

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2755

Appeal MA11-339

Town of Amherstburg

June 25, 2012

Summary: The Town of Amherstburg received a request for all records relating to an in-camera meeting which involved an identified company. The town identified seven responsive records and withheld portions of two of them (the in-camera meeting minutes, and a report prepared by the company) on the basis of a number of exemptions under the *Act*. This order finds that the withheld portion of the report is exempt from disclosure under section 10(1)(a) (third party information). The order also finds that the minutes of the meeting are not exempt under section 6(1)(b) (closed meeting), and orders that the relevant portions of the minutes be disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 10(1)(a) and 10(1)(c); *Municipal Act, 2001*, R.S.O. 1990, c. 25, as amended, section 239(2).

OVERVIEW:

[1] The Town of Amherstburg (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) as follows:

On Monday, September 13, 2010 there was a special in-camera meeting. This meeting was scheduled for 4:30pm. ... I am requesting copies of the council agenda for this meeting. I am also requesting copies of the

minutes of this meeting including all documentation exchanged between representatives of [a named corporation] and [the town].

[2] In response to the request, the town issued a decision which identified seven responsive records. Access was granted to five of the responsive records. The town indicated that access was denied to a portion of one record (the relevant portion of the in-camera minutes of the September 13, 2010 meeting - Record 3) on the basis of the exemption in section 6(1)(b) (closed meetings). The town also stated that disclosure of one of the records (a report - Record 5) may affect the interests of the named corporation (the affected party), and that it was notifying this affected party of the request as required by section 21 of the *Act*.

[3] Following notification of the affected party, the town issued a second decision, denying access to Record 5 on the basis of the exemptions in sections 10(1)(a) and (c) (third party information) and 11(a) and (c) (economic or other interests). The town later confirmed that it was denying access only to pages 6 to 15 of Record 5.

[4] The appellant appealed the town's decision.

[5] During mediation, the town issued a further decision letter in which it confirmed that it was applying the exemption in section 6(1)(b) to both of the withheld records. It also clarified the portions of Record 3 that were responsive to the request and withheld under section 6(1)(b). In addition, the parties confirmed that certain portions of the records which were identified as non-responsive to the request were not at issue in this appeal.

[6] Mediation did not resolve the remaining issues, and this file was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the town and the affected party, initially, and received representations from both of them. After addressing certain issues regarding the sharing of representations, I sent the Notice of Inquiry, along with the representations of the town and the non-confidential portions of the representations of the affected party, to the appellant. The appellant also provided brief representations in response.

[7] In this order, I find that the withheld portion of Record 5 qualifies for exemption under section 10(1)(a), but that the withheld portion of Record 3 does not qualify for exemption under section 6(1)(b), and I order that it be disclosed.

RECORDS:

[8] The records remaining at issue are the following:

- 1) a portion of page 4 of Record 3 (in-camera meeting minutes)
- 2) pages 6-15 of Record 5 (an attachment to a council report)

ISSUES:

- A. Do the mandatory exemptions at sections 10(1)(a) and/or (c) apply to the withheld portion of Record 5?
- B. Does the discretionary exemption at section 6(1)(b) apply to the withheld portion of Record 3?

DISCUSSION:

Issue A: Do the mandatory exemptions at sections 10(1)(a) and/or (c) apply to the withheld portion of Record 5?

[9] As identified above, the town denied access to pages 6-15 of Record 5 on the basis of section 10(1)(a) and (c). Both the town and the affected party provide representations in support of the position that these pages of Record 5 are exempt under sections 10(1)(a) and (c) of the *Act*. 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[10] 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.²

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[11] For section 10(1) to apply, the town 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) and/or (c) of section 10(1) will occur.

[12] I will now review the withheld portion of Record 5 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

[13] The affected party takes the position that pages 6-15 of Record 5 contain commercial and financial information, thereby satisfying the first part of the three-part test. These terms have been discussed in prior orders as follows:

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

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

[14] I adopt the definitions of these terms as set out in the prior orders.

[15] The affected party states that the record contains commercial information and that "the commercial nature of the records relates to [the affected party's] purchase of [certain] shareholdings in [another identified company]."

[16] With respect to whether the information in the record is financial information, the affected party states:

The financial nature of the [information] relates to valuation methods, acceptable rates of return and potential purchase prices utilized and considered by [the affected party] in finalizing this share purchase transaction.

[17] The appellant does not address this part of the three-part test.

[18] On my review of pages 6-15 of Record 5, I am satisfied that much of the information contained in them constitutes commercial information within the meaning of that term in section 10(1) of the *Act*, as it relates to the purchasing of certain shareholdings by the affected party. Some of the information also constitutes financial information for the purposes of that section.

