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

ORDER M-1143

Appeal M-9800057

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the contamination of a specified property which was the site of a former gasoline service station (the property).

After locating the responsive records, the City determined that the interests of three organizations could be affected by disclosure, and provided them with notice pursuant to section 21 of the Act. Two organizations objected to disclosure, and the third one did not respond to the notice.

After considering the submissions of the two organizations, the City issued its decision granting access in full to the requested records.

One of the organizations appealed the City's decision, claiming that the records qualified for exemption under sections 10(1)(a) and (b) of the Act. This organization (now the appellant) included a number of other issues in its appeal letter, including: (1) the City's section 21 notice was not proper; (2) the City had not provided an adequate description of the content of the records it intended to disclose; (3) the City misstated the provisions of sections 10(1)(a) and (b) in its notice to the appellant.

During mediation, the City agreed to provide the appellant with its index, which included a detailed description of each record.

The records consist of 151 pages and include correspondence, a memorandum of agreement, an environmental off-property site assessment, an environmental investigation report, site monitoring reports and other reports and relevant documentation pertaining to the property.

This office provided a Notice of Inquiry to the City, the appellant, the requester, and the two organizations that had received the section 21 notice from the City (the affected parties). Representations were received from the appellant and one of the affected parties (affected party #1), but not from the City, the requester or the other affected party.

In its representations, the appellant removes its objection to the disclosure of records commissioned by the appellant of "off-site" environmental conditions relating to the property, specifically pages 16-46 and 82-87. Because the City had originally decided to grant access to these records and no other mandatory exemptions apply, pages 16-46 and 82-87 should be disclosed to the requester.

PRELIMINARY MATTERS:

Adequacy of Section 21 notice

In its representations, the appellant re-asserts its claim that the City failed to provide an adequate description of the records that relate to the appellant, and that the City misstated sections 10(1)(a) and (b) in its section 21 notice.

Section 21 of the Act states, in part:

> (1) A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,
>
> (a) that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information; or
>
> (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).
>
> (2) The notice shall contain,
>
> (a) a statement that the head intends to disclose a record or part of a record that may affect the interests of the person;
>
> (b) a description of the contents of the record or part that relate to the person; and
>
> (c) a statement that the person may, within twenty days after the notice is given, make representations to the head as to why the record or part should not be disclosed.
>
> (2.1) If the request covers more than one record, the description mentioned in clause (2)(b) may consist of a summary of the categories of the records requested if it provides sufficient detail to identify them.

In its section 21 notice, the City states that it had received a request "to disclose all environmental records pertaining to [the property]" and that the records consist of "various records and reports".

The appellant submits that this level of description is insufficient.

As noted above, during mediation the appellant was provided with a copy of the City's index of records. I have reviewed this index and, although the appellant is not satisfied, in my view the index adequately describes the records by providing details such as the date of the records, who they are from, who they are addressed to and the general nature of their contents. Accordingly, I find that whatever inadequacies that may have existed in the City's section 21 notice have been appropriately and adequately addressed and resolved by the provision of the index to the appellant.

As far as the description of sections 10(1)(a) and (b) is concerned, the City's section 21 notice paraphrased the wording of these sections in a way which omitted some of the relevant wording. However, the appellant

has clearly noticed these omissions and has rectified the deficiency on his own. In addition, the Notice of Inquiry issued by this office included the exact wording of these sections. In my view, the appellant has not been prejudiced by any deficiencies contained in the section 21 notice, and I will not consider this matter further.

Process considerations

When considering whether to disclose the records, the City notified three organizations and sought their representations on disclosure. The City subsequently decided to disclose these records, and before doing so, notified all three organizations, advising them of their right to appeal this decision within 30 days. Only one organization (the appellant) appealed the City's decision.

Although some records involve the appellant and one or more of the other organizations, others are not related to the appellant. The records unrelated to the appellant should have been disclosed by the City to the requester after the expiration of the 30-day appeal period. This did not occur. To further complicate the situation, the other two organizations were added as affected parties to the appellant's appeal, and one of them provided representations claiming that its records should be protected from disclosure by section 10(1). Also, Records 136-149 do not relate to the appellant or either of the affected parties, but to another company which formerly operated a business at the property but is no longer in business (the company).

I have decided that the most appropriate process to follow in the circumstances of this appeal is to consider all records relating to the appellant, the two other affected parties, and the company under the mandatory provisions of section 10(1).

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a) and (b) state:

> 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;

Section 42 of the Act stipulates that the burden of proof that a record or part of a record falls within one of the specified exemptions in the Act lies upon the head. However, where a third party appeals the head's decision to release a record, the burden of proving that a record should be withheld from disclosure falls on the third party (Order 42). This means that the party resisting disclosure (in this case the appellant and affected party #1) must show how the information in the records satisfies all three parts of the section 10(1) test.

For a record to qualify for exemption under sections 10(1)(a) or (b):

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 10(1) will occur.

