



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1965

Appeals MA-040327-1 and MA-040380-1

City of Hamilton



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NATURE OF THE APPEAL:

The City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all receipts and invoices pertaining to all expenditures for the construction of a named shelter in the City.

Upon receiving the request, the City notified the organization involved in the construction of the shelter (the third party) of the request pursuant to section 21 of the *Act*, and invited the third party to provide its views on the disclosure of the records. The third party, through its representative, responded by identifying that it did not consent to the release of the information.

The City then issued a decision which identified that the responsive records included cheque requisitions, summary claims forms, invoices, handwritten notes and spreadsheets, and accounts payable disbursement forms. With respect to the issue of access to these records, the City stated that it was prepared to disclose, in whole or in part, approximately 293 pages of responsive records. It identified that access was denied to certain records and portions of records on the basis of the exemptions in sections 10(1) (third party information) and 14(1) (invasion of privacy) of the *Act*.

The decision also identified the fees that would be payable for the requested information, and that the third party was being notified of the decision. The decision stated that, if the third party did not appeal the City's decision to disclose certain records, the requester would receive the information by an identified date.

When it was notified of the City's decision to disclose certain records in whole or in part, the third party filed an appeal of that decision with this office, and Appeal Number MA-040327-1 was opened. The third party appealed the decision on the basis that none of the information should be disclosed to the requester.

The requester (now the appellant) also appealed the City's decision, and takes the position that all of the requested information should be disclosed. As a result, Appeal Number MA-040080-1 was opened.

Mediation did not resolve either of the appeals and they were transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in both of these appeals to the City and the third party, initially. I also identified 17 parties referred to in the requested records who may have an interest in the disclosure of the records, and I sent the Notice of Inquiry to them (the affected parties), inviting each of them to provide representations on the issues.

The City and the third party provided representations in response to the Notice of Inquiry. In addition, three affected parties provided representations. Two of the affected parties who provided representations consented to the disclosure of the information in the records relating to them. The other affected party who provided representations objected to the disclosure of information relating to it on the basis that the information was exempt under section 10(1) of the *Act*. I did not receive representations from the other 14 affected parties.

I then sent the appellant the Notice of Inquiry, along with a copy of the City's representations, the representations of the affected party that objected to disclosure and the non-confidential portions of the representations of the third party. I did not receive representations from the appellant.

RECORDS:

There are approximately 208 pages of records remaining at issue in these appeals. The records include cheque requisitions, summary claims forms, invoices, City handwritten notes and spreadsheets, and accounts payable disbursement forms and other records pertaining to the expenditures for the construction of a named shelter in the City of Hamilton.

DISCUSSION:

PERSONAL INFORMATION

The City takes the position that portions of the records are exempt from disclosure under section 14(1) of the *Act*, as the disclosure would be an unjustified invasion of the privacy of identified individuals. In order to determine whether section 14(1) applies to any of the information, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that

correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The City takes the position that records D-43, D-44, E-10 and G-14 to G-23 all contain the personal information of identifiable individuals. It states:

Records D-43, D-44, E-10, G-22 and G-23 are titled "Earnings and Hours by Employee" and each contain personal information of shelter employees such as employee name, employee number, payment period, and exact salary earnings and deductions.

Record G-14 is a "Salary Change Form" containing the name of an identifiable individual of the shelter and the exact salary amount being earned by the individual followed by a figure indicating the amount the salary will be increased.

Records G-15 to G-21 are titled "Accounts Payable Disbursement" and list a number of shelter employees by name with the exact salary amounts being paid to each employee.

The City submits that each of these records contain personal information as defined in section 2(1) of the *Act*.

I have reviewed the records at issue and agree that the records referred to by the City contain the personal information of identifiable individuals. This information includes information relating to financial transactions in which the individual has been involved (paragraph 2(1)(b)), an identifying number, symbol or other particular assigned to the individual (paragraph 2(1)(c)), and

an individual's name where it appears with other personal information relating to the individual (paragraph 2(1)(h)).

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (h) of section 14(1) applies. The only section that may apply in these circumstances is section 14(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information, the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

The City submits that the disclosure of the personal information in the records is presumed to constitute an unjustified invasion of privacy as set out in section 14(3)(f) of the *Act*, which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

I have reviewed the records at issue, and find that some of the personal information contained in the records contains information relating to an individual's income; however, in the circumstances of this appeal, it is not necessary for me to determine exactly which portions contain this information.

I have determined that the identified portions of records contain the personal information of identifiable individuals other than the appellant. In the absence of representations from the appellant on the issue of the application of section 14(1)(f), and after reviewing the records, I

find that there are no factors favouring disclosure of this personal information. Accordingly, I find that disclosure of the records which I have found contain the personal information of identifiable individuals would constitute an unjustified invasion of personal privacy, and the exception in section 14(1)(f) of the *Act* does not apply (see Order PO-1851-F).

