



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

ORDER MO-2557

Appeal MA09-423

City of Timmins



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The City of Timmins (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

[a]ll 2009 renewal documents pertaining to the Property Casualty Insurance program underwritten by [a named insurance company]. In particular, I require all Building and Contents Schedules with the Values for Each item (sic) in the schedule as well as all fleet schedules with the insured values on all the individual items.

The City located the responsive record and after providing notification to the affected party, who objected to disclosure of the record, it issued a decision to deny access to the record, citing the discretionary exemption at section 11 of the *Act* (economic and other interests).

The requester, now the appellant, appealed this decision.

During mediation, the City issued a new decision to the appellant, advising that it is no longer relying on section 11 but rather, is applying the mandatory exemption at section 10 (third party information) to the record at issue. The City advised the mediator that only Exhibit "A" was being withheld under this section. The City's position was that no exemptions apply to the first seven pages of the record and the affected party did not dispute this position. Accordingly, the City disclosed these pages to the appellant.

The appellant confirmed to the mediator that Exhibit "A" was the only record at issue in the appeal, and stated that he believed that disclosure of the information in the record would be in the public interest. Accordingly, section 16 was added as an issue.

This file was moved to adjudication where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the City, the affected party and the appellant. Neither the City nor the affected party provided representations, nor did they consent to the release of the record at issue. I then sent a Notice of Inquiry to the appellant. The appellant provided representations. I provided a copy of the appellant's representations to the City and the affected party and sought reply representations. Neither the City nor the affected party provided reply representations. The City indicated in response to my request for reply representations that: "It has always been the position of the City of Timmins that the [affected party] should be the one to defend its position that they do not want their information released and it is [the City's] position that it would be more appropriate for them to defend this position.

RECORD:

Exhibit A of "2009 Report Attachments Corporation of the City of Timmins"

DISCUSSION:

THIRD PARTY INFORMATION

I will now determine whether the mandatory exemptions at sections 10(1)(a) to (c) apply to the record. Section 10(1) states in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. 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 and 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 types of information listed in section 10(1) have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

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].

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].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- names, duties and qualifications of individual employees [MO-2164]
- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

The appellant describes the record as being created as a result of the City requesting bids for their insurance program. As part of the bidding process, it was necessary for the bidders to send a breakdown of all the individual building and contents values (there are over 150 buildings) as well as values on the vehicles to the City's insurance company (the affected party). The information disclosed to the appellant provided a one sum amount for all the buildings and contents but not the individual amounts. The appellant submits that the record has no monetary value even though the affected party spent some money with appraisers to get the estimated numbers in the record.

Analysis/Findings re: part 1

At issue in this appeal is Exhibit "A" to a Claims Exhibit Report prepared by the affected party for the City. This exhibit lists the estimates of individual building and contents values, as well as estimates of values of automobiles owned by the City. Based upon my review of the information at issue in the record, I find that part 1 of the test has been met as the information at issue is financial information. The information at issue relates to money and its use or distribution and contains specific data as to the value of items estimated by the affected party.

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].

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.)].

There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The “immutability” exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above)].

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 [Orders PO-2043, PO-2371, PO-2497]

The appellant did not provide representations on part 2 of the test under section 10(1).

Analysis/Findings re: part 2

Based upon my review of the record, I find that the information at issue was “supplied” since it was directly supplied to the City by the affected party [Orders PO-2020 and PO-2043].

However, as I do not have representations from either the City or the affected party, I am unable to find that this information was supplied in confidence. Although the information at issue is marked confidential, I do not have evidence that the information was communicated to the City on the basis that it was confidential and that it was to be kept confidential. Nor do I have evidence that the information at issue:

- was 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,
- that it was not otherwise disclosed or available from sources to which the public has access, and
- that it was prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371 and PO-2497]

As I cannot find that the information was supplied by the affected party with a reasonable expectation of confidentiality, part 2 of the test has not been met and the information is not exempt under section 10(1) of that *Act*. As no other exemptions have been claimed for this information, and as the exception in section 10(2) does not apply, I will order it disclosed. Nevertheless, for the sake of completeness, I will also consider whether part 3 of the test has been met.

Part 3: harms

General principles

To meet this part of the test, the institution and/or the third party 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 need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 10(1) [Order PO-2435].

Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

The appellant submits that there is no guarantee that the affected party would be prejudiced against by releasing the information at issue. He states that even if another insurance company had a lower insurance price, the City would look at many other factors besides price before awarding the contract.

Analysis/Findings re: part 3

Based on my review of the record and the fact that I do not have representations from either the City or the affected party, I am unable to find that disclosure of the information at issue in the record gives rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 10(1) will occur. The information at issue sets out values for various items as of 2009 and the harms that will occur from disclosure of this information at this time is not self-evident from a review of the record [Order PO-2435]. Therefore, I find that part 3 of the test under section 10(1) has not been met.

ORDER:

I order the City to disclose the information at issue in the record to the appellant by **November 24, 2010** but not before **November 19, 2010**.

Original Signed by: _____
Diane Smith
Adjudicator

October 20, 2010