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

ORDER MO-1935

Appeal MA-040375-1

Toronto Catholic District School Board

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NATURE OF THE APPEAL:

The Toronto Catholic District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the lease agreement between the Board, as lessee, and the Toronto District School Board (the public Board), as lessor, for the use of a school building.

The Board located the lease agreement that constitutes the responsive record and notified the public Board under section 21 of the *Act* on the basis that its interests may be affected by the disclosure of the record. The public Board objected to the disclosure of the lease.

The Board issued a decision denying access to the record on the basis that it is exempt from disclosure under the discretionary exemptions in sections 6(1)(b)(closed meeting) and 11(c) and (d) (economic and other interests) and the mandatory exemption in section 10(1)(a) (third party information) of the *Act*.

The requester (now the appellant) appealed the decision. During the mediation of the appeal, the public Board confirmed its objection to the disclosure of the record. No further mediation was possible and the matter was moved to the adjudication stage of the appeals process. I sought and received the representations of the two school Boards initially. In its submissions, the public Board seeks to raise the application of the discretionary exemptions in sections 6(1)(b), 11(c) and 11(d) on the basis that it too is an institution under the *Act*, and that its economic interests will also be adversely affected by the disclosure of the record. I did not deem it necessary to seek the representations of the appellant in this matter, owing to the outcome of the decision to follow.

RECORDS:

The sole record at issue is a lease agreement between the Board and a predecessor of the current public Board.

DISCUSSION:

PRELIMINARY ISSUE

Is the public Board entitled to rely on the discretionary exemptions in sections 6(1)(b) and 11(c) and (d)?

The public Board takes the position that, because it is also an institution under the *Act*, it ought to be entitled to rely on the discretionary exemptions in the *Act*, in the same manner as the Board which was the recipient of the request. Specifically, the public Board submits that:

> The access to information request was made to the Catholic Board. As a result, the Public Board stands in the unusual position of being described [as] an affected third party when it is itself an institution covered by the MFIPPA [the *Municipal Freedom of Information and Protection of Privacy Act*]. The Public Board does not consent to the Catholic Board releasing the record at issue.

> At the highest level of generality MFIPPA creates two broad categories of exemptions: exemptions for information created by institutions covered by MFIPPA and exemptions for third parties who provide information to institutions covered by MFIPPA. Here the Adjudicator will note that [the] Public Board has claimed the benefit of both categories of exemptions.
>
> However, the Public Board submits that the better view is that the Public Board is entitled to the benefit of the exemptions created to benefit institutions covered by MFIPPA even if the access to information request was not directed to the Public Board in this instance. The Public Board is not a true third party to this record. The Public Board is an institution subject to MFIPPA and the record concerns the Public Board. The Public Board's ability to preserve the confidential nature of its own information ought to be no different here than if the request had been made directly to the Public Board.
>
> As a result, it is submitted that the better view is that section 6(1)(b) and sections 11(c) and (d) apply to the Public Board. However, as a result of the unusual circumstance the Public Board also claims the benefit of section 10(1)(a).

The appellant made the request to the Board, and not to the public Board. Both Boards are institutions under the *Act* and are, accordingly, required to respond to requests for access to information which they receive in accordance with the provisions of the *Act*. Section 18(3) of the *Act* provides for the transfer of a request from one institution to another in situations where the institution which received the request considers that another institution "has a greater interest in the record". Section 18(4) provides guidance in making a determination as to whether another institution in fact "has a greater interest in the record".

In my view, if the Board that received the request was of the view that the public Board had a greater interest in the record, as described in sections 18(3) and (4), it may have chosen to transfer the request to the public Board. In fact, it did not exercise this option to transfer the request but instead proceeded to process the request and issue the requester a decision letter respecting access to it, after notifying the public Board under section 21(1) of the *Act*. The Board provided the public Board with the opportunity to make submissions as an interested affected party under section 21(1) and the public Board did so.

I find that because the request was directed to the Board, it is the "institution" for the purposes of this appeal and it and it alone may claim the possible application of exemptions, discretionary or mandatory, to the information in the record. In my view, the public Board is simply an affected party, and is entitled to be notified and given the opportunity to make submissions only on the application of the mandatory exemptions in the *Act*. I do not accept the public Board's arguments that it ought to be treated as if it were the institution that received the request simply as a function of its status as an institution under section 2 of the *Act*. If the Board believed the public Board had a greater interest in the record, it had the option of transferring the request to the public Board under section 18(3). Had that transfer taken place, the public Board would be

considered to be the institution under the *Act* and would be charged with responding to the request as if it had been made directly to it, rather than to the Board.

Accordingly, I will accept the representations of the public Board with respect to the application of the mandatory exemption in section 10(1)(a), which is intended to protect the informational assets of third parties. I will not, however, treat the public Board as if it were the institution that received the request from the appellant and will not its submissions on the application of the discretionary exemptions to the record.

CLOSED MEETING

The Board claims the application of the discretionary exemption in section 6(1)(b) of the *Act*. Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the Board must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Under part 3 of the test

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

The Board did not make any submissions on the application of section 6(1)(b), despite being invited to do so, and the evidence of the application of section 6(1)(b) is not apparent on the face of the record. As a result, I find that this exemption does not apply to the record at issue.

The public Board has provided me with representations in support of its arguments that the lease agreement at issue in this appeal was discussed not only by the Board of Education which received the request but also at one of its own predecessor Boards prior to the amalgamation of the public Boards. As a result, it argues that it is also entitled to rely on section 6(1)(b). As noted above, the public Board is not entitled to rely on the discretionary exemption in section 6(1)(b) and I will not, accordingly, consider its arguments with respect to that exemption.