In summary, I find that Records D-43, D-44, E-10 and G-14 to G-23 qualify for exemption under section 14(1) of the *Act*.

THIRD PARTY INFORMATION

As identified above, the City denied access to portions of certain records on the basis of section 10(1) of the *Act*. The third party took the position that all of the records were exempt from disclosure under this section of the *Act*. One of the affected parties also objected to the disclosure of information relating to it on the basis that the information was exempt under section 10(1).

The relevant part of section 10(1) reads:

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;
- (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:

the record must reveal information that is a trade secret or scientific, technical,

commercial, financial or labour relations information; and

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

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.

In this appeal, I sent a Notice of Inquiry to the City, the third party and 17 affected parties. The City and the third party provided representations in response to the Notice of Inquiry. In addition, three affected parties provided representations. Two of the affected parties who provided representations consented to the disclosure of the information in the records relating to them. The other affected party who provided representations objected to the disclosure of information relating to it on the basis that the information was exempt under section 10(1) of the *Act*. I did not receive representations from the other 14 affected parties.

In the City's representations, the City states:

Following receipt of the Notice of Inquiry a number of affected parties contacted the City to discuss the Notice and the responsive records. Many of the affected parties (save one) ... advised that there were no concerns about the complete disclosure of their respective invoices.

The City then identifies that it is prepared to disclose the remaining records at issue to the requester, subject to my findings on the application of the exemption based on the representations of the third party or the affected parties.

I will now review the records at issue and the representations of the parties to determine if the three-part test under section 10(1) has been established.

Part one: type of information

The third party takes the position that the records contain "financial information" for the purpose of the first part of the three-part test. The affected party refers to the "commercial" nature of the information. The terms "financial information" and "commercial information" have been defined in previous orders as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I adopt these definitions for the purpose of this appeal.

As identified above, the records at issue include cheque requisitions, summary claims forms, invoices, spreadsheets, and accounts payable disbursement forms and other records. On my review of the records, I am satisfied that much of the information contained in them constitutes either commercial or financial information for the purposes of section 10(1) of the *Act*. Some of the records remaining at issue (for example, portions of the handwritten notes made by City employees) do not contain the types of information referred to in section 10(1); however, in view of my findings under part three of the section 10(1) test set out below, it is not necessary for me to identify specifically which portions of the records contain the type of information referred to in section 10(1) of the *Act*.

Part 2: supplied in confidence

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 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 third party states that “the information was supplied to the City with a reasonable expectation that it would be treated as confidential”. The third party acknowledges that, in its agreement with the City, the parties agreed that certain information would be made public; however, the third party takes the position that this expectation did not extend to information covered by a mandatory exemption under the *Act*. The third party states that “... at no time was there an expectation that all the ... information provided to the City would be disclosed ...”.

In the circumstances of this appeal, I am satisfied that some of the records were supplied to the City by the third party. Many of the records detail the amounts paid by the third party to suppliers, or are the invoices prepared by the affected parties for the third party, who then supplied them to the City. Based on the representations of the third party as well as on the nature of the information contained in some of the records, I am satisfied that the third party had a reasonable expectation of confidentiality when it submitted some (but not, in my view, all) of the records to the City. Furthermore, some of the records (for example, the handwritten notes made by a City employee) do not appear to have been supplied by the third party to the City. However, in view of my findings under part three of the section 10 test set out below, it is not necessary for me to identify specifically which records were supplied in confidence to the City.

Part 3: harms

General principles

To meet this part of the test, the party resisting disclosure 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].

Section 10(1)(a) and(c): prejudice to competitive position or undue loss or gain

The third party and the affected party objecting to disclosure claim that the records containing financial or commercial information are exempt under sections 10(1)(a) or (c) of the *Act*. These sections read:

Section 10(1) states:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Representations

The affected party objecting to disclosure submits that any information relating to pricing and/or services should not be disclosed. It states that its relationship with other parties is of a commercial nature, that pricing for its services is an informational asset, and that exposure of this information could be exploited by competitors to the detriment of the affected party. The affected party also identifies the competitive nature of the business it is in, and refers generally to the “unique knowledge and techniques” it utilizes.

With respect to the representations received from the third party, the third party also identifies that it is involved in competition with other, similar entities, and that disclosure of the “financial details” in the records will serve to permit other entities to unduly gain from the information. The third party also states:

Disclosure of any financial information will prejudice significantly the competitive position of [the third party] and the financial arrangements with design professionals and contractors who are retained on the project. The financial information includes price and budget estimates representing a trade secret as it contains complex programs and processes that have economic value from not being generally known

[The affected party] has been successful ... by applying budgeting techniques unknown or not used by other [entities]. Release of the records ... will prejudice our competitive position.

