ORDER MO-1750

Appeal MA-030221-1

Town of Newmarket

NATURE OF THE APPEAL:

The Town of Newmarket (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for information relating to a fire that was investigated by the former Town of Aurora Fire and Emergency Services Department. The Town of Aurora Fire and Emergency Services has since been combined with the Newmarket Fire Department to form Central York Fire Services, which is now managed by the Town. The requester sought access to the documentation contained in the Inspector's file, including:

> . . . all documents, including the report of [a named certification agency, the affected party], and [the Inspector's] reports, notes, and photographs and any other documentation relevant to this fire loss.

After notifying and receiving representations of the affected party under section 21(1) of the *Act*, the Town denied the requester access to a report prepared by the affected party, claiming the application of the mandatory exemption in section 10(1) of the *Act* (third party information). The requester, now the appellant, appealed the Town's decision.

During the mediation stage of the appeal, the Town clarified its original decision by confirming with the appellant that it was denying access to the subject report in its entirety under section 10(1)(a).

Further mediation of the appeal was not possible and the matter was moved to the adjudication stage. I decided to seek the representations of the Town and the affected party initially. Both parties submitted representations, which were shared with the appellant in their entirety, along with a copy of the Notice of Inquiry. The affected party also raised the possible application of the mandatory exemption in section 10(1)(b). The appellant submitted representations that were also shared with the Town and the affected party. I then received additional representations from both of these parties by way of reply.

RECORDS:

The sole record at issue in this appeal is a 3-page report prepared by the affected party, a copy of which was given to the Town of Aurora Fire and Emergency Services. The report relates to an examination of a clothes dryer which had been involved in a house fire in the Town of Aurora.

DISCUSSION:

THIRD PARTY INFORMATION

The Town and the affected party rely on the application of the mandatory exemptions in sections 10(1)(a) and (b), which 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, 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;
>
> (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 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) to apply, the institution and/or the affected party 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 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The Town and the affected party take the position that the record contains information that qualifies as "technical information" for the purposes of section 10(1). The term "technical information" has been defined as follows in a prior order of this office:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, 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 [Order PO-2010].

Based on my review of the representations of the affected party and the Town, as well as the record itself, I have no difficulty in concluding that it contains information that qualifies as "technical information" for the purposes of section 10(1). The information clearly belongs to an organized field of knowledge that falls within the general category of applied science.

The appellant makes reference to the non-professional status of the individual who prepared the report and takes the position that this person does not qualify as a "professional in the field" within the definition referred to above. In my view, the evidence provided by the affected party demonstrates that this individual is well qualified to conduct the investigation that was performed and to prepare the report arising from that investigation. I specifically find that the individual who prepared the report is a "professional in the field" for the purposes of section 10(1) and I dismiss this argument by the appellant.

Part 2: supplied in confidence

Supplied

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].

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- 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

- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [PO-2043]

Representations of the parties

The appellant argues that the record at issue was not "provided in confidence" by the affected party as the examination which gave rise to its creation took place in the presence of a representative of the manufacturer of the dryer that was alleged to be the source of the fire. As a result, the appellant is of the view that "this was an open process and there was no implied confidentiality".

The Town indicates that the report was provided to it by the affected party on July 9, 2001. The Town points out that the record itself contains the following explicit statement:

> . . . the information in this document is confidential and is provided to the addressee acting in the capacity of a Provincial Regulatory Authority. This document must not be reproduced or publically [sic] disclosed without the written permission of [the affected party].

The Town also indicates that it has treated the record as confidential since it was received.

The affected party states that:

> The fire investigation report in question was supplied by [the affected party] to the Captain of Fire and Emergency Services for the Town of Aurora (which has since consolidated with the Newmarket Fire Department to form Central York Fire Services which is managed by the Town of Newmarket) on July 9, 2001. [The affected party] supplied the technical information in the reports covered by this appeal at the request of the Town of Aurora Fire and Emergency Services. The information was supplied in the context of fulfilling our accreditation . . . by providing follow-up on an incident involving a certified product in the field and as part of our relationship with regulatory authorities as discussed in the accreditation requirements.
>
> [The affected party] is a private company in a very unique position. The very special nature of our work means that we seek to balance the positive social benefits of assisting the government in its mandate to regulate the marketplace and the environment, as against our client's legitimate need to preserve the confidentiality of the information that we hold. This is a difficult line to walk at the best of times, and we can only manage to achieve both goals if the confidential nature of our relationship with the regulatory authorities is preserved.

The affected party also refers to the "confidentiality clause" contained in the record and provides an excerpt from its internal Corporate Audits and Investigations Unit *Guideline for Handling Product Incident Investigations* which describes the confidentiality of the investigation process in situations where a client's product is being examined by the affected party.

The affected party concludes this portion of its representations as follows:

> In the situation at hand, the opportunity to conduct an investigation was made available by the regulatory authorities [the Aurora Fire Department] to the other parties who would be relevant, such as representatives of the insurers who participated at the same time. The other parties who participated in this investigation all had their own experts present to view the same material and participate in the same procedures. The other parties present had the same opportunity to form their own opinion and create their own reports at exactly the same time. [The affected party] was not acting on behalf of any of those parties in its participation in the investigation and has no responsibility or obligation to provide its report or any of the opinions or conclusions it contains to any of those other parties.

