee in Committee Room No. 4, City Hall ... They are publicly read as they are opened and are then referred to the office of the City Clerk to be listed. After 1:00 p.m. on the date such tenders are opened, you may peruse this listing at the office of the City Clerk, 2nd Floor, City Hall, Toronto, or may secure the information by telephoning 947-7031.

Based on the submissions of counsel and the above language found in the tender documents, I cannot conclude that the Company held a reasonable expectation of confidentiality with respect to the information it provided to the City in its tender documents. Therefore, I do not find that the parts of Record 2 and the site plans in Record 4 that were provided by the Company to the City were "supplied in confidence" for the purposes of sections 10(1)(a) and (c) of the Act.

Harms

As indicated previously, in order for the records to be exempt under sections 10(1)(a) or (c) of the Act, they must satisfy all the elements of the exemption. I have found that Records 1, 3, 5-10 and parts of Record 2 were not "supplied" to the City. Even though I have made a finding that the Company did supply parts of Record 2 and the site plans in Record 4 to the City, I did not find that it did so in confidence. These findings are sufficient to dispose of this appeal in that the records do not satisfy all the elements of the section 10(1) exemption.

However, because counsel has provided extensive representations on the "harms" aspect of the exemption, I will set out his submissions below together with some background information as provided by the Company.

It appears that from the outset, the contractual relationship between the Company and the City has been the subject of public and political pressures. In this regard, the Company notes that after it had executed the original contract with the City, it was faced with some public opposition based on terms of the agreement which had made their way into the public arena. Counsel states that "... All the problems that had surfaced to that point were obviously as a result of the public having become aware of the contract documents and exerting tremendous political pressure".

Over the years the relationship between the City and the Company has been further strained by, among other matters, what counsel terms an "illegal vending issue" which has negatively affected the profits of the Company. This issue apparently came to a head in the summer of 1996. As a result of events which occurred at that time, the City and the Company are currently in the process of renegotiating the agreement once again.

In addition, during the summer of 1996, the appellant wrote an article about the situation in a Toronto weekly newspaper. The Company has put the appellant on notice with respect to potential legal action because of the appellant's statements about the Company, as reported in the article.

In order to make a finding of "harms" under section 10(1)(a) of the Act, I must be satisfied that disclosure of the records could prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. In this respect, counsel submits that in the past "... the Licensee [the Company] has spent/lost ... due to the public knowledge of the contract documents".

Counsel emphasizes that the draft agreement he has proposed to resolve the current impasse between the parties is in its initial stages of negotiation and that the negotiations are delicate. He submits that disclosure of the records would allow the appellant to "... interfere with negotiations of a private commercial contract between the City and the Licensee [the Company] by trying to bring public pressure to bear based on false information".

In my opinion, regardless of what the appellant may publish about the agreement and the public reaction it engenders, it is the City with whom the Company is negotiating. The City is aware of the facts. Even if the appellant were to publish "false information" the Company may pursue its legal remedies, which it has previously advised the appellant that it might do. Counsel's submissions on the disclosure of the agreement in the past and the negative effect it had on its operations, relate to the fact that the public appeared to disagree with the arrangement the City had made, especially in the face of what appears to be lack of consultation at that time. The records at issue do not include the current proposal put to the City by the Company, the proposal which is at the negotiations stage at this time.

As far as section 10(1)(c) is concerned, counsel submits that disclosure of the records could reasonably be expected to result in undue loss to the Company and concomitant undue gain to another party should it decide to sell its interests. Counsel states that interested third parties

could gain a stronger bargaining position. In my view, should the Company decide to sell its interests, it would be reasonable to expect a potential purchaser or assignee of its rights to seek disclosure from the Company of these records to assess the commercial viability of such an agreement.

In addition, counsel states that if these rights come up for tender again, competitors will have an unfair advantage in knowing the financial basis of the Company's existing tender proposal. Given that the records relating to the Company's initial tender are over ten years old and the many changes that have been made to them, I do not find that disclosure of this information could reasonably be expected to result in the alleged harms if a future tender is let by the City.

Counsel also submits that "... it is reasonable to conclude that the disclosure of the record would likely result in undue financial loss to the Licensee [the Company] as the commercial reputation would be further damaged by the requester [the appellant]". As a corollary to this point, counsel suggests that disclosure of the records could result in undue loss as the Company's lender might not be receptive to further requests for financing.

In my opinion, the article written by the appellant focuses on one side of the story. The facts as set out in the records arguably relate to the other side which, if disclosed by the appellant could, in fact, benefit the Company. Furthermore, counsel has not presented any evidence which suggests that the Company suffered financial loss as a result of the publication of the appellant's article in the summer of 1996. Moreover, it seems reasonable that the company's lender would address refinancing issues based on the Company's financial statements and business plans rather than on the information contained in any articles the appellant might publish.

Accordingly, I find that the Company by its counsel has not established that the harms set out in section 10(1)(c) of the Act could reasonably be expected to occur should the records be disclosed.

In summary, I find that I have not been provided with sufficient evidence that the exemptions in sections 10(1)(a) or (c) apply to the records at issue.

ORDER:

1. I order the City to disclose all the records to the appellant by sending him a copy by **May 7, 1997** but not earlier than **May 2, 1997**.

2. I reserve the right to require the City to provide me with copies of the records I have ordered disclosed under Provision 1.

Original signed by: April 2, 1997
Anita Fineberg
Inquiry Officer

APPENDIX A

(1) Contract dated September 3, 1986 between the City and the Company with attached Statutory Declaration of the President of the Company

(2) Tender Documents submitted to the City by the Company (Schedule "A" to Record 1)

(3) City's Tender Specifications (Schedule "B" to Record 1)

(4) Four Site Plans (part of Schedule "C" to Record 1)

(5) Drawing of concession Building sites (Schedule "E" to Record 1)

(6) Contract dated January 11, 1988 between the City and the Company

(7) Break in Term Agreement dated January 11, 1988 between the City and the Company with attachment

(8) Contract dated September 7, 1989 between the City and the Company

(9) Contract dated February 18, 1993 between the City and the Company

(10) Contract dated March 22, 1995 between the City and the Company