ECONOMIC AND OTHER INTERESTS

General principles

The Board takes the position that the information contained in the record is exempt from disclosure under the discretionary exemptions in sections 11(c) and (d), which state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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 purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

The section 11(c) exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].

The Board indicates that it too has recently had to declare several school properties as surplus to its needs as a result of changes to the provincial funding formula for all Ontario school boards. As a result, it finds itself in the situation where it is also leasing property to third parties. In support of its arguments in favour of the application of section 11(c), the Board submits:

> In order to maintain a competitive advantage in the marketplace, the Board must be able to hold confidential the terms of leasing agreements in order to be able to maximize profit from any future agreements it may enter into for vacant sites. As a direct example, the TCDSB [the Board] does lease space to private school operators. Should the terms of a lease between the [public Board] and [the Board] become well known, our ability to generate higher or better terms with private entities would likely be harmed. In addition, other non-educational entities that seek space with this Board would likely expect similar or better terms to the detriment of the Board.

I do not accept the Board's position that the exemption in section 11(c) applies to the record. The lease agreement at issue in this appeal was effective on August 1, 1988, despite the fact that it was executed sometime in 1989. The agreement is between two school boards which no longer exist, though each now form part of the public Board and the Board respectively. The terms of the lease describe the rent to be paid in 1988 with a provision for the calculation of future rents based on a figure that is set by the Ministry of Education each year. The dollar value of those increments, and therefore the current rent paid by the Board, is not readily apparent from the lease agreement and could not be arrived at without the additional information set by the Ministry of Education and a complex calculation of increases over the past 17 years.

I find that the disclosure of the information contained in this particular record to the appellant cannot reasonably be expected to result in prejudice to the economic interests or competitive position of the Board. The information pertains to a 17 year old lease agreement containing rent payments that appears to bear little relation to the current actual cost to the Board. The majority of the terms contained in the lease are "boilerplate" terms that are included in commercial leases of all descriptions. I do not accept the Board's position that the disclosure of the information contained in this lease agreement could reasonably be expected to result in the harms described in section 11(c). I find that the Board has not provided me with the kind of detailed and

convincing evidence of harm that is required in order to uphold the application of the exemption. As a result, I find that the record is not exempt under section 11(c).

The Board has also provided me with confidential representations concerning its reasons for applying the section 11(d) exemption to the record. These submissions relate primarily to the possibility that the disclosure of the record could adversely impact future transactions involving the two Boards. In my view, the position taken by the Board is not a reasonable one. The disclosure of the record at issue cannot reasonably be expected to result in the harm contemplated by the Board to its financial interests under section 11(d). In my view, the consequences flowing from disclosure that are posited by the Board are not sufficiently "detailed and convincing" to give rise to a reasonable expectation of the harm set out in section 11(d) occurring. I find that the contemplated harm under section 11(d) is, instead, speculative at best.

THIRD PARTY INFORMATION

The public Board takes the position that the record is exempt under section 10(1)(a) of the *Act*, which 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,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

The public Board goes on to point out that:

> [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].

For section 10(1)(a) to apply, the Board and/or the public Board 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 Board in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in paragraph (a) of section 10(1) will occur.

Part one of the test

The public Board submits that the record at issue contains commercial information for the purposes of section 10(1) as it describes the terms of a commercial leasing agreement between the two Boards for a school property.

The term "commercial information" has been defined in previous orders to include 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].

I find that the information contained in the record relates directly to a commercial transaction between the two Boards involving the lease of a school property. As such, the information qualifies as "commercial information" under section 10(1) and the first part of the test has, thereby, been satisfied.

Part two of the test

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 [Orders PO-2018, MO-1706].

The public Board acknowledges that the term "supplied" does not encompass the terms of a negotiated contract, such as the lease agreement at issue in this appeal. In effect, the public Board argues that the Commissioner's office has wrongly decided these cases because this interpretation is "at odds with the purpose of the exemption and the language of *MFIPPA*."

The public Board submits that the principles of statutory interpretation require that the purpose of section 10(1)(a) and the legislative purpose of the section must be examined "to revisit the restrictive interpretation which the IPC has given to the word 'supplied'." The public Board has urged that I accept its interpretation of the language in the Williams Commission report *Public Government for Private People* which gave rise to the current municipal and provincial access to information laws. The public Board suggests that the legislative intent behind the enactment of section 10(1)(a), as evidenced by the language used in the Williams Commission report, was to

protect from disclosure a wider and more comprehensive assortment of information of a commercial nature than that currently recognized by the Commissioner's decisions.

I do not agree with the interpretation put forward by the public Board. In my view, the interpretation given the word "supplied" in the decisions of the Commissioner's office are in keeping with the legislative intent of promoting access to information save and except in situations where one of the specified exemptions apply to information. I do not accept the public Board's contention that this approach requires revisiting at this time.

Finally, the Board argues that the terms of the lease agreement in effect contain its "current pricing" for the lease of what are commercially valuable school facilities. In my view, the terms included in the lease agreement were arrived at by the Board and the public Board as part of a set of negotiations aimed at arriving at a mutually advantageous arrangement for the lease of a surplus school belonging to the public Board for the Board's use. The information in the lease was not "supplied" by the public Board to the Board for the purposes of section 10(1). Accordingly, as all three parts of the test under section 10(1) must be met, the exemption cannot apply to the record at issue.

I have found that none of the exemptions claimed by the Board and the public Board apply to the record and I will, accordingly, order that it be disclosed to the appellant.

ORDER:

1. I order the Board to disclose the record to the appellant by providing him with a copy by **July 11, 2005.**

2. In order to verify compliance with Order Provision 1, I reserve the right to require the Board to provide me with a copy of the record that is disclosed to the appellant.

Original Signed by: June 17, 2005
Donald Hale
Adjudicator