[Order 36]

All three parts of the test must be satisfied in order for the exemption to apply.

The appellant's representations deal with the various components of the section 10(1) exemption test. However, affected party #1's representations consist solely of the following sentence:

> We hereby object to the release or disclosure of any information of [sic] records as they were prepared for us *in confidence* and supplied to the City of Etobicoke *in confidence*.

Part 1 - Type of Information

The appellant states that the records, in particular the environment assessment reports, contain scientific, technical and commercial information. This information includes such things as calculations relating to hydraulic conductivity of subsurface soil, ground water flow velocity, petroleum vapour concentrations and soil chemical analyses. Affected party #1 does not provide representations on this part of the test.

"Technical information" has been identified in previous orders as "belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics ... it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing." [Orders P-454 and P-479].

Having reviewed the records, I agree with the appellant that certain records contain information prepared by firms expert in the field of environmental analysis and describe operational or maintenance activities. As

such, the following records contain "technical information": Records 62-81, 93-97, 98-115, 116-117 and 120-134.

I also find that the following records contain information concerning the purchase and sale of the property and other related business activities of the appellant, the affected parties and/or the other company in relation to their involvement with the property, and is properly characterized as "commercial information": Records 2, 5, 7-10, 11-15, 47, 48-54, 56, 58, 59, 60-61, 89, 90, 91, 92, 118, 119, 135, 136, 137-149, 150 and 151.

Therefore, the first part of the section 10(1) test has been satisfied for the above-noted records.

As far as the remaining records are concerned, I find that they do not contain any of the types of information listed in section 10(1), and do not satisfy the first part of the section 10(1) test. Record 1 is a letter from the Ministry of Environment & Energy to the City that simply acknowledges the environmental conditions at the property; Records 3-4 consist of a FAX cover sheet with an attachment that lists the various reports, by title only, that have been compiled for the property; and Records 6, 55, 57 and 88 are also FAX cover sheets that simply identify the sender and the addressee.

Part 2 - Supplied in confidence

In order for this part of the section 10(1) test to be met, the information must have been supplied to the City in confidence, either implicitly or explicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the City.

Supplied

Both the appellant and affected party #1 submit that the records relating to them were supplied to the City in confidence.

Record 47 is a letter from the City addressed to affected party #1 stating that it is awaiting additional information from affected party #1 and/or the appellant. Record 91 is a memorandum from an employee of the City's Works Department addressed to a member of the City's Planning Department in which the employee reviews the situation at the property from the City's perspective. Records 136, 138-139 and 141-143 are letters addressed to the company from the City in which the City draws certain identified environmental concerns to the company's attention. Records 140, 144-149, 150 and 151 are all notes made by City employees in the context of complaints and subsequent investigations regarding environmental concerns at the property. Because all of these records were created by the City and its staff, I find that they were not "supplied" to the City for the purposes of
section 10(1) of the Act. I also find that, due to the nature of the records, their disclosure would also not permit the drawing of accurate inferences with respect to the information actually supplied to the City. Therefore, these records do not satisfy part two of the section 10(1) test.

Records 11-15 and 48-54 are draft agreements between the City and affected party #1 (although they indirectly involve the appellant), and Record 58 is part of a draft agreement between the appellant and the City regarding the property. Because information in an agreement is typically the product of a negotiation process between parties, the content of agreements will not normally qualify as having been "supplied" for the purposes of section 10(1) of the Act. A number of previous orders have addressed this question and have concluded that for information to have been "supplied", it must be the same as that originally provided to an institution by the other party to the agreement. In addition, information contained in a record would "reveal" information "supplied" by an affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied during the course of negotiations. (See, for example, Orders P-36, P-204 and P-251 and P-1105). I should also note that the status of an agreement as either draft or final is not determinative of whether or not the information was "supplied"(Order P-1105).

Based on the information contained in the draft agreements and the appellant's representations, I cannot conclude that the information contained in the draft agreements was supplied by affected party #1 and/or the appellant to the City. The letters from the City and its counsel which accompany the draft agreements clearly indicate that the attached drafts are revised versions of the ones previously discussed by the City and these parties. In the absence of evidence to the contrary, in my view, these records contain information which reflects the various stages of the "give and take" of the negotiation process between the City and these parties, and is not properly characterized as having been "supplied" for the purposes of section 10(1).

Accordingly, I find that Records 11-15, 47, 48-54, 58, 91, 136, 138-139, 140, 141-143, 144-149, 150 and 151 were not supplied to the City and, therefore, fail to satisfy the second part of the section 10(1) test.

The remaining records are either communications to the City from the appellant, the company or one of the affected parties, reports commissioned by one or more of these organizations and provided to the City, or communications from the City to one or more of these organizations, the disclosure of which would permit the drawing of accurate inferences with respect to the information actually supplied to the City. Therefore, I find that these records were supplied to the City by the appellant, the company and/or one of the affected parties.