Findings

It is beyond dispute that the record at issue was supplied by the affected party to the Town, specifically through the predecessor Fire Department operated by the Town of Aurora. A copy of the report was provided to the Fire Department in its capacity as a regulatory authority in accordance with the affected party's internal policies.

In addition, in my view, the record was provided with an explicit expectation that it would be treated confidentially. I find that the inclusion of a confidentiality clause in the report itself is evidence of an expectation on the part of the affected party that the Town would treat the record in a confidential manner. The fact that the Town has only shared its contents with those of its employees who "need to know" is further proof of the expectation on the part of both the Town and the affected party that the record was confidential in its nature.

I further find that the record does not contain information which was supplied to the Fire Department by the manufacturer of the dryer. The appellant concedes that a representative of the manufacturer was present when the dryer was being examined by the affected party's representative. However, the record does not indicate that any of the technical information referred to therein was provided to the individual conducting the examination by the manufacturer's representative.

As a result, I find that the second part of the test under section 10(1) has been satisfied.

Part three: harms

General principles

To meet this part of the test, the institution and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a): prejudice to competitive position

The appellant disputes the contention of the affected party and the Town that harm to the competitive position of the affected party could reasonably be expected to result from the disclosure of the record. The appellant points out that construction and wiring apparatus installed in the clothes dryer which is the subject matter of the record is not "secretive" and an identical model could be purchased and "reverse engineered" to determine how it was constructed.

The Town argues that the report contains technical information that would not otherwise be available to the affected party's competitors. As a result, it submits that prejudice to the affected party's competitive position and an undue gain to its competitors could result from the disclosure of the report.

The affected party points out that since the enactment of the *North American Free Trade Agreement*, it is "now in direct competition with other accredited certification organizations including those located in the US, which was not previously the case." It suggests that " The record in question contains information that is highly sensitive to our client [the manufacturer of the dryer] and regarding which our client has contractual expectation of confidentiality."

The affected party goes on to argue that:

> This is a reasonable expectation because the integrity of our process and the [affected party] trade mark is a critical component of [its] positioning in the marketplace. If our clients lose confidence in [the affected party's] ability to keep technical information confidential, they will choose other service providers with respect to certification and will no longer agree to participate in [the affected party's] standards development activities.

. . .

> The [affected party's] trade mark is almost universally recognized in Canada and is the single most valuable asset owned by [it]. The market value to the [affected party] of the integrity of our trade mark cannot be overstated. As has been demonstrated by the numerous accreditation and internal guidance documents on the topic of confidentiality, confidential handling of information is critical to our status as an accredited standards development and certification organization. It is our respectful submission that requiring the release of information that is confidential according to [the affected party's] guidelines would result in a reasonable apprehension that there would be a significant erosion of the perception of external stakeholders that [the affected party] is an organization which can be entrusted with sensitive information, resulting in corresponding gain to our competitors.

In its reply submissions, the affected party reiterates its position by arguing, in part, that:

> . . . while general information about common appliances is widely known, as referred to by the requester on various web-sites, the specific design criteria of an individual manufacturer's devise is proprietary design criteria of that manufacturer.
>
> . . .
>
> [The affected party] would emphasize that confidentiality of client information is an absolutely critical business factor for us. Attached please find a copy of our template contract, which we use with manufacturers of certified products. Please note in particular section 4.1:
>
> > Section 4.1 *Confidentiality:* [The affected party] shall not voluntarily disclose proprietary information received from the Client without the Client's authorization. Proprietary information acquired from the Client and information from other sources may be disclosed to the public if, in the opinion of the [affected party], such disclosure is necessary to warn the public of a potential hazard that exists. Where information, including proprietary information, relating to the client is requested by a regulatory authority or pursuant to a court order, subpoena or similar process, [the affected party] will comply with such a request. When [the affected party] intends to disclose the Client's confidential information under this section, it will make reasonable efforts to advise the Client in advance of its intention to do so.

> Without this contractual condition in place, we would be unable to do business. While [the affected party] has a contractual provision built in that allows us to provide information at the request of a regulatory authority, that does not mean that our client has thereby consented to release of the information to all the world.
>
> In fact, technical information about products is so important to many of our clients that many clients request additional non-disclosure agreements before being willing to release any file information to [the affected party] so that we can engage in certification and testing activities.
>
> In previous years, [the affected party] was a monopoly. Since *NAFTA*, [the affected party] competes with a host of other certification agencies such as the UL, ETL and Intertek. Clients now have a choice of where to take their certification business that they did not have in previous years. If the clients do not trust that [the affected party] can and will honour its contractual confidentiality obligations, they will take their business elsewhere.

