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

INTERIM ORDER MO-1996 - I

Appeal MA-050139-1

Regional Municipality of York

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NATURE OF THE APPEAL:

The Regional Municipality of York (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

1. A copy of the [company A] Hydrogeological Investigation which was required to be completed before the Ministry of the Environment would renew a Permit to Take Water (expiring March 31, 2005) for [the named company].

2. A copy of the Permit to Take Water for [company A] which I understand has recently been issued for a period of 10 years.

3. A copy of the draft report "Geology and Hydrogeology of York Region" prepared by [company B].

4. A copy of a [named individual's] review of #3.

5. A copy of a required watershed plan and its components until March 9, 2005.

The Municipality identified records that were responsive to the request. The Municipality granted access to records responsive to parts 1 and 2 of the request and denied access to records relating to parts 3 and 4 under the mandatory exemptions at sections 10(1)(a), (b) and (c) of the *Act* (third party information). The Municipality also indicated that it had no records in its custody or control responsive to part 5 of the request.

The requester (now the appellant) appealed the Municipality's decision. During the mediation stage of this appeal, the appellant advised that she was aware that the watershed plan had yet to be submitted to the Municipality. Accordingly, the appellant accepted that the watershed plan referred to in part 5 of the request was not in the Municipality's custody or control, and part 5 is, therefore, not an issue in this appeal.

Mediation did not resolve the appeal, which was therefore transferred to the adjudication stage of the process. I sent a Notice of Inquiry identifying the facts and issues in the appeal to the Municipality. I also identified 6 parties referred to in the requested records who may have an interest in disclosure. One of the affected parties (Company B) was the author of the draft report. Four other affected parties were also involved in the preparation of the report and its appendices. The sixth affected party prepared a review of the draft report. I sent the Notice of Inquiry to them (the affected parties), inviting each of them to provide representations on the issues.

The Municipality provided representations in response to the Notice of Inquiry. In addition, all of the affected parties provided representations. One of the affected parties consented to the disclosure of the information in the records relating to them. The other affected parties objected to the disclosure of information.

I decided it was not necessary to seek representations from the appellant before issuing this interim order.

RECORDS:

The records at issue in this appeal are:

Record A (part 4 of the request)

- Draft for Discussion - Geology and Hydrogeology, September 2004 (37 pages)
- Draft Appendix A - Conceptual Geologic Model and Draft Appendix B - Groundwater Flow for York region (169 pages)

Record B (part 3 of the request)

- Correspondence, dated December 24, 2004 (2 pages)
- Emails with attachments (16 pages)

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

As noted above, one of the affected parties provided a review of the draft report. That affected party is an employee of the Government of Canada. The review and related e-mail correspondence comprises Record B. This raises the possibility that the mandatory exemption at section 9(1) of the *Act* might apply to Record B. This section states, in part:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;

Because section 9 might apply and because the parties have not had an opportunity to address this issue, I have decided to defer my review of issues regarding access to Record B. I will therefore deal only with Record A in this interim order. Only sections 10(1)(a), (b) and (c) have been claimed for Record A (which I will refer to as "the Record").

THIRD PARTY INFORMATION

Sections 10(1)(a), (b) and (c) 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency…

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 third 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 Municipality submits that "[t]he report clearly is based in the natural sciences and therefore qualifies under part I of the test as revealing scientific or technical information." The affected parties either submitted that the records revealed scientific and/or technical information, or they were silent on the matter.

The meanings of scientific and technical information in section 10(1) have been discussed in prior orders:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In

> addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *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].

As noted previously, the records consist of a draft report and appendices to the draft report. The draft report and its appendices deal with the Municipality's water resources, and in particular, analyzing and mapping the Region's geology and hydrogeology.

In my view, with limited exceptions, this information is scientific and/or technical information, and therefore meets part 1 of the test for exemption from disclosure under section 10(1) of the *Act*.

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].

From my review of the records, I am satisfied that all of the information was supplied to the Municipality by the affected parties.

