



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

FINAL ORDER MO-1536-F

Appeal MA-010026-4

Region of Peel



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Regional Municipality of Peel (the Region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all files relating to the following municipal infrastructure projects:

1. Etobicoke Creek Sanitary Trunk Sewer - Contract 2, Region of Peel Project 99-2960;
2. Etobicoke Creek Sanitary Trunk Sewer crossing Burnhamthorpe Road (sewer was constructed approximately 25 years ago).

The Region located a large number of responsive records and granted access to many of them, in whole or in part. The Region denied access to other records, or portions of records, claiming the application of the following exemptions contained in the *Act*:

- closed meeting - section 6(1)(b);
- advice or recommendations – section 7(1);
- third party information – section 10(1);
- economic or other interests – section 11;
- solicitor-client privilege – section 12;
- invasion of privacy – section 14(1).

The requester, now the appellant, appealed the Region's decision to deny access to the records. Another appeal involving the same request was resolved by Order MO-1459-F in which I upheld the Region's decision to charge a fee for the cost of preparing the records for disclosure and photocopying the records.

In Order MO-1514, I addressed the application of the exemptions claimed by the Region to the records. In that decision, I upheld the Region's decision to deny access to some of the records and ordered it to disclose other records to the appellant. In addition, I determined that some of the records identified in the appeal may contain information relating to third parties and that they ought to be given the opportunity to make submissions to me on the possible application of section 10(1) of the *Act*.

Accordingly, I deferred making a decision with respect to the application of section 10(1) of the *Act* to Records 1-72, 81, 85, 87, 89, 101, 102, 103, 108, 113, 126 to 151, 157, 158, 163, 169, 171, 173, 174, 177, 178, 181, 183, 190, 196, 198, 199, 201, 202, 206, 216, 217, 229, 231, 232, 234, 245 and 245(b). I then provided a Notice of Inquiry to 24 companies and a law firm whose interests may be affected by the disclosure of the information contained in these records (the affected parties). In response, I received representations from five of the affected parties. The appellant and the Region made their submissions on the application of the section 10(1) exemption to the records in their initial representations.

In their submissions, three of the affected parties consented to the disclosure of the information contained in Records 89, 103, 157, 158, 177, 178, 190, 199 and 232. As the information relates only to these affected parties, I will order that these records be disclosed to the appellant. The five affected parties who responded to the Notice of Inquiry object generally to the disclosure of

the information in the records which relates to them. Many of the records do not, however, relate to these five affected parties. The companies to whom this information relates have not provided me with submissions regarding the application of the section 10(1) exemption. However, because section 10(1) is a mandatory exemption, I am obliged to independently review the documents to ensure that they do not qualify for exemption under this section.

The records at issue consist of a large number of invoices, payment certificates, cost breakdowns, change orders, minutes of meetings and other documents relating to the sewer construction project.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the affected parties and/or the Region, as the parties resisting disclosure of the information contained in the records, 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 Region 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 subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing**" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the

onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*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 (Div. Ct.)]

Part 1: Type of Information

The affected parties resisting disclosure take the position that the records contain information which qualifies as "financial" or "commercial" information for the purposes of section 10(1). Previous orders of this office have defined these terms as follows:

The term [financial information] refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs.

[Orders P-47, P-87, P-113, P-228, P-295 and P-394]

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

[Order P-493]

The invoice records which comprise Records 1-72 contain information about the pricing policies of the affected parties, including the hourly rates charged by their staff and the "unit prices" set by the affected parties for the provision of their services to the Region, its contractor or subcontractors. I find that this information qualifies as both financial and commercial information for the purposes of section 10(1).

Other records also contain similar information pertaining to the pricing policies and unit prices of the affected parties. The information is included in the Cost Breakdown section of Record 87, the Payment Certificates in Records 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 139, 140, 142, 143, 144, 145, 148, 149 and 151, the Change Orders in Records 136, 141, 146, 147, 196 and 202, the Summary of Restoration Costs in Records 163, 173, 181 and 231 and the invoices in Records 206, 216, 229 and 245. I find that this information also qualifies as financial and commercial information as those terms have been defined in previous orders.

