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

ORDER MO-1481

Appeal MA-010141-1

Regional Municipality of Halton

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NATURE OF THE APPEAL:

The Regional Municipality of Halton (the Region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain records pertaining to two named child care centres. Specifically, the requester sought the following:

- expense reports, administrative costs, revenue and wage subsidy grants;
- amount of wage subsidy grants given to the centres by the Ministry of Community and Social Services and the Region;
- number of subsidized families at both centres, assistance the Region provides to the operator with respect to subsidizing families;
- whether the operator is permitted to take on subsidized children and the process for doing so;
- complaints about the centres;
- copy of the operating license of one of the centers; and
- amount of grant that should be distributed to staff.

The Region located a number of records responsive to the request and disclosed some of them in total to the requester. Pursuant to section 21 of the *Act*, the Region gave notice to a third party (the owner of the two child care centres), seeking submissions with respect to disclosure of the remainder of the responsive records. The third party responded by objecting to the disclosure of the records based on section 10 of the *Act*.

Subsequently, the Region issued its decision to the third party advising that it had decided to grant access to four child care wage subsidy utilization statements indicating that that these records did not meet the requirements of section 10. In addition, the Region indicated it had also decided to grant access to the operating license of one of the centres, based on it being a public document under section 75(11) of Regulation 262 under the *Day Nurseries Act*.

The third party (now the appellant) appealed the Region's decision.

During mediation, the requester confirmed to the Mediator that she was only interested in the child care wage subsidy utilization statements and was not interested in obtaining the operating license in question. Accordingly, this record is no longer at issue in this appeal.

Subsequently, the appellant consented to the release of the two child care wage subsidy utilization statements relating to one of the child care centres. Accordingly, these records are also no longer at issue in this appeal. The appellant confirmed, however, that she continues to object to the disclosure of the remaining two child care wage subsidy utilization statements for the second child care centre. Accordingly, these records remain at issue in this appeal.

I sent a Notice of Inquiry to the appellant, requesting representations on the issues in dispute. After reviewing the representations received from the appellant, I determined that it was not necessary to seek representations from the Region or the requester.

RECORDS:

The only records remaining at issue in this appeal are two Child Care Wage Subsidy Utilization Statements for a particular non-profit child care center for the reporting periods of April 1, 1999 to March 31, 2000 and April 1, 2000 to December 31, 2000.

DISCUSSION:

THIRD PARTY INFORMATION

The Region decided that the records do not qualify for exemption under section 10(1) of the *Act*. Therefore, the onus is on the appellant, as the only party resisting disclosure, to establish the application of this exemption.

Section 10(1) of the *Act* states, in part:

> 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;

In order for a record to qualify for exemption under section 10(1)(a), (b) or (c) of the *Act*, each part of the following three-part test must be satisfied:

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) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

Part One: Type of Information

Prior orders have found that commercial information is "information which relates solely to the buying, selling or exchange of merchandise or services": see, for instance, Order P-493. "Financial information" has been found to mean information relating to money and its use or distribution, containing or referring to specific data. Examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs (see Orders P-228, P-295 and P-394).

As outlined above, the records at issue consist of two child care wage subsidy utilization statements relating to a named non-profit child care center covering two reporting periods. Each statement contains the following information concerning the day care center: the number of full time positions; total salaries/benefits expenditures; total wage subsidy received; amount used for salaries/benefits; amount used for home child care provider payments; amount used for non-salary purposes; and total wage subsidy used. Based on my review of the records, I am satisfied that the information in the records constitutes either commercial or financial information within the meaning of the *Act*, consistent with the above orders.

Part Two: Supplied in Confidence

The second part of the three-part test under section 10(1) encompasses two components: it must be shown that the information was "supplied" to the institution, and that the supply of the information was "in confidence".

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.

[Order M-169]

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]

In her representations, as well as throughout the course of the appeal, the appellant has provided extensive information as to the history between her and the requester. However, for the most part, the appellant's representations do not directly address the requirements of the section 10(1) test.