Part 2: supplied in confidence

[19] 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].

[20] 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].

[21] 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].

[22] 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]

[23] The affected party states that the record was supplied to the town with both an implicit and explicit expectation of confidentiality. It states:

Prior to being supplied the subject matter records each shareholder municipality, including [the town], and their duly authorized representatives were expressly advised by [the affected party] of the confidential nature of the records.

... The records were not only considered confidential in nature as a result of the subjective opinion of [the affected party] but more importantly, the subject matter records were implicitly and objectively confidential in nature for the reasons contained in [the possible harm to the affected party as a result of disclosure, as set out under Part 3, below]. [The affected party] supplied the information ... with a reasonable expectation of maintaining confidentiality at all times.

[24] The affected party also states:

The ... records were generated by [the affected party] for the sole purpose of its purchase of share interest in [the identified corporation]. These records and the detailed analysis, strategies and comments contained therein would not have otherwise been disclosed or available from sources which the public had access. The competitive commercial nature of the share purchase transaction for which the records relate should not entail disclosure.

[25] The town confirms that the relevant record was provided to the town in confidence by the affected party.

[26] The appellant does not address this part of the three-part test.

[27] On my review of pages 6-15 of Record 5, which include a detailed report prepared by the affected party, and an attached 2-page letter, I accept the affected party's position that the record was supplied to the town by the affected party.

[28] 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].

[29] With respect to whether the record was supplied to the town “in confidence,” I have reviewed the representations of the affected party on this issue. The affected party states that the town’s representatives were explicitly advised of the confidential nature of the records. The affected party also refers to the confidential, commercially sensitive nature of the information at issue.

[30] Based on my review of the representations of the affected party and the town, and on the record at issue, I am satisfied that the information was supplied to the town with both an explicit and an implicit expectation of confidentiality that was reasonably held. Accordingly, the second part of the three-part test has been met.

Part 3: harms

General principles

[31] 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.³

[32] 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)

[33] The affected party takes the position that the record is exempt under sections 10(1)(a) and (c), as its disclosure could reasonably be expected to prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations.

[34] The affected party begins by identifying a company that is in direct competition with it. The affected party then states that the disclosure of the information contained in the record would provide this competitor, as well as other competitors, with significant details regarding, amongst other things, the strategy the affected party utilizes with respect to investment opportunities. The affected party states that disclosure of the information in the records would, therefore, prejudice its competitive position.

³ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[35] The affected party also states that disclosure of the withheld record could significantly interfere with its contractual or other negotiations in the following ways:

- the framework for other investment opportunities would be revealed and could potentially severely prejudice the affected party's current and future negotiation positions with respect to other investment opportunities;
- acceptable rates of return for regulated and non-regulated business are discussed in detail in the records and would be revealed (therefore prejudicing the affected party's current and future negotiation positions with respect to other investment opportunities);
- the affected party's selection of valuation method would be disclosed;
- the records would disclose its future, internal, confidential business strategies, which could significantly interfere with future pursuit and success of those strategies;
- the records reveal business opportunities considered by the affected party, and disclosure would significantly compromise its future bargaining position; and
- rates of return on actual transactions are revealed in the record which, if disclosed, could significantly interfere with the affected party's contractual or other negotiations for similar type projects in the future.

[36] In the confidential portions of its representations, the affected party refers specifically to the information in the records which, if disclosed, would result in the harms contemplated by section 10(1).

[37] The appellant's representations focus on the nature of the affected party and its relationship with the town. The appellant notes that the town is a shareholder of the affected party, and that the appellant, as a taxpayer in the town, ought to therefore have access to the requested information. The appellant also takes the position that the affected party has a monopoly on its services to the community, and questions how its competitive position could be harmed if it has a monopoly.

Analysis and findings

[38] On my review of the representations of the parties and the records at issue, I am satisfied that the disclosure of pages 6-15 of Record 5 would result in significant prejudice to the competitive position of the affected party, or would interfere significantly with the contractual or other negotiations of the affected party.

[39] The affected party has identified the information contained in pages 6-15 of Record 5, and stated that this record relates to the affected party's purchase of certain shareholdings in another identified company. The affected party has also stated that the withheld information includes its own internal strategy and framework for other investment opportunities in the future, the affected party's views of the acceptable rates of return for regulated and non-regulated business, information about future

confidential business strategies and business opportunities, and rates of return on actual transactions.