I have not, however, been provided with any evidence to indicate that the remaining records, or parts of records, include information which falls within the ambit of these definitions. In addition, it is not evident from the face of these records that they contain information falling within the ambit of one of the listed “types of information” in section 10(1). As the first part of the test under section 10(1) has not been satisfied, therefore, these records, and parts of records, do not qualify for exemption under this exemption.

Part II: Supplied in Confidence

In order to satisfy part two of the test, the affected parties and/or the Region must show that the information was supplied to the Region, either implicitly or explicitly in confidence.

In order to establish the confidentiality component of part two of the test, the affected parties and/or the Region must demonstrate that an expectation of confidentiality existed at the time the records were submitted, and that this expectation was reasonable and had an objective basis. All factors are considered in determining whether an expectation of confidentiality is reasonable, including whether the information was:

- (1) Communicated to the Region 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 parties prior to being communicated to the Region.
- (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, PO-1722, PO-1924 and MO-1476)

One of the affected parties submits that the pricing information which it supplied on its invoices to an adjoining landowner for work which it performed was supplied with an implicit understanding that it would be treated confidentially. It states that it was not aware that its invoices would be submitted to the Region by the party for whom the work was performed and that it did not consent to this disclosure.

In response to the original Notice of Inquiry provided to him, the appellant submits that the “project in question is a sewer project. These are public record documents relating to the engineering and construction of this project. We think the Commissioner will agree that the release of such records can hardly be injurious to the Region of Peel.” The harm being evaluated in the context of section 10(1) is, however, harm to the interests of the third parties, not the Region.

The Region's submissions focus on each individual record and repeat that they were supplied to the Region with an implicit expectation of confidentiality on the part of the supplier.

Based upon the information provided to me by the affected party who made detailed submissions and my own review of the records, I am of the view that the information in the records was supplied to the Region within the meaning of section 10(1). Although the information may have been originally provided by the party to whom it relates to another affected party, all of this information found its way into the project's records maintained by the Region.

I further find that, in the context of the normal practices of the construction industry, information pertaining to hourly rates and unit prices are submitted with a reasonably-held expectation that they will be treated in a confidential manner by the project managers and property owners. This finding is in keeping with a number of previous orders which have held that pricing information is generally considered to have been submitted on a confidential basis when determining whether it is properly exempt from disclosure under section 10(1) or its provincial equivalent. [Orders P-166, P-610, M-250, PO-1696 and MO-1471]

Accordingly, I find that the pricing information relating to unit prices and hourly rates contained in the invoices reflected in Records 1-72, the Cost Breakdown section of Record 87, the Payment Certificates in Records 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 139, 140, 142, 143, 144, 145, 148, 149 and 151, the Change Orders in Records 136, 141, 146, 147, 196 and 202, the Summary of Restoration Costs in Records 163, 173, 181 and 231, the invoices in Records 206, 216, 229 and 245 were supplied to the Region with a reasonable expectation that they would be treated in a confidential manner.

Part III: Harms

In order to meet the third part of the test, the affected parties and/or the Region must demonstrate that one or more of the harms enumerated in sections 10(1)(a) or (c) could reasonably be expected to result from the disclosure of the records.

Three of the affected parties who have provided me with representations have, for the most part, objected to the disclosure of certain information contained in invoices paid by the Region during the course of the construction project, based on the exemption in sections 10(1)(a) and (c). These invoices are for work performed by the affected parties on behalf of the Region, one of the subcontractors or an adjoining landowner. The records also describe in some detail the nature of the services performed and the manner in which the Region was billed for them. These affected parties have not, however, provided any submissions as to the nature of the harm to their competitive position or any undue loss or gain which may be derived from the disclosure of the information.

One of the affected parties objects to the disclosure of any and all records relating to the construction project as there remains an on-going dispute involving the appellant and the Region in which certain factual information is unresolved. Again, beyond referring to the wording of section 10(1), this affected party has not made any submissions about the nature or reasonableness of the harm which may result from the disclosure of the records.

