Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2922

Appeal MA12-34

City of Welland

July 29, 2013

Summary: The requester sought access to environmental assessment records submitted to the City of Welland in relation to a specific property. The city identified one 268-page report and denied access to it under the mandatory exemption for third party information in section 10(1). In conducting an inquiry into the requester's appeal of the city's decision, the adjudicator obtained representations from the city, the third party and the appellant. In this order, the adjudicator finds that section 10(1) does not apply to the record and she orders it disclosed.

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

Orders and Investigation Reports Considered: MO-1263, MO-1503, MO-1974 and PO-2558.

OVERVIEW:

[1] This order addresses the decision of the City of Welland (the city) in response to an access request filed by a lawyer representing a credit union lender under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to "any environmental concerns" regarding a particular property.

[2] In response to the request, the city identified a 2008 environmental site assessment report prepared by an environmental consulting firm as the sole responsive

record. Prior to issuing its decision, the city did not notify[1] the owner of the property (the third party) that had obtained the report because that party had previously made its views on disclosure of the record known to the city when it originally submitted the report in 2008. The city issued a decision to the requester, denying access to the report, in its entirety, under section 10(1), which is the mandatory exemption for confidential third party business information.

[3] The requester, now the appellant, appealed the city's decision to this office and a mediator was assigned to the appeal to explore settlement with the parties. There were also efforts made to resolve the matter outside the mediation process. However, ultimately, the appeal could not be resolved and it was transferred to the adjudication stage, in which an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to this appeal commenced her inquiry by sending a Notice of Inquiry to the city and the third party, seeking their representations.

[4] After the city's representations were received, the appeal was re-assigned to me to continue the inquiry. Counsel for the third party subsequently submitted representations. I then sent a modified Notice of Inquiry to the appellant, along with a copy of the city's and third party's representations, seeking the appellant's submissions, which I received. The appeal was moved to the order stage.

[5] In this order, I find that section 10(1) does not apply to the record, and I order that it be disclosed to the appellant.

RECORDS:

[6] Final Phase II Environmental Site Assessment and Data Gap Assessment, dated August 2008 (286 pages).

DISCUSSION:

Does the mandatory exemption for third party business information in section 10(1) apply to the record?

[7] The city and the third party both claim that the record is exempt under sections 10(1)(a) and (c) of the *Act*. These exemptions state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

[1] Section 21 of the *Act* requires notification of affected third parties prior to disclosure of information that might be subject to the exemption in section 10(1). In this way, third parties are permitted an opportunity to provide submissions as to whether the requested records should be disclosed.

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or …

[8] Section 10(1) is intended 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]

[9] For section 10(1) to apply, the city 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.

[10] Section 42 of the *Act* provides that the burden of proof that a record falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 10(1) of the *Act* share the onus of proving that this exemption applies.[4] For the reasons set out below, I find that section 10(1) does not apply to the record.

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[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.).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] Order P-203.

Part 1: type of information

[11] The city submits that the record contains scientific and technical information, while the third party refers to the record containing commercial information. These types of information have been discussed in prior orders, as follows:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

[12] The city submits that the record contains scientific and technical information because it is a site assessment report prepared by a qualified professional in the field of environmental engineering. The city states that the report contains laboratory analyses of soil and water samples, gathered to determine the environmental state of a proposed development site. Further, the city submits that:

> Environmental assessments contain information belonging to an organized field of knowledge, natural and biological science. The laboratory analyses in the assessment consist of the observation and testing of specific hypotheses or conclusions and are undertaken by experts in the field.

[13] The third party submits that the commercially sensitive information about the property contained in the report qualifies as "both scientific and commercial information." The third party argues that the information in the record "is not generally

known and has economic value in and of itself and also informs the value of the property…"

[14] The appellant's representations respecting this part of the test merely state: "We agree that the record reveals information that is scientific and technical."

Analysis and findings

[15] The record at issue in this appeal contains detailed information about the testing and analysis of soil and groundwater for environmental contamination at the specified property by an engineering consulting firm. The information consists of a written report of the findings accompanied by numerous figures, tables and appendices.

[16] Based on my review, I am satisfied that the record contains both technical and scientific information, as those terms have been defined by past orders of this office. Specifically, I find that the scientific information consists of information relating to the testing that was carried out by environmental engineering experts to determine the presence or absence of contamination on the property. I also find that the records contain explanations and descriptions related to the testing and analysis of the soil and groundwater of the specified property that fit within the definition of technical information.

[17] However, I find that the record does not contain commercial information. In my view, this record does not relate to the "buying, selling or exchange of merchandise or services." Moreover, as stated in Order P-1621, "the fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information."

[18] Regardless, on the basis of the first of these conclusions respecting the technical and scientific information in the environmental site assessment report, I find that part one of the test for exemption under section 10(1) is met.

Part 2: supplied in confidence

[19] The purpose of section 10(1) is to protect the informational assets of third parties. This purpose is reflected in the requirement under part two that it be demonstrated by the party resisting disclosure that the information was "supplied" to the institution.[5] 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.[6]

[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.

[20] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that at the time the information was provided, the supplier of the information had a reasonable expectation of confidentiality, either implicit or explicit. This expectation must have an objective basis.[7]

Representations

[21] The city submits that the record at issue was supplied to the city by the third party as a required component of an application for a grant under an incentive program that is aimed at promoting development of brownfield sites. According to the city, the requirement for the environmental site assessment is found in the *Environmental Protection Act* and Ontario Regulation 153/04.