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 [Order 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 [Order PO-2043]

The parties' representations on confidentiality

The Municipality submits that the records were supplied in confidence. It explains as follows:

> The Region's position is supported by the following statement contained in the September 28, 2004 Company B letter addressed to [the] Program Manager, Water Resources Protection:
>
> > "draft for discussion
> > Re: [an identified numbered report] - Issuance of Draft Reports
> >
> > A DRAFT is a rough copy of a report. The intent in issuing it is to allow other knowledgeable people associated with the project an opportunity to review the style and content prior to final issuance.
> >
> > Since the FINAL report may differ from the draft, *we think it only prudent to collect all of the DRAFT reports* prior to issuance of the FINAL report.
> >
> > *We would appreciate it if you would see that all copies of the DRAFT are returned to us* and then we will issue our FINAL report.
> >
> > We thank you in advance for your cooperation.
> >
> > Yours very truly, [Company B]"
>
> The Region has interpreted this letter as being an explicit indication that the record was submitted on a confidential basis. [My emphases.]

Company B submitted:

> [I]t was clearly [Company B's] explicit intent to supply draft reports to the Region of York in confidence. All draft reports supplied to the Region contained a transmittal letter from our President (Attachment 1) requesting that the reports be used only by the Region and that they all be returned to [Company B] prior to finalization of the reports.

The other affected parties either took similar positions or were silent on the matter.

Analysis and findings

The representations of the Municipality and the affected parties, in my view, do not establish an *explicit* expectation of confidentiality. The Municipality makes no substantive representations to that effect; rather, it relies on quotes from Company B's draft covering letter which indicates that the draft is for review purposes and asks that draft reports be returned prior to issuance of the final report. Similarly, Company B's representations rely on their requirement that all "DRAFTS" be returned before issuing a "FINAL report".

In my view, the fact that drafts are to be returned is not determinative of whether the documents were supplied with an *explicit* expectation of confidentiality. Based on the representations, it appears that the only explicit expectation was that the drafts were to be returned before the final report is issued. Nevertheless, in my view, this supports a conclusion that there was an *implicit* expectation of confidentiality.

The representations from the Municipality and the affected parties are that they received/submitted the record in confidence. In view of the statements in Company B's covering letter, the representations of the Municipality and affected parties, and the nature of the record itself, I am satisfied that Company B supplied the record to the Municipality with an implicit expectation of confidentiality that had an objective basis. Accordingly, I find that the record was provided to the Municipality in confidence, and the second part of the test under section 10(1) has been satisfied.

Part 3: harms

General principles

To meet this part of the test, the institution and/or the affected parties 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 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].

The question, therefore, is whether disclosure of this particular information could reasonably be expected to result in any of the harms listed in sections 10(1)(a), (b) or (c).

The parties' representations on harms

The representations of the Municipality

The Municipality claims harms under sections 10(1)(a), (b) and (c) and responded as follows to the questions posed in the Notice of Inquiry:

> The Region has had the benefit of seeing the submissions to be made by Company B in this matter. It is the *firm position of Company B* that its professional reputation, 30 years in the making as a leading groundwater and environmental consulting firm, will be put at serious risk were the records which are the subject of this appeal released at this time. As indicated in its submission, Company B has "an enviable reputation in the market place known for [its] innovation and the quality of [its] work. The draft report and associated appendices are very much a work in process. It provided a status of the scientific work to date and interpretations completed by [its] professional staff. The draft report was only intended for use by the Region and its expert review committee…
>
> …
>
> It is the Region's position that the release of the records which are the subject of this appeal would result in the loss of engagements for Company B and thereby prejudice its competitive position in the marketplace. In that the subject matter of the draft report has been the subject of controversy in the Region, it is reasonable to predict that any inference that Company B has been unduly influenced or has performed beneath expectations would be widely publicized, exacerbating the harm to Company B (section 10(l)(a)).
>
> Further, attacks on the reputation or credibility of Company B will result in loss of engagements by Company B and therefore will result in undue loss to Company B (section (10)(1)(c)).
>
> Further still, the Region's objective in commissioning the report is to create a clear, accurate and defensible understanding of the groundwater resources of York Region. Company B has accepted that the collaboration of professionals as part of a peer review is an important means of validating the report before its final release, but has participated only on the understanding that its professional reputation would be protected (i.e. ***the draft report and any resulting peer critique would be kept confidential***). The Region believes there is substantial

