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

ORDER MO-2616

Appeal MA10-404-2

City of Greater Sudbury

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/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Greater Sudbury (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "[the] soils and ground water report as described in [an identified recommendation]…" relating to a specific property.

After notifying two parties whose interests might be affected by this request (the affected parties) in accordance with section 21 of the *Act*, and hearing from them, the City issued a decision denying access to the record on the basis of the exemptions in sections 10 (third party information) and 11 (economic and other interests) of the *Act*.

The appellant appealed the City's decision.

During mediation, the City advised that it was relying on sections 10(1)(a) and (c) and 11(c) and (d) to deny access to the record.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry, identifying the facts and issues in this appeal, to the City and the two affected parties. The City and one affected party (affected party A) provided representations. The second affected party (affected party B) responded by indicating that it did not consent to the release of the record.

Because of the manner in which I dispose of the issues in this order, it was not necessary for me to hear from the appellant in this appeal.

RECORD:

The record at issue is an identified "Geotechnical Investigation" for an identified site. It consists of a nine-page report, as well as four attachments.

DISCUSSION:

PRELIMINARY MATTER

As a preliminary matter, I note that both the City and affected party A take the position that there may be other affected parties who may have an interest in the disclosure of the record, and who ought to be notified and invited to provide representations in this matter. They refer to the parties who may now have an interest in the site identified in the report, as they have purchased homes on the site or have other interests in the land.

I do not accept the position of the City and affected party A. The record at issue was prepared a number of years ago by affected party B for affected party A, and then provided to the City. It consists of a site specific geotechnical investigation relating to the soil and groundwater for the identified land. The report was provided to the City pursuant to a plan of subdivision to be built. Although I accept that the parties who now own properties in this subdivision, or have other

interests in the land, may be interested in the subject matter of the report as it relates to their property, I am not satisfied that these parties have an interest sufficient to trigger notification of them for the purposes of sections 21(1) or 39(3) of the *Act*.

THIRD PARTY INFORMATION

As identified above, the City denied access to the responsive record on the basis of section 10(1) of the *Act*. Both the City and affected party A provide representations in support of the position that the record is exempt under sections 10(1)(a) and (c) of the *Act*. In addition, the City provides representations which raise the possible application of the mandatory exemption in section 10(1)(b). Those sections read:

> 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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 City 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) and/or (c) of section 10(1) will occur.

I will now review the record 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

Both the City and affected party A take the position that the record contains technical information for the purpose of the first part of the three-part test. This term has been discussed in prior orders as follows:

> *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].

I adopt this definition of these terms as set out in the prior orders.

The City provides representations which refer to the definition of geotechnical work as "work, in the field or laboratory, undertaken to determine the physical properties of materials recovered from the surface or subsurface or the seabed or its subsoil of any frontier lands." On my review of the record, I am satisfied that it was prepared by a professional in the field and it constitutes technical information within the meaning of that term 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 party 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 City confirms that the record was supplied to the City because the City required it to be prepared and provided as a condition for granting draft plan approval of a plan of subdivision. The City identifies that this requirement to submit a soils and groundwater report is authorized by the *Planning Act* and is a standard requirement of municipalities when a developer is seeking draft plan approval of a subdivision. The City states that the report was prepared by one party (affected party B) and, although it required that a geotechnical report be provided to it, the City "had no part in the commissioning or preparation of" the document. The City states that affected party B was retained by affected party A to prepare the report. Only after the report was prepared was it "supplied" to the City.

With respect to whether the report was supplied "in confidence," the City reviews the requirements established by previous orders (set out above), and then states:

> The City, including the Planning Committee, frequently considers information provided by a third party in open meetings and in so doing guarantees no reasonable expectation of privacy.
>
> However, City Council expressly required that the [geotechnical report] be submitted directly to the particular City officials for their consideration. At no time, [was the report] publically considered by Council or the Planning Committee.
>
> The City received [the report] with the knowledge that it contained certain methods and approaches to the observation, modelling and analysis that are proprietary to [affected party B].
>
> The City continues to treat [the report] in a manner consistent with the protection of [the record]. The [report is] kept at the City and made accessible to staff only in the discharge of their duties relating to this development. The City has refused to release the [report] to persons requesting the record through informal, routine disclosure processes and will continue to do so. As such, [the report was] supplied in implicit confidence.

Affected party A also provides some brief information in its confidential representations in support of its position that the report was supplied to the City in confidence.

