

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-2669-R

Appeal MA08-379

Order MO-2566

St. Thomas Holding Inc.

November 9, 2011

Summary: The appellant made a request for information relating to the acquisition of two named companies by St. Thomas Holding Inc. (STHI). Order MO-2566 was issued and portions of the records were found to be exempt under the mandatory personal privacy exemption in section 14(1). The adjudicator failed to consider the application of the mandatory third party information exemption in section 10(1) and reconsidered Order MO-2566 on that basis. Section 10(1)(a), (b) and (c) were found not to apply to the information at issue.

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

OVERVIEW:

[1] The appellant made the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of St. Thomas for:

...information related to the acquisition of [named company] and [named company] by the St. Thomas Holding Inc., owner and operator of St. Thomas Energy Services Inc. (STESI).

- The financial terms related to the acquisition of [named company] and [named company] by St. Thomas Holding Inc.
 - Purchase price of [named company] and [named company]
 - Financial instrument(s) to secure the purchase
 - Project ROI at time of acquisition
- The most recent balance sheet of [named company] and [named company]

[2] The city transferred the request to St. Thomas Holding Inc. (STHI) under section 18(3) of the *Act* on the basis that STHI has a “greater interest” in the requested records. Accordingly, STHI is the institution for the purposes of this appeal.

[3] After an inquiry was conducted into the appeal, I issued Order MO-2566 where I ordered STHI to disclose to the appellant certain portions of the records by December 13, 2010. Further, in that decision, I found that portions of the records were exempt from disclosure under the mandatory exemptions in section 14(1) (personal privacy).

[4] After reviewing my decision in Order MO-2566, I determined that I had failed to consider the application of the mandatory exemption in section 10(1) and that there were, therefore, grounds for me to reconsider my decision on that basis.

[5] During the original inquiry in this appeal, the affected parties¹ and the appellant were asked to and did provide representations on this issue. Representations were shared in accordance with Section 7 of the IPC’s *Code of Procedure* and Practice Direction 7. While STHI did not provide representations on the application of section 10(1), I have considered their representation on sections 11(c) and (d) for the purposes of this order.

[6] In this decision, I find that section 10(1) does not apply to the records at issue and the order provisions in Order MO-2566 still apply.

RECORDS:

RECORD	DESCRIPTION	EXEMPTION CLAIMED
1(a)	Share Purchase Agreement dated November 15, 2007	11(c), 11(d), 14(1)

¹ In Order MO-2566 I refer to the affected parties as “affected persons”. The affected persons are the two individuals who are the sole shareholders of the two businesses purchased by STHI.

RECORD	DESCRIPTION	EXEMPTION CLAIMED
1(c)	Valuations prepared August 16, 2007 by Graham Scott Enns LLP	11(c), 11(d), 14(1)
2	Financial Statements for [named company] and [named company]	11(c), 11(d), 14(1)

ISSUES:

- A. Are there grounds under section 18.01 of the *Code of Procedure* to reconsider Order MO-2566?
- B. Does the mandatory exemption section 10(1) exemption apply to the records?

DISCUSSION:

A. ARE THERE GROUNDS UNDER SECTION 18.01 OF THE *CODE OF PROCEDURE* TO RECONSIDER ORDER MO-2566?

The Reconsideration Process

[7] Section 18 of the IPC's *Code of Procedure* sets out the grounds upon which the Commissioner's office may reconsider an order. Sections 18.01 and 18.02 of the *Code of Procedure* state as follows:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

Grounds for the Reconsideration Request

[8] As set out in paragraph (a) to section 18.01, this office may reconsider an order where it is established that there has been a fundamental defect in the adjudication process.

[9] During the inquiry into this appeal, the adjudicator originally assigned to this matter sought and received representations on the issue of whether the mandatory third party information exemption in section 10(1) applied to the records at issue. In Order MO-2566, I failed to consider the application of this exemption and ordered the disclosure of the records, in part. Owing to my failure to consider the parties' representations on the application of the mandatory exemption in section 10(1), a fundamental defect in the adjudication process occurred which is grounds for a reconsideration. Accordingly, I will reconsider my decision in Order MO-2566 on this basis and I will now proceed to consider the application of section 10(1) to the records at issue.