Finally, the third party identifies its concerns about the disclosure of specific records which it states include confidential solicitor/client information, and it argues that the release of that information would also result in the harms identified in section 10(1)(c). The third party provided confidential representations in support of its position that the exemption in section 10(1)(c) applies to this specific information, and I am accordingly unable to reproduce those submissions in this order.

Findings

I have carefully reviewed the records remaining at issue, which contain detailed information pertaining to the costs and expenditures of the third party, and include numerous invoices received by it from various affected parties. I have also reviewed in detail the representations of the two parties objecting to the disclosure of the records (the third party and one of the affected parties). After reviewing all of the above, I am not persuaded that the disclosure of the records will result in the harms identified in sections 10 (1)(a) or (c).

As set out above, to meet this part of the test, the party resisting disclosure must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. In my view, neither the affected party nor the third party have provided the sort of detailed and convincing evidence necessary to establish the identified harm.

The affected party has identified its concerns about the disclosure of the records relating to it. It takes the position that the pricing for the services it provides is its “informational asset”, and that disclosure of it could be exploited by a competitor. I have reviewed the information relating to the affected party, which consists of invoices for the work it did and proof of payment of the invoices by the third party. Other than the general statements the affected party makes about its concerns regarding the disclosure of the pricing information, I can find no other support for the position that disclosure of this invoicing information could reasonably be expected to result in the harms contemplated by section 10(1)(a) or (c). Although the affected party refers to the “unique knowledge and techniques” it utilizes, it has not identified how the information in the records at issue would disclose this “unique” information, nor has it connected this information with the records at issue. Accordingly, I am not persuaded that the disclosure of the information relating to the affected party will result in the identified harms.

Similarly, the third party’s representations are general in nature, and although they refer to the harms which the third party submits would result from the disclosure of the information, the submissions do not specifically link the records at issue to the general concerns which it raises. The bulk of the third party’s submissions relate to all of the records at issue. The third party objects to the disclosure of any portion of the records, and states that the disclosure of “any” financial information will prejudice “significantly” its competitive position. There are various records at issue in this appeal, ranging from invoices and payments made on what appear to be relatively regular commercial transactions, to more detailed statements of professional services provided to the third party. General statements such as the ones made by the third party in support of its position are not what I consider to be “detailed and convincing evidence” that the harms identified in section 10(1)(a) or (c) could reasonably be expected to result from disclosure of the records.

The third party does refer to its “price and budget estimates” which it states contain “complex programs and processes that have economic value from not being generally known”; however, the third party does not identify which portions of the records at issue contain or may reveal this type of information. It does not relate the identified harms to any specific records and, on my

review of the records remaining at issue, I am not persuaded that the disclosure of them will result in the harms contemplated by sections 10(1)(a) or (c).

Finally, as identified above, the third party does refer specifically to those records which it states contain confidential solicitor/client information, and it argues that the release of these records would result in undue gain as identified in section 10(1)(c). In this case, the third party does connect the identified harm to specific records, and takes the position that disclosure of these records will result in the identified harm, as they include confidential solicitor/client information. The third party provided confidential representations to me in support of its position, which I am unable to refer to in the body of this order.

I have carefully reviewed the specific records referred to by the affected party. Although there may be instances where information contained in records of this sort may result in the harms identified by the third party, I am not persuaded that the disclosure of these records would result in the identified harms. The specific records at issue appear relatively general in nature and, in my view, the evidence provided by the third party amounts to speculation of possible harm, as opposed to “detailed and convincing” evidence of harm. Furthermore, although the third party has argued that the identified harms relate to these specific records, it has not specified what information in these records would result in the identified harms. Accordingly, I am not persuaded that the disclosure of them will result in the harms contemplated by sections 10(1)(a) or (c).

As an aside, although the third party refers to these records as containing “confidential solicitor-client” information, suggesting that privilege may exist in these records, any such privilege would appear to have been waived by the third party when it provided the records to the City.

In summary, I find that the disclosure of the records will not result in the harms identified in sections 10(1)(a) or (c). As all three parts of the test under section 10(1) must be met, the records do not qualify for exemption under section 10(1).

ORDER:

1. I uphold the City’s decision to deny access to Records D-43, D-44, E-10 and G-14 to G-23 on the basis of the exemption in section 14(1) of the *Act*.
2. I order the City to disclose the remaining records to the appellant by October 25, 2005 but not before October 20, 2005.

3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant, upon request.

Frank DeVries
Adjudicator

September 19, 2005