Findings

On my review of the record at issue and the representations of the parties, I am satisfied that the report was supplied to the City. In this case, the report was prepared by an identified company (affected party B) and supplied to the City on behalf of affected party A.

However, with respect to whether the record was supplied to the City "in confidence," based on my review of the record and the representations of the parties, I am not satisfied that the record was supplied to the City with a reasonable expectation of confidentiality, either implicit or explicit.

In order to satisfy the "in confidence" component of part two, the party 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 terms of whether there was an explicit expectation of confidentiality, there is no reference in any of the information provided to me to indicate that there was an explicit understanding that the record was supplied to the City in confidence. In the absence of evidence supporting an explicit expectation of confidentiality, I find that no such expectation existed.

With respect to whether there existed an implicit expectation of confidentiality, as set out above, this expectation must have an objective basis, and be based on reasonable and objective grounds. I must also consider all the circumstances, including the ones listed above.

I have the general information provided by affected party A and the City that the report was communicated to the City on a confidential basis. I also have the City's submission that the record was not disclosed or made available to the public, that it was expressly required to be submitted directly to a particular City official. The City also submits that the record was kept confidential, and that it was prepared for the purpose of responding to a condition of draft plan approval, and not for public disclosure. However, I also have the City's statement that information provided by third parties is "frequently" considered in open meetings, and there is ordinarily no guarantee of confidentiality.

Although I have the evidence of the City referred to above, I have not been provided with any corroborating evidence from either the City or the affected parties that would suggest that the affected parties had a implicit reasonable expectation of confidentiality at the time the geotechnical report was supplied to the City.

In addition, I have not been provided with evidence from the parties resisting disclosure as to whether the parties' expectation of confidentiality was based on reasonable and objective grounds. Although the parties were invited to provide objective evidence in support of their position that the report was supplied with an expectation of confidentiality, other than the general statements made by the City and affected party A, I was not provided with any independent objective evidence in support of the position that this record, or other records of this nature, are ordinarily kept confidential, or reference to such practices in other instances. Furthermore,

although the City states that the report contains information that is proprietary to affected party B, that affected party has not provided me with evidence supporting that statement. Accordingly, I am not satisfied that there existed an implicit expectation of confidentiality at the time the information was provided to the City.

As a result, I find that the parties resisting disclosure have failed to satisfy the requirements of part 2 of the section 10(1) test.

For section 10(1) to apply, the parties resisting disclosure must satisfy each part of the three-part test. Given that I have found that the City and affected party A have failed to satisfy part 2 of the section 10(1) test, it is not necessary for me to consider whether they have also met part 3. However, in the interests of completeness, I will consider whether the last part of the section 10(1) test has been satisfied.

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)

The City and affected party A claim that the record is exempt under section 10(1)(a) and (c), as its disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization, or result in undue loss or gain to any person, group, committee or financial institution or agency.

The City provides representations in support of the position that the harms in sections 10(1)(a) and (c) would result from disclosure. It identifies some of the specific information contained in the record and then states that disclosure could result in harm to the author of the record (affected party B) because:

> Access to this information would allow competing geotechnical engineers … to model their own such reports after that of [affected party B] without the benefit of [affected party B] having access to the same from competitors. …

> This would result in financial injury to [affected party B] because it would limit the opportunities for which they could market their services and also give their competition access to commercially valuable methods and approaches to … soils and groundwater analysis.
>
> As such, the disclosure of [the report] would result in both a prejudice to the competitive position of [affected party B] and an undue financial and marketing loss to [affected party B] with a corresponding undue gain to their competitors.

The City also argues that harm would result to affected party A as the information in the reports relates to property owned by that affected party, and may be of interest to and benefit current or future owners of nearby properties.

As identified above, affected party B did not provide representations in this appeal. Affected party A's representations regarding the possible harm to it are consistent with some of the representations made by the City.

Findings

I find that I have not been provided with sufficient evidence to satisfy me that the harms in sections 10(1)(a) or (c) would result from disclosure of the record.

With respect to the possible impact of disclosure of the record to affected party B, although the City has provided some representations supporting the position that disclosure would result in harm to that affected party, affected party B has not provided representations to me. On my review of the record at issue, I am not satisfied that disclosure would result in the harms identified by the City. The City itself has indicated that information provided by third parties is frequently considered in open meetings. Furthermore, the report at issue relates solely to the particular land at issue, and is site specific. In addition, in my view there is nothing in the record to suggest that the record at issue in this appeal is different than other geotechnical reports prepared as a result of the requirements to provide such information to the City in support of plans to develop land.