In Confidence

The appellant explains that it voluntarily provided certain sensitive environmental and other records relating to the property to the City in the course of its negotiations with the City regarding the sale of the property. The appellant submits that this information was supplied to the City in the strictest of confidence, and that disclosure of these records would breach the confidentiality under which they were provided.

In Order M-169, Adjudicator Holly Big Canoe made the following comments with respect to the issue of confidentiality in section 10(1) of the Act:

> In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of

> confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

Although both the appellant and affected party #1 state that the records were supplied in confidence, neither has provided evidence which supports this claim, other than stating their expectations that the records would be held in confidence. The appellant makes reference to the impact that a breach of confidence by disclosure of the records would have on future dealings with the City, which I will address under the discussion of part three of the test.

None of the records contain any express indication that they were supplied in confidence. There is also nothing to indicate that the records were treated by the City in a confidential manner, and the intention of the City to disclose the records to the requester indicates an absence of confidentiality concerns on the City's part. In my view, neither the appellant nor affected party #1 have established the requirements of the second part of the test for these records, as outlined by in Orders M-169 and P-561.

Accordingly, I find that none of the records satisfy the requirements of both the first and second part of the test for exemption under section 10(1). Because the requirements of all three parts of the test must be present in order to uphold an exemption claim under section 10(1), no record qualifies for exemption, and all records should be disclosed to the requester.

Because all records fail to qualify under either parts one or two of the exemption test, it is not necessary for me to go on to consider the third part of the test. Because the appellant's representations deal with the harms requirements under part three, I have decided to make a finding under this part, in the alternative.

Part 3 - Harms

Affected party #1's representations do not deal with the issue of harm. The submissions of affected party #1 in response to the City's section 21 state that "disclosure of the information can reasonably be expected to potentially result in undue loss to [affected party #1] and its tenants upon the property". However, it is important to note that affected party #1 did not appeal the City's decision to disclose all records to the requester. Having reviewed the records, I find that affected party #1 has failed to provide evidence necessary to satisfy part 3 of the section 10(1) test with respect to any records relating to it.

The company is no longer in business, and the records relating to it are quite dated. In my view, disclosure of any records relating to it could not reasonably be expected to result in any of the harms listed under section 10(1).

Section 10(1)(a)

As noted earlier, the appellant has consented to disclose certain records which relate to "off site" contamination, but objects to disclosure of records relating to "on-site" conditions at the property. The appellant submits that the very purpose of the requester's application is to influence ongoing negotiations with the appellant regarding contamination at the property, and that disclosure would interfere with those negotiations. The appellant explains that it is currently in negotiations with the requester in an attempt to resolve a dispute regarding alleged contamination of the requester's nearby property. In the appellant's view, disclosure of the records would interfere with these ongoing negotiations.

In order to satisfy the requirements of section 10(1)(a), the appellant must establish that disclosure of the records **could reasonably be expected to interfere significantly with negotiations** between the appellant and the requester. Other than making the statement that negotiations are ongoing, and referring to the exchange of documents relating to off-site contamination, the appellant offers no evidence in support of its position. I have insufficient evidence to persuade me that disclosure of records prepared and submitted to the City in the context of discussions and negotiations unrelated to the requester could reasonably be expected to interfere with these negotiations. More particularly, I find that there is insufficient evidence to establish that any such interference, even if present, would be "significant".

Therefore, even if some records had satisfied the requirements of parts one and two of the test, which is not the case in this appeal, I find that the requirements of part three of the section 10(1)(a) test have not been established.

Section 10(1)(b)

The appellant states that it voluntarily supplied the records to the City in confidence and, should the records be disclosed, this breach of confidentiality would result in similar information no longer being supplied to the City, where it is in the public interest to do so.

I do not accept the appellant's submissions on section 10(1)(b), for a number of reasons. First, the appellant does not provide arguments or evidence to support this claim. Second, even if the appellant were

to decide to no longer voluntarily provide similar information to the City in future, in the absence of evidence from the City to the contrary, I am not persuaded that this would affect the public interest. The public interest in this matter relates to the City's satisfactory and complete investigation of the alleged environmental contamination, which presumably could and would be completed regardless of whether the appellant were to provide the type of information contained in the records at issue in this appeal. Third, the City has decided to disclose the records to the requester and chose not to provide representations in this appeal, both of which are strong indicators that the harm contained in section 10(1)(b) is not present in the circumstances.

Therefore, even if some of the records had satisfied the requirements of parts one and two of the test, which is not the case in this appeal, I find that the requirements of the part three of the section 10(1)(b) test have not been established.

In summary, I find that none of the records satisfy all three parts of the test for exemption, and therefore none qualify for exemption under sections 10(1)(a) and/or (b) of the Act and they should all be disclosed to the requester.

ORDER:

1. I uphold the City's decision.

2. I order the City to disclose the records in their entirety to the requester by providing him with a copy by **September 11, 1998** but not earlier than **September 7, 1998**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 2.

Original signed by: August 7, 1998
Tom Mitchinson
Assistant Commissioner