B. DOES THE MANDATORY SECTION 10(1) EXEMPTION APPLY TO THE RECORDS AT ISSUE?

[10] 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

[11] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.² 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.³

² *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.).

³Orders PO-1805, PO-2018, PO-2184, MO-1706.

[12] 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: Do the records reveal information that is commercial or financial information?

[13] The affected parties submit that the records contain commercial and financial information within the meaning of section 10(1). These terms have been defined in past orders of this office as:

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

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.⁶

[14] The records at issue relate to the affected parties' sale of two businesses to STHI. The Share Purchase Agreement contains the details and structure of the transaction between the parties and also contains the amounts of payment. I find that this record contains commercial and financial information for the purposes of section 10(1).

⁴ [Order PO-2010]

⁵ [P-1621]

⁶ [Order PO-2010]

[15] The Valuation records contain details about the affected parties' businesses including financial statements (prepared by an accounting firm) about the businesses. I find that this record also contains commercial and financial information for the purposes of section 10(1).

[16] The Financial Statements contain the statements prepared by the accounting firm for the shareholders of the two businesses. I find that this record contains commercial and financial information for the purposes of section 10(1).

[17] Accordingly, the records describe the terms of the purchase and sale, including details of the businesses and various monetary amounts related to the businesses and the actual purchase and sale transaction. I find that the records contain commercial and financial information within the meaning of section 10(1) of the *Act* and thus part 1 of the test for the application of section 10(1) has been met.

Part 2: Was the information supplied to STHI in confidence, either implicitly or explicitly?

Supplied

[18] 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].

[19] 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].

[20] 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.)].

[21] 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)].

[22] The affected parties submit that the information in the records was supplied by them in confidence to STHI, and state:

...we would say that the reason that the information was "supplied" is based on the "inferred disclosure" exception. Specifically, because our transaction included an earn-out component, providing the requested information will disclose how St. Thomas Holding Inc. valued the businesses it was purchasing which will place it at a competitive disadvantage in any future transactions in which it may be involved.

[23] Based on my review of the records I find that the commercial and financial information in the Financial Statements were supplied for the purposes of section 10(1). I find that the information in the Share Purchase Agreement and the Valuations were not supplied by the affected parties to STHI.

[24] As stated above, the contents of a contract (in this case the Share Purchase Agreement) 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. In the present appeal, I see no reason to find otherwise.

[25] The affected parties submit that the "inferred disclosure" exception should apply in this instance and that the terms of the "earn-out" component can be characterized as "supplied", as disclosure of this information would disclose STHI's valuation of the two businesses. In my view, the inferred disclosure exception does not apply in the circumstances of this appeal. The affected parties' representations do not explain how disclosure of the earn-out component would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to STHI. Nor do the affected parties specify the nature of the "non-negotiated confidential information" which it supplied to STHI. Further, based on my review of the earn-out terms in the Share Purchase Agreement, I am unable to discern how disclosure of this information would permit the accurate inference of underlying non-negotiated confidential information supplied by the affected parties to STHI. Accordingly, I find that the Share Purchase Agreement was not "supplied" for the purposes of section 10(1).

[26] The Valuation was prepared by an accounting firm for STHI and I find that as such, it was not supplied by either of affected parties to STHI. It is clear from the record that the valuations were supplied by the accounting firm to STHI in order to aid STHI in establishing a share purchase price for the negotiations that were to ensue between STHI and the affected parties. I find that the valuations were not "supplied" for the purposes of section 10(1).

[27] The Financial Statements were prepared by an accounting firm for the shareholders of the two businesses. I accept that these statements would have been supplied by the affected parties to STHI, and only this record fulfills the part 2 requirement for the application of section 10(1).

[28] I will now consider whether the Financial Statements were supplied "in confidence" to STHI.

In confidence

[29] 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].