> public benefit in maintaining a process such as this and fears that a decision requiring the release of preliminary versions of reports prepared by its scientific consultants will cause Company B and other consultants to no longer provide opportunity for peer review of their work product prior to final report issuance. (section 10(l)(b)). [emphasis added]

The representations of Company B

> **Disclosure must give rise to a reasonable expectation of harm:** as indicated above, [Company B] is firmly of the opinion that harm will occur to it as defined in Section 10 (1)(c) of the Act if the information is released. The Records in dispute, namely our preliminary report and appendices… should not be disclosed because to do so would be injurious to the reputation and commercial interests of [Company B] and will result in a loss of income. Further, release of preliminary information will lead to confusion amongst the public and will not assist in the Region's objective to promote a clear understanding of the groundwater resources of York Region once the final report is released.
>
> It is our strong opinion that [Company B] passes the three-part test and we therefore respectfully submit that the Region of York was correct in denying access to the requested information on the basis that it contains third party information that reveals scientific information explicitly supplied in confidence, the release of which will result in undue loss for [Company B]. In addition, were the information required to be released, [Company B] would have to seriously consider whether its draft reports would be permitted to be submitted for peer review by institutions covered by access and privacy legislation. We therefore respectfully further submit that it is in the public interest that complex information be released with clarity and without confusion, and that a direction from the IPC to disclose preliminary information in circumstances such as these would result in similar information no longer being supplied to institutions where it is in the public interest that similar information continue to be supplied...

The representations of the other affected parties

As noted previously, one affected party did consent to the release of the records at issue. The others, however, did not. Their representations reflect those of the Municipality and Company B. One affected party stated, in addition, that they were concerned that if they agreed, it "might significantly damage my relationship with this very important client…".

Analysis and findings

As I understand the representations of the Municipality and the affected parties, they believe part 3 of the test is met because:

- The release of the record may be injurious to the reputations of the affected parties, thereby resulting in a loss of competitive position, and/or undue loss (sections 10(1)(a) and (c)).

- Unrestricted disclosure of this information has the potential to undermine the business interest of the affected parties (section 10(1)(a)).

- It is feared that the differences between the draft report and the final report could cast doubt on the abilities and/or integrity of the affected parties (10(1)(a) and (c)).

- The Municipality also suggests that disclosure of the information may result in similar information no longer being supplied to it (section 10(1)(b)). In this regard, I noted previously that the Municipality states that "…Company B has accepted that the collaboration of professionals as part of a peer review is an important means of validating the report before its final release, but has participated only on the understanding that its professional reputation would be protected (i.e**.** *the draft report and any resulting peer critique would be kept confidential*). The Region believes there is substantial public benefit in maintaining a process such as this and fears that a decision requiring the release of preliminary versions of reports prepared by its scientific consultants will cause Company B and other consultants to no longer provide opportunity for peer review of their work product prior to final report issuance" (emphasis in original). Company B comments that disclosure could lead it "… to seriously consider whether its draft reports would be permitted to be submitted for peer review by institutions covered by access and privacy legislation."

- The Municipality and Company B assert that disclosure of the draft report could "confuse" the public.

In my view, these arguments are extremely general and do not point to any objective or factual basis for believing that the disclosure of the particular record at issue here could reasonably be expected to result in the harms mentioned at sections 10(1)(a), (b) or (c). As regards sections 10(1)(a) and (c), for example, it is not clear how the disclosure of the information in the record could result in prejudice to competitive or negotiating provision, or produce undue loss or gain.