Based on my review of the records, I find that the information within them was supplied to the Region by the appellant. I am not satisfied, however, that any of the information in these records was supplied "in confidence", as required by section 10(1). The appellant has not made any submissions with respect to the issue of confidentiality beyond her bare assertion, at the request stage, that the information was "supplied in confidence". I have not been provided with any other evidence that would demonstrate that there existed an explicit or implicit expectation of confidentiality on the part of the appellant. There is also nothing on the face of these records to suggest that they are to be treated in a confidential manner by the Region. Accordingly, in the circumstances, I find the information at issue was not supplied "in confidence" by the appellant to the Region.

Although it is not necessary for me to do so, I will consider whether the third requirement of harm has been met in this case.

Part three: Harms

To discharge the burden of proof under the third part of the test, the party opposing disclosure must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed. The evidence to establish this must be detailed and convincing.

The requirement that the disclosure of information "could reasonably be expected to" result in probable harm has been interpreted by Senior Adjudicator David Goodis in Order PO-1747 as follows:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.),

> reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Applying this reasoning, the appellant must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in these sections as a result of disclosure of the record.

At the request stage, in response to the Region's request for submissions with respect to disclosure of the requested records, the appellant took the position that "disclosure of the information might reasonably expect to cause prejudice to her competitive position and interference with her contractual rights", pursuant to section 10(1)(a). The appellant later also asserted that the information at issue was sought by the requester to "either establish or strengthen an anticipated claim for damages" against one of the day care centres in question. These submissions appear to relate to the reasonable expectation of the harms set out in section 10(1)(c). During the course of the appeal, the appellant provided extensive background information concerning the day care centre, outlining the difficulties she has been experiencing as a result of certain actions by a number of individuals. In her representations in response to the Notice of Inquiry, the appellant reiterates some of these difficulties and states that the disclosure of the information will "create more problems".

In my view, the appellant has failed to provide a sufficient connection between disclosure of the particular information in the child care wage subsidy utilization statements and a reasonable expectation of harms as described in sections 10(1)(a) or (c). The appellant does not refer to any specific portions of the records and makes only general assertions without providing any supporting details with respect to the alleged harms. Furthermore, it is not evident on the face of the records how disclosure of this information could reasonably be expected to significantly prejudice the competitive position or interfere significantly with any future contractual or other negotiations.

Further, I note that the appellant's concern that the requested information could be used to "either establish or strengthen an anticipated claim for damages" relates to the day care centre whose child care wage subsidy utilization statements the appellant had consented to disclose during mediation. Even if it could be argued that the remaining two statements relating to the second day care centre could also be used for the same purpose, I am not persuaded that this would amount to *undue* loss or gain, as contemplated by section 10(1)(c).

In Order PO-1912, Assistant Commissioner Mitchinson considered whether disclosure of certain records which may be relevant to a particular civil action would result in unfair exposure to pecuniary or other harm, pursuant to section 21(2)(e) of the *Freedom of Information and Protection of Privacy Act* (equivalent to section 14(2)(e) of the *Act*). He concluded that any determination of personal liability would be based on a finding to that effect by a court and, therefore, could not accurately be described as being "unfair".

Although the wording of section 10(1)(c) is somewhat different from section 14(2)(e), both provisions address similar types of harms, and therefore the Assistant Commissioner's comments are also relevant in this case. In my view, since any damages that may be awarded as a result of the potential legal proceedings in this case would be based on a finding by a court, in my view, this cannot be characterized as an "undue" loss. Accordingly, I find that section 10(1)(c) is not applicable in the circumstances.

Based on the material before me, I am not persuaded that the appellant has established that disclosure of the records at issue in this appeal could reasonably be expected to result in any of the harms contemplated under section 10(1). Accordingly, I find that section 10(1) does not apply in the circumstances.

ORDER:

1. I uphold the Region's decision to grant access to the two records at issue.

2. I order the Region to disclose the two records at issue to the requester no later than **December 17, 2001**, but not earlier than **December 10, 2001**.

3. In order to verify compliance with this order, I reserve the right to require the Region to provide me with a copy of the records disclosed to the requester in accordance with provision 2 of this order.

Original signed by: November 9, 2001
Irena Pascoe
Adjudicator