Section 10(1)(b) – information no longer supplied

The affected party submits that the information at issue also qualifies for exemption under section 10(1)(b). It states that:

> Should the IPC require release of the records requested in this situation, [the affected party] will be forced to reconsider the nature of its liaison relationship with regulatory authorities. [The affected party] supplied the subject technical information at the request of the regulatory authority under an expectation of confidentiality, which was explicit in six out of seven of the documents and implicit in the remaining document. [The affected party] strives to support the regulatory authorities in their actions in fulfilling the public mandate but as an organization, we cannot continue to take the risk of losing clients who are fearful that their technical information will be exposed; and of our competitors gaining information about our technical processes and how we apply them.

Neither the appellant nor the Town address the application of section 10(1)(b) to the record.

Findings

In Order MO-1706, Adjudicator Bernard Morrow made the following comments with respect to the type of evidence to be tendered by a party claiming the application of section 10(1) to records containing information which falls within that section. He cited with approval a decision of British Columbia Information and Privacy Commissioner Loukidelis in B.C. Order 01-20, finding that:

The affected party's arguments focus on harms relating to disclosure of financial terms. The affected party has suggested that release of this information could jeopardize relationships with existing clients and future potential clients as well as providing competitors with a competitive advantage in future bids. I am not convinced that there is any inherent value in this information. The information is now more than three years old and there is evidence to suggest that it would be of little value to competitors as the landscape changes with respect to the creation of cold beverage vending arrangements between public institutions and prospective vendors.

In short, I find both the affected party's and the Board's evidence speculative. The affected party and the Board have not provided detailed and convincing evidence that disclosure of this information could lead to a reasonable expectation of harm. I address my findings with respect to this financial information in greater detail below.

In addition, I have carefully reviewed Order 01-20 and I find strong parallels between the circumstances of that case and this appeal, both of which involve similar records.

The appellant in this case has focused on Commissioner Loukidelis' finding that the institution and the affected party had not provided "convincing" evidence of harm to the affected party in the event that the severed portions of the contract were released to the applicant. Commissioner Loukidelis used the words "sweeping assertions" to describe the evidence of harms tendered by UBC and the affected party. In establishing an evidentiary benchmark, he states:

> Evidence relating to the whole of the agreement, as a product, is irrelevant, as most of the agreement has been disclosed. The evidence needs to address the specific items of information which have been withheld. Evidence that vaguely connects speculative harm to unspecified parts of the agreement is not meaningful.

In this appeal, both the affected party and the Board have made an attempt to address concerns pertaining to the information at issue. However, the evidence of harm provided in their representations does not address the specific items of information that have been withheld. Therefore, I do not find their evidence persuasive. I note also that the affected party, being in the best position to describe in detail the potential for competitive harm or undue loss under sections 10(1)(a) and (c), has provided only generalized assertions regarding the potential impact of the disclosure of financial information on its relationship with existing and potential customers and on its competitive advantage. It has failed to provide me with specific and detailed reference to the information at issue and

> explanations as to how these harms could reasonably be expected to occur from disclosure of this information.

In the present appeal, the affected party and the Town have argued that the affected party will suffer harm to its competitive position should the information in the record under consideration be disclosed. The information in the record consists of a technical examination of the cause of a fire in a clothes dryer. The record does not contain any specific information that is unique to the affected party, such as information describing a particular technique employed in the conduct of this examination. I further find that the disclosure of the record at issue could not reasonably be expected to reveal any detailed information regarding the construction techniques or other unique qualities relating to the dryer itself. Rather, the record simply attempts to describe in technical language the investigator's views on the reason for the fire.

In my view, the disclosure of the technical information at issue could not reasonably be expected to give rise to harm to the competitive position of the affected party and section 10(1)(a) does not apply. The information relates solely to the investigator's examination of the dryer and does not, in my view, reveal information that could be used by one of the affected party's competitors to its disadvantage. The affected party acknowledges, as is evidenced by its confidentiality undertaking quoted above, that certain information relating to the "failure of certified products" is routinely passed along to regulatory authorities, such as fire departments, for their use in preventing accidents or alerting the public to potential dangers. This is precisely the situation in the present case. The report was made available to the local fire department as the incident occurred in its jurisdiction. As a result, I find that the affected party's arguments on the application of section 10(1)(b) are similarly untenable.

In my view, all of the participants in the certification process gain something in this transaction. The manufacturer becomes entitled to the use of the affected party's trade mark on its product indicating that it has received the certification of the affected party. In return, the affected party receives a fee and retains the right to involve "regulatory authorities" in those situations where its certification may be called into question as the result of an accident or malfunction of the certified product. The public interest is also protected by this relationship as regulatory authorities like fire departments are notified if there is a problem with a certified product.

I am not convinced by the evidence tendered by the Town and the affected party that this relationship would be seriously threatened by the disclosure of the information contained in this particular record. In my view, it is in the interests of all of the parties to the certification process that information be shared with regulatory authorities and manufacturers by the affected party. I am not convinced that there exists any real likelihood that the harm contemplated by section 10(1)(b) could reasonably be expected to take place should this particular record be disclosed. As a result, I find that I have not been provided with the kind of detailed and convincing evidence to establish the application of section 10(1)(b) in this case.

ORDER:

1. I order the Town to disclose the record at issue to the appellant by providing him with a copy by **March 11, 2004 but not before March 4, 2004.**

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

Original signed by: February 6, 2004
Donald Hale
Adjudicator