Another affected party objects to the disclosure of any information which might reveal financial information which it supplied to the Region, without explaining how the disclosure of that information could reasonably result in the harms contemplated by sections 10(1)(a), (b) or (c).

With respect to the application of section 10(1)(a), however, one of the affected parties submits that:

Services are provided [by it] to clients based on a confidential bidding system. If the rates that [this affected party] charges for its services are disclosed, this will have a significant negative impact on our ability to compete for projects with other firms in our industry.

Generally, a bidder's list is available to firms competing for projects. Even if the list is not available, a list is kept of the firms that obtain a bidder's information package and the identity of interested firms can be easily determined. This practice is common in both the public and private sectors. If [this affected party's] pricing practices are disclosed to the public, other firms could reasonably estimate [its] bids based on the information contained in the records.

The information in the records sets out staff billing rates, amounts charged for specific types of tasks and the amount of time [the affected party] requires to complete specific tasks. With this information in the public domain, other firms could reasonably estimate their costs to [the affected party] for similar tasks included in a proposal request and tailor their bids based on this information. Consequently, the disclosure of this information will have a severe negative impact on the ability of [the affected party] to operate competitively in its industry.

The disclosure of Records 67, 55, 48, 37 and 21 could reasonably be expected to interfere with the contractual or other negotiations of [the affected party].

With respect to the application of section 10(1)(c), this affected party submits:

The expectation of undue loss is reasonable since, with its pricing policy a matter of public record, [the affected party] would be unable to compete effectively in a confidential bidding process. The loss cannot be quantified because there would be no way of knowing the number of opportunities that the firm has been denied because of decisions made based on the information in the records. . .

The Region supports the position of the affected party and suggests that harm to the competitive position of each of the affected parties could reasonably be likely to follow the disclosure of the information contained in the records.

In my view, the affected party has provided me with the kind of detailed and convincing evidence required to establish its position that harm to its competitive position could reasonably

be expected to result from the disclosure of the pricing information contained in the records. The affected parties operate in a competitive industry where pricing practices are closely guarded and are not generally publicly disclosed. In my view, the third part of the test under section 10(1) has been satisfied with respect to the pricing information contained in the invoices reflected in Records 1-72, the Cost Breakdown section of Record 87, the Payment Certificates in Records 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 139, 140, 142, 143, 144, 145, 148, 149 and 151, the Change Orders in Records 136, 141, 146, 147, 196 and 202, the Summary of Restoration Costs in Records 163, 173, 181 and 231, the invoices in Records 206, 216, 229 and 245. As all three parts of the test have been satisfied with respect to this information, I find that it is exempt from disclosure under the mandatory exemption in section 10(1).

Based on my review of the remaining records and those portions of Records 1-72, 87, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 163, 173, 181, 196, 202, 206, 216, 229, 231 and 245 which do not contain information relating to pricing, they do not qualify for exemption under section 10(1) and should be disclosed to the appellant. I have not been provided with any evidence to substantiate a finding that the disclosure of the information contained in these records or parts of records could reasonably be expected to result in any of the harms contemplated by sections 10(1)(a), (b) or (c).

FINAL ORDER:

1. I uphold the Region's decision to deny access to the pricing information contained in the invoices reflected in Records 1-72, the Cost Breakdown section of Record 87, the Payment Certificates in Records 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 139, 140, 142, 143, 144, 145, 148, 149 and 151, the Change Orders in Records 136, 141, 146, 147, 196 and 202, the Summary of Restoration Costs in Records 163, 173, 181 and 231, the invoices in Records 206, 216, 229 and 245.
2. I order the Region to disclose the remaining records and those portions of Records 1-72, 87, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 151, 163, 173, 181, 196, 202, 206, 216, 229, 231 and 245 which do not contain information related to pricing to the appellant by providing him with copies by **June 12, 2002** but not before **June 7, 2002**.
3. In order to verify compliance with the terms of this final order, I reserve the right to require the Region to provide me with copies of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Donald Hale
Adjudicator

_____ May 8, 2002