Nor is there any credible explanation of why, in the circumstances of this case, any deviation in the final report from the contents of the record at issue, which is clearly marked as a "draft" report, could reasonably be expected to result in harms of that kind. Also, because the record is clearly marked "draft", I do not accept arguments of Company B that withholding it would

prevent "confusion". For this same reason, I am not satisfied that, even if any such confusion should occur, this could reasonably be expected to constitute or result in the type of "harm" envisaged by sections 10(1)(a) and (c).

Previous orders of this office have addressed similar situations where the party with the onus failed to provide the kind of detailed and convincing evidence required to establish a reasonable expectation of alleged harms under sections 10(1)(a) and (c) (see, for example, Orders MO-1319, PO-1791 and M0-1914.) Adjudicator John Swaigen's comments on this issue in Order PO-1914 and his comments are, in my view, similarly applicable:

> The harms described by the Town are potential general impacts from disclosure of drafts containing errors or omissions. They do not address the impacts of the disclosure of the particular information at issue in this appeal. The harms described by the consultant are speculative and lack substance.
>
> I want to comment specifically on two aspects of the contemplated harm.
>
> The first aspect is the concern that the public, if permitted to see the information in the draft, will be confused and believe it is the final opinion of the consultant. In my view, the possibility of such a misunderstanding is minimal, for three reasons. First, the fact that the draft does not contain the seal or stamp of the Professional Engineer who prepared it indicates clearly that it is not to be relied upon as the professional opinion of the consultant. The Town, the consultant and the appellant all acknowledge this. Second, the copy of the record provided to this office has the word "draft" written on the cover page, indicating clearly that it is not the final version. Third, the final version of the study is available for comparison.

With respect to the representations regarding the potential harms to Company B and the other affected parties, Adjudicator Swaigen also comments on similar arguments put before him in Order PO-1914:

> The second aspect is the concern that may be summarized as harm to the consultant's reputation. I accept that it is possible for disclosure of a record to result in harm to the reputation of a person who supplied information in the record, and that this loss of reputation in turn can have the potential to result in a harm listed in section 10(1), such as undue gain to competitor. Whether disclosure of information could reasonably be expected to harm the supplier's reputation depends on factors such as the nature of the particular information and the nature of any errors or omissions. Having reviewed the draft report and the representations on this issue, I see nothing in this information or in the circumstances of this case that could reasonably be expected to result in this kind of harm.

Similarly, in the circumstances of this appeal, I have not been provided with "detailed and convincing" evidence to establish a "reasonable expectation" of the identified harms in sections 10(1)(a) and (c). Having reviewed the draft report and the representations, including the nature of any errors or omissions, I am not persuaded that disclosure could reasonably be expected to result in these harms and I find that sections 10(1)(a) and (c) do not apply.

With respect to section 10(1)(b), the Municipality submits that continued peer review is in the public interest, and that this "may" not continue to occur if the report is disclosed. Company B says that it would have to "seriously consider" whether to continue with peer review by the Municipality. In my view, neither of these statements on their face is sufficient to establish a reasonable expectation of the cessation of the peer review process (i.e. the continued supply of this type of information to the Municipality). Moreover, while I accept that such a peer review would clearly be in the public interest where the Municipality is the client of Company B, I am not persuaded that the cessation of this practice is a reasonable expectation in the context of any future negotiated contract between the Municipality and Company B (or any other consultant) to produce a report of this nature. I find that section 10(1)(b) does not apply.

In summary, I find that the disclosure of the record cannot reasonably be expected to result in the harms identified in sections 10 (1)(a), (b) or (c). As all three parts of the test under section 10(1) must be met, Record A does not qualify for exemption under section 10(1). As no other exemption has been claimed for it, I will order it disclosed.

ORDER:

1. I order the Town to disclose a copy of Record A by **January 3, 2006** but no earlier than **December 29, 2005**.

2. To verify compliance with this order, I reserve the right to require the Town to provide to me a copy of the record disclosed to the appellant pursuant to provision 1.

Original signed by: November 24 2005
Beverley Caddigan
Adjudicator