[40] On my review of the information contained in the withheld portion of the record, I accept the position of the affected party that it contains detailed information relating to the affected party's approaches to investment opportunities, and identifies in detail the strategies and positions taken by the affected party when considering investment opportunities. The record also contains detailed financial information about the affected party's current transactions. In my view, the disclosure of the withheld portions of Record 5 could reasonably be expected to prejudice significantly the competitive position of the affected party, or interfere significantly with the affected party's contractual or other negotiations. As a result, I am satisfied that the withheld portion of this record qualifies for exemption under section 10(1)(a).

[41] I have also considered the appellant's position that the affected party's competitive position cannot be harmed because it has a monopoly on its services to the community. I find, however, that the issue of whether or not the affected party has a monopoly on its services to the community does not impact my finding that section 10(1)(a) applies to the information. The record at issue relates to the affected party's purchase of an interest in an identified corporation, and contains detailed analysis and strategies of the affected party regarding investment opportunities. In that respect, the affected party is in competition with other companies regarding investment opportunities. Whether or not it has a monopoly on its own services to the community does not affect its competitive position regarding possible investment opportunities elsewhere.

[42] As a result, I find that the withheld portion of Record 5 qualifies for exemption under section 10(1)(a) of the *Act*. Having made this finding, it is not necessary for me to review whether it also qualifies for exemption under the other sections claimed for this record.

Issue B: Does the discretionary exemption at section 6(1)(b) apply to the withheld portion of Record 3?

[43] As indicated above, the town takes the position that the withheld portion of Record 3 is exempt under section 6(1)(b). That section states:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[44] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting [Orders M-64, M-102, MO-1248]

[45] Each part of this three-part test must be established to determine whether the record qualifies for exemption under this section. In the circumstances, I will only review the second part of the three-part test.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

[46] With respect to part 2 of the test, that *a statute authorizes the holding of the meeting in the absence of the public*, the town states that the meeting was held in the absence of the public under the authority of section 239(2)(d) of the *Municipal Act, 2001*. Section 239(1) of the *Municipal Act, 2001* requires meetings to be open to the public; however, section 239(2) provides certain exceptions. Section 239(2)(d) states:

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(d) labour relations or employee negotiations;

[48] The town states that the meeting was closed to the public on the basis of this section because the meeting was:

... in connection with labour relations between [the affected party] and its employees during the course of a lock-out. [The town] is a shareholder of [the affected party] and as such was adversely affected. Information was provided to [the town] as a shareholder in [the affected party] for the purpose of understanding the position of [the affected party] in the course of labour relations.

[49] However, on my review of both the withheld portions of Record 3 (the minutes of the meeting) as well as the information in Record 5 (withheld above), I do not see any reference to or discussion of any issues pertaining to labour relations or employee negotiations. Based on this review, and in the absence of representations from the town identifying the labour relations matter under consideration, I find that the subject

matter being considered at the meeting to which Record 3 relates is not "labour relations or employee negotiations" as required by section 239(2)(d) of the *Municipal Act, 2001*.

[50] In addition, I note that the disclosed portion of Record 3, which addressed the item that was withheld, makes a reference to a "Litigation/Potential Litigation Matter." This reflects the wording of section 239(2)(e), which reads:

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

[51] However, on my review of both the withheld portions of Record 3 (the minutes of the meeting) and the information in Record 5 (withheld above), there are no references, express or implied, to any litigation or potential litigation. As a result, based on this review and on the absence of representations on this issue, I find that the subject matter being considered at the meeting to which Record 3 relates is not "litigation or potential litigation" as required by section 239(2)(e) of the *Municipal Act, 2001*.

[52] Accordingly, I conclude that the municipality was not permitted to rely on the exception in sections 239(2)(d) or (e) to hold a meeting closed to the public to consider the matters described in the portion of Record 3 at issue. As a result, this portion of Record 3 does not meet the second part of the three-part test under section 6(1)(b), and I find that it does not qualify for exemption under that section. Since no other exemptions were claimed for this portion of Record 3, I will order the municipality to disclose the portion of Record 3 at issue to the appellant.

ORDER:

1. I order the town to disclose the withheld portion of page 4 of Record 3 at issue to the appellant by sending the appellant a copy of the information by **July 31, 2012** but not before **July 26, 2012**.
2. I uphold the town's decision to deny access to pages 6-15 of Record 5 on the basis of the mandatory exemption in section 10(1)(a) of the *Act*.

3. In order to verify compliance with the terms of Order provision 1, I reserve the right to require the town to provide me with a copy of the material which it discloses to the appellant.

Original signed by: _____
Frank DeVries
Adjudicator

_____ June 25, 2012