In addition, although the City argues that companies competing with affected party B could model their own reports after the record at issue, previous orders have addressed similar concerns that disclosure of a record would allow competitors to tailor future reports to disclosed documents. For example, in PO-2478, similar arguments were put forward by an affected party and the Ministry of Energy in respect of a proposal received by the Ministry. In that case, the exemptions in sections 17(1)(a) and (c) of the *Freedom if Information and Protection of Privacy Act*, (which are similar to section 10(1)(a) and (c) of the *Act*) were raised. After reviewing the argument, I stated:

> In general, I do not accept the position of the Ministry and affected party concerning the harms which could reasonably be expected to follow the disclosure of the record simply on the basis that the disclosure of the "form and structure" of bid would result in the identified harms under sections 17(1) (a) and

> (c), as it would allow competitors to use the information contained in the successful bid to tailor future bids. In a recent Order, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms. In Order PO-2435, Assistant Commissioner Beamish made the following statement:
>
> > The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.
>
> I accept the position taken by the Assistant Commissioner. In my view the arguments put forward by the Ministry and affected party regarding their concerns that disclosure of the "form and structure" of the bid, or its general format or layout, will allow competitors to modify their approach to preparing proposals in the future would not, in itself, result in the harms identified in either section 17(1)(a) or (c).

I apply the above approach to the circumstances of this appeal. As a result, I am not satisfied that the disclosure of general information contained in the record which discloses the "form and structure" of the report could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

With respect to the possible impact of disclosure on affected party A, the City takes the position that release of the record could impact affected party A as this affected party has an interest in the land, and is the party that requested that the report be prepared. The City states that the information contained in the record may result in harms to affected party A's competitive position as it may provide valuable information to parties that may want to develop land in that area, and these parties would have the benefit of that information without having paid for it.

The City also refers to other possible harms to affected party A resulting from disclosure, and refers to the competitive market that affected party A is in, and the possible impact disclosure may have on identified potential litigation.

As identified above, affected party A's representations regarding the possible harm to it are consistent with some of the representations made by the City.

I am not satisfied that disclosure of the record could reasonably be expected to result in the harms in section 10(1)(a) and (c) to affected party A.

With respect to the City's position that disclosure may provide valuable information to parties that may want to develop land in that area, and thereby benefit these other parties, I am not satisfied that the identified harm would result from disclosure. In the first place, the record is site specific, and only deals with the property that is the subject of the report. Although other parties that may wish to develop land in the area may be interested in the information relating to

this property, this is not sufficient to trigger the harms in section 10(1). Any future development would require similar reports to be prepared, and I have not been provided with any evidence to suggest that the existence of this report would obviate the need for similar site specific reports for other properties. The possible benefit that others could derive from disclosure of the record does not, in my view, constitute "significant prejudice" for the purpose of section 10(1)(a) or "undue loss or gain" under section 10(1)(c).

With respect to the other possible harms identified by the City, I find that these harms are not substantiated. They are, at best, speculative, and I have not been provided with sufficient evidence to support a finding that disclosure of the record could reasonably be expected to result in the harms identified in sections 10(1)(a) and/or (c).

Section 10(1)(b)

The City also provides representations in support of its position that disclosure would result in undue loss to the public. As I interpret these arguments, I regard them as raising the possible application of the mandatory exemption in section 10(1)(b), and will discuss them in that context.

The City states:

> The City needs to know that consultants are willing to utilize proprietary methods to analyze the effects of development in order for the City to be an effective regulator. However, the threat of the City disclosing such information is likely to have a chilling effect on the consultants' willingness to provide such information to the City. Alternatively, consultants will be motivated to dilute their information so as not to reveal proprietary information when providing reports … to the City.
>
> A lack of reporting or diluted reporting by consultants will have an impact on the City's ability to ensure that a developer has properly turned its mind to … the proper grading and building of foundations on certain soil types. The public, as the party that stands to gain or lose from such regulation for their own safety and security of property, will lose if full and comprehensive information is not provided to the City. As such, the public will suffer an undue loss if the [record is] disclosed.
>
> The release of [the record] will have the effect of resulting in a less competitive market when, on future projects, the City or developers seek similar reports from [the affected party or its competitors]. Where companies know that their proprietary materials will be accessible, by their competitors and the public, they are unlikely to bid on doing such jobs with the City or developers. This will have the detrimental effect of limiting the pool of experts from which developers and the City can draw to gain the expertise needed to regulate for the benefit of the public.

