Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2684

Appeal MA11-332

City of Ottawa

January 5, 2012

Summary: The City of Ottawa (the city) received a request for a report prepared by a consultant. The city, after notifying the consultant, issued an access decision informing the requester and the consultant that it had decided to grant full access to the responsive record. The consultant appealed the city's decision claiming the application of the mandatory third party information exemption in section 10(1). This order upholds the city's decision and orders disclosure of the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 8(1)(f), 10(1), 51(1).

Orders and Investigation Reports Considered: Orders P-1137, PO-2940.

OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the "Richardson Ridge Stormwater Management Report and Interim Design Brief" dated August 2010 that had been prepared by a consultant for the city.

[2] The city located the responsive record and, pursuant to section 21 of the *Act*, notified the consultant who prepared the record requesting its views regarding its disclosure. The consultant objected to disclosure of the record. The city subsequently

issued an access decision to the requester informing it that the city had decided to grant full access to the responsive record.

[3] The consultant, now the appellant, appealed the city's decision.

[4] As mediation did not resolve the issue in this appeal, the file was transferred to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry, setting out the facts and issue in this appeal, to the appellant seeking its representations as to the application of the mandatory third party information exemption in section 10(1) of the *Act* to the record. I received representations from the consultant. In its representations, the consultant objected to disclosure of its representations to the original requester. Because of the manner in which I have addressed the application of section 10(1) in this order, it was not necessary for me to obtain representations from the city or the original requester.

[5] In this order, I find that section 10(1) does not apply and I uphold the city's decision to disclose the record to the original requester.

RECORD:

[6] The record at issue in this appeal is a report entitled "Richardson Ridge Stormwater Management Report and Interim Design Brief" dated August 2010.

DISCUSSION:

Does the mandatory exemption at section 10(1) apply to the record?

[7] 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;
> >
> > (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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[8] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] 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].

[9] 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

[10] Some of the types of information listed in section 10(1) have been discussed in prior orders.

[11] For example, 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].

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[1] *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.).

[12] Based upon my review of the record, I find that it contains technical information as it contains information prepared by experts in the field of water resources engineering concerning stormwater management plans and the operation of a stormwater facility.

[13] Therefore, part 1 of the test under section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[14] 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].

[15] 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].

[16] 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.)].

[17] 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)].

[18] I find that the record was supplied by the appellant to the city for the purposes of part 2 of the test under section 10(1) of the *Act*.

In confidence

[19] 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].

[20] 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]

[21] Although I agree with the consultant that it supplied the record to the city, I do not agree that it supplied this record with a reasonably held expectation that it would be held in confidence. There is a cover letter from the consultant attached to the record. This cover letter indicates that the record was sent to both the city and copied to another institution, a local conservation authority. There is no indication in the record or the cover letter that the information which they contain was communicated to either institution on the basis that it was confidential and that it was to be kept confidential. Similarly, there is nothing to indicate that it was prepared for a purpose that would not entail disclosure.

[22] As there was no reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided, I find that part 2 of the test has not been met. The record is not exempt under section 10(1) of the *Act* and I will order it disclosed. However, for the sake of completeness, I will also consider whether part 3 of the test has been met.

Part 3: harms

[23] 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.)].

[24] 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].

[25] 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].

[26] 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].

[27] The appellant provided general representations as to the harms, primarily focusing on harms to the city and/or repeating the harms test set out in section 10(1) of the *Act*.

[28] As stated above, section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] Accordingly, the appellant's submissions as to harm which may accrue to the city by the disclosure of the record is not relevant to a determination of whether a record is exempt under the mandatory third party information exemption in section 10(1).

[29] Furthermore, as the city has decided to disclose the record, I find that the appellant's representations about possible harm to the city as a result of disclosure of the record to be both speculative and not supported by the evidence before me.

[30] In addressing the application of section 10(1), the appellant also appears to have raised the application of section 8(1)(f) of the *Act*. This section reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,

[2] See footnote 1.

> deprive a person of the right to a fair trial or impartial adjudication;

[31] Section 8(1) is the discretionary law enforcement exemption. In this appeal, the city has not raised the application of section 8(1) to the record. The issue of the raising of a discretionary exemption by a non-institutional party has been considered in a number of previous orders. The leading case is Order P-1137, where Adjudicator Anita Fineberg made the following comments concerning the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*):

> The [provincial] *Act* includes a number of discretionary exemptions within sections 13 to 22 [of *FIPPA*, the equivalent of sections 6 to 16 of the *Act*] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
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> The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) [the equivalent of section 14(1) of the *Act*] and 17(1) [the equivalent of section 10(1) of the *Act*] of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
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> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

[32] I adopt the following findings of Adjudicator Fineberg in Order P-1137 and find in the circumstances of this appeal that the appellant cannot raise a discretionary exemption not claimed by the city. The appellant's interests have been considered in this appeal in the context of the application of the mandatory section 10(1) exemption.

[33] Even if I had found that the appellant should be allowed to raise the application of section 8(1)(f) to the record, I would have found that this exemption does not apply. The record contains information about stormwater management. It does not concern a law enforcement matter. In order for section 8(1)(f) to apply, it must be shown that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers.[3]

[34] The appellant's arguments focus on harm to the city and other institutions, not on any potential harm to it in any trial or adjudication. The appellant's representations on section 8(1)(f), other than repeating the wording of the section 8(1)(f) exemption, do not contain information concerning how disclosure of the record would lead to a "real and substantial risk" of interference with the right of the appellant to a fair trial or impartial adjudication.

[35] In addition, the relationship between access under the *Act* and civil litigation is dealt with in section 51(1), which reads:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

[36] In Order PO-2490, Senior Adjudicator John Higgins in considering section 64(1) of the provincial *Act*, the equivalent to section 51(1) of the *Act*, determined that:

> The legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through discovery in litigation, but it did not do so. In Order PO-1688, Senior Adjudicator David Goodis discussed the relationship between access under the *Act* and the discovery process. In that case, a third party appellant had argued that it was improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process

[3] Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.).

under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
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> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [*Act*] is unfair ... Had the legislators intended the *Act* to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …
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> …

In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the *Act's* municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the *Municipal Freedom of Information and Protection of Privacy Act* legislation, nor ban the publication of the contents of police files required to be produced under that *Act.* … In my view, there is no inherent conflict between the *Act* and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The *Act* contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the *Act*; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

[37] I agree with this analysis of Senior Adjudicator Higgins. I find that the appellant's argument about the use of the information in the record in another forum in and of itself does not result in a finding that information is exempt under the *Act*.

[38] Taking into consideration the contents of the record and the entirety of the appellant's representations, I find that the appellant has not provided the requisite "detailed and convincing" evidence to establish a "reasonable expectation of harm" to it under section 10(1) of the *Act*. Therefore, part 3 of the test under section 10(1) has not been met in this appeal.

ORDER:

1. I uphold the city's decision and order the city to disclose the record to the requester by **January 26, 2012**.

2. In order to verify compliance with order provision 1, I reserve the right to require the city to provide me with a copy of the record disclosed to the requester.

Original Signed by: January 5, 2012
Diane Smith
Adjudicator