[30] 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]

[31] The affected parties submit that during their negotiation with STHI there were mutual confidentiality obligations and those confidentiality clauses were continued and set out in Article 4.08 of the Share Purchase Agreement. I have reviewed Article 4.08 and I accept that the affected parties had an explicit reasonable expectation of confidentiality when they provided the financial statements to STHI during the

negotiations. I further find that, although the Financial Statements are not explicitly referred to in the clause, these records contain the type of information that could be described as “confidential information”. Accordingly, the affected parties have met the requirements for part 2 of the test for section 10(1) and I will proceed to consider whether disclosure of the Financial Statements could reasonably be expected to result in any of the harms in section 10(1).

[32] As I found that the Share Purchase Agreement and the Valuation records were not supplied for the purposes of section 10(1), these records do not qualify for exemption under section 10(1) and should be disclosed to the appellant in accordance with Order MO-2566.

Part 3: Would disclosure of the records give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 10(1) will occur?

[33] As the Financial Statement records do not include the type of information set out in section 10(1)(d), I will only consider the harms set out in sections 10(1)(a), (b) and (c).

[34] 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.)].

[35] 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].

[36] 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].

[37] 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].

Section 10(1)(a): prejudice to competitive position

[38] The affected parties argue that disclosure could reasonably be expected to significantly prejudice STHI’s competitive position or interfere significantly with its contractual negotiations with other companies. The affected parties argue STHI’s

competitors would benefit from disclosure of records as the competitors would use this information to structure their own transactions or to compete with STHI to purchase businesses.

[39] STHI submits, in its representations on the issue of sections 11(c) and (d), that:

- Due to Ontario's deregulation and reorganization of the electricity sector STHI and its competitors operate in extremely competitive marketplace.
- Disclosure of the information in the records would permit STHI's competitors or other businesses (which STHI may seek to purchase in the future) to negotiate more favourable deals or to structure their own transactions to compete more aggressively with STHI.

[40] The affected parties did not provide representations on the manner in which the information in the records could be used by competitors. Nor did the affected parties provide the detailed and convincing evidence necessary to establish that disclosure of the record could reasonably be expected to result in the harm set out in section 10(1)(a). The only record remaining at issue in my analysis of section 10(1) are the affected parties' financial statements. I find that disclosure of the financial and commercial information about the affected parties' businesses could not reasonably be expected to interfere significantly with the contractual negotiations of STHI or to significantly prejudice STHI's competitive position.

[41] I find that section 10(1)(a) does not apply to the commercial and financial information in the Financial Statements.

Section 10(1)(b): similar information no longer supplied

[42] While the affected parties allege that disclosure of the record could reasonably result in similar information no longer being supplied to STHI, where it would be in the public interest for this information to be continued to be supplied, they do not provide sufficiently detailed and convincing evidence that this could occur. Further, STHI does not make the representations nor provide evidence that disclosure of the record could reasonably result in the harm set out in section 10(1)(b).

[43] Based on my review of the commercial and financial information in the Financial Statements, I find that section 10(1)(b) also does not apply. In my view, affected parties who intend to sell their businesses to STHI would not be in a position to refuse to supply financial statements or similar records to STHI.

[44] In conclusion, I find that section 10(1)(b) does not apply to exempt the commercial and financial information from disclosure.

Section 10(1)(c): undue loss or gain

[45] The affected parties also argue that disclosure of the record could reasonably be expected to result in undue loss to STHI and undue gain to its competitors or other businesses. The affected parties arguments are the same for this harm as set out in section 10(1)(a), above.

[46] As above, I find that the affected parties' argument on this harm is nothing more than speculation as I have not been provided with detailed and convincing evidence to establish that disclosure could possibly result in the harm in section 10(1)(c). Further, based on my review of the commercial and financial information in the Financial Statements, I am unable to discern how this information could result in undue harm to STHI or undue gain to STHI's competitors.

[47] As I have found that the harms in sections 10(1)(a),(b) and (c) do not apply to exempt the information in the Financial Statements and section 10(1) does not apply to information in the Share Purchase Agreement or the Valuations, this information should be disclosed to the appellant in accordance with Order MO-2566.

ORDER:

I uphold my decision in Order MO-2566 and order STHI to disclose the records to the appellant.

Original signed by: _____
Stephanie Haly
Adjudicator

_____ November 9, 2011