On my review of this issue, I am not satisfied that the harms in section 10(1)(b) have been met.

Firstly, one of the City's identified concerns is that if proprietary information in the report is disclosed, companies authoring reports of that nature will either be reluctant to provide the information in the future, or will provide "diluted" reports which may impact the City's ability to ensure proper oversight of future developments. The basis of this argument is that authors of reports such as the one at issue would be concerned about disclosure of proprietary information. However, other than the City's arguments, there is no other evidence suggesting that this report contains proprietary information, particularly since the author of the report has not provided representations in this regard. Furthermore, the City acknowledges that third party information is often made available to the public.

Secondly, the report at issue is a geotechnical investigation report of soil and groundwater conditions. In my view a report of this nature would need to include certain specific information about the soil and the groundwater on the site. I do not accept the argument that disclosure would result in future reports of this nature containing "diluted" information, particularly as the City has indicated that the report was provided to it under the requirements of the *Planning Act*.

As a result, I am not persuaded that disclosing the information could reasonably be expected to result in similar information no longer being supplied to the City in the future, as contemplated by section 10(1)(b). In my view companies doing business with public institutions such as the City understand that certain information regarding proposed developments, including specific information about the soil and groundwater of a particular site, will be made public. I find a number of the arguments put forward by the City speculative, and not sufficiently "detailed and convincing". Furthermore, I do not accept that the prospect of the release of the record at issue in this appeal could reasonably be expected to result in reluctance on the part of companies such as affected party B to participate in future projects.

Accordingly, I find that the requirements for section 10(1)(b) have not been met.

ECONOMIC AND OTHER INTERESTS

The City has also claimed the application of sections 11(c) and (d) to the records remaining at issue. These sections read:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of*

Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)].

Section 11(c) and (d): prejudice to economic or financial interests

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

With respect to the application of sections 11(c) and (d), the City states:

> As discussed above …, the release of the [Report] will have the effect of resulting in a less competitive market when, on future projects, the City or developers seek similar reports from [the affected parties] or their competitors. Where the consultants know that their proprietary materials will be made accessible to their competitors, they are unlikely to bid on doing other reports for the City or developers where the developers will be required to submit the reports to the City.
>
> This will have the detrimental effect of limiting the pool of experts from which developers and the City can draw to gain the expertise needed. This would be unfortunate because the City is a frequent user of such consulting services, as are developers ….

The City then argues that, with a limited field of experts willing to provide reports such as the one at issue to the City, the City would be forced to look further afield or select from a limited field of experts. The City argues that this may have the effect of raising the prices for the City or developers paying for such services, resulting in additional costs to the City. It also argues that limiting the pool of experts will limit the pool of expertise available to the public.

Findings

In the circumstances, I am not satisfied that disclosure of the record at issue would result in the harms identified in sections 11(c) and/or (d).

I have addressed some of the arguments put forward by the City under my discussion of section 10(1)(b), above. As I found above, other than the City's arguments, there is no other evidence before me suggesting that this report contains proprietary information. In addition, the City acknowledges that third party information is often made available to the public. The suggestion that disclosure of this record would result in companies such as affected party B no longer providing such information, and thereby limiting the fields of experts who could provide such reports is, in my view, not supported by the evidence.

Furthermore, it is not clear to me how disclosure could reasonably be expected to prejudice the economic interests of the City, the competitive position of the City, or be injurious to the financial interests of the City. The report at issue was prepared by affected party B for affected party A, and was then supplied to the City as a requirement of the *Planning Act*. Even if I were to accept the City's position that companies would in the future be reluctant to prepare and provide such reports (which I do not accept), the City could still require that these reports be provided to it to meet the requirements of the *Planning Act*.

In summary, I find that I have not been provided with sufficiently detailed and convincing evidence to satisfy me that the disclosure of the record could reasonably be expected to lead to the harms set out in sections 11(c) or (d) of the *Act*.

ORDER:

1. I order the City to disclose the record to the appellant by **June 6, 2011** but not before **June 1, 2011**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the City to provide me with a copy of the record that it discloses to the appellant.

Original Signed by: April 29, 2011
Frank DeVries
Adjudicator