[22] The city refers to the cover letter that accompanied the record when legal counsel for the third party submitted it for the described purpose and submits that it was explicitly "supplied in strict confidence to the City of Welland and shall not be copied or disclosed to the public." The city notes that the report is labeled "Privileged & Confidential, Not for Public Consumption." In support of the confidential nature of the report, the city refers to communications with the third party, where the third party expressed concern about the city retaining a copy of the report specifically because of its perceived vulnerability to public access. The city indicates that it advised the third party that the report had to be retained as part of the application. However, the city acknowledged the third party's request and, subsequently:

> [Advised the third party] to inscribe on the Report "Privileged & Confidential – Not for Public Consumption" to avert the possibility of the public gaining access to the Report.

[23] The third party states that the record was prepared by its environmental engineering consultant and then was supplied in confidence to the city. The third party submits that it had a reasonable expectation that the city would not disseminate the record, but would, rather, hold it in confidence.

[24] The appellant points out that the cover letter to the record when it was submitted to the city in 2008 stated that it "shall not be copied or disclosed **to the public**," and he submits that as the lender of funds to the site owner for site remediation, he is not "the public." The appellant also submits that:

> As part of those loan negotiations, the owner has agreed to specifically provide any environmental site reports. Further the acknowledgment by the registered owner that funds were to be used to remediate the

[7] Order PO-2020.

> property should be interpreted to mean that there has been a waiver of any right of confidentiality as against [the appellant].[8]

Analysis and findings

[25] Based on my review of the parties' representations and the record, I am satisfied that the record was prepared by the environmental engineering consultant retained by the third party and that the third party subsequently provided it to the city as required for the grant application. Further, I am satisfied that the record was "supplied" to the city to assist in the assessment of the suitability of the property for the development grant.

[26] I must now consider whether the "supplied" information was provided "in confidence" to the city; that is, whether the third party held a reasonable and objectively-based expectation of confidentiality. Past orders have established that the circumstances surrounding the supply of the information are relevant in determining the objective basis of the expectation. Such circumstances may include 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 third party prior to being communicated to the institution;
- Not otherwise disclosed or available from sources to which the public has access; and/or
- Prepared for a purpose that would not entail disclosure.[9]

[27] Based on the preponderance of the evidence, I conclude that the record was supplied by the third party to the city with a reasonably-held expectation that it would be treated confidentially by the city. To begin, this expectation was communicated to the city explicitly, in the form of the confidentiality statement in the letter and on the record itself. Notably, the August 22, 2008 cover letter from the third party that was attached to the record when it was submitted to the city is marked with words suggesting an intention that it be kept in confidence: "Privileged & Confidential – Not for Public Consumption." Although the use of this type of statement is not determinative of the issue, it serves as evidence of the third party's expectation.

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[8] With its representations, the appellant provided several loan documents in support of the argument that the site owner had contracted to provide environmental assessment reports.

[9] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct.).

[28] The city's representations also indicate that in response to the third party's concern about protecting the record from disclosure, the city recommended, apparently based on legal advice, that the third party "inscribe on the Report 'Privileged & Confidential – Not for Public Consumption' to avert the possibility of the public gaining access to the Report." As stated, merely inscribing words to this effect does not determine the issue of confidentiality and/or public access under the *Act*. Moreover, in all situations, an institution that is subject to the *Act* has an obligation to exercise its own independent judgment as to the application of an exemption. It is not sufficient to simply take direction from a third party that is resisting disclosure.

[29] In any event, I also accept that the record was originally prepared for a purpose which would not entail disclosure, and I have no evidence before me to suggest that this record has otherwise been disclosed or is available from sources to which the public has access. I find the following comments by Adjudicator Catherine Corban in Order MO-1974 applicable in the present appeal:

> In my view, it is reasonable to conclude that parties who submit documents required to support an application for a building permit do so with the implicit expectation that the documents will not be disclosed for purposes unrelated to the application and will be treated confidentially (see Orders: MO-1225 and MO-1823).

[30] I conclude that the circumstances of the present appeal are analogous to Order MO-1974 and I adopt Adjudicator Corban's reasons here.

[31] Based on the submissions of the city and the third party, and on the record itself, I am satisfied that the parties had a reasonable expectation that the record would be held in confidence. Therefore, I find that the second requirement for exemption under section 10(1) of the *Act* is met.

Part 3: harm

[32] To meet this third part of the test, the city and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." In other words, the resisting parties must describe a set of facts and circumstances that could lead to the conclusion that there is a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed. Evidence amounting to speculation of possible harm is not sufficient.[10]

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[10] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* 1998 CanLII 7154 (ON CA), (1998), 41 O.R. (3d) 464 (C.A.).

[33] 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.[11]

Representations

[34] The city submits that in supplying the record, the third party indicated in its cover letter that "disclosure would interfere significantly with [the third party's] ongoing contractual negotiations in relation to the potential sale of portions of the property." The city describes the development for which the environmental site assessment was required as commercial and mixed residential use. According to the city, information generated as part of the planning and development process, including records of this type, is closely connected to the commercial value of the site. Noting that the residential development business is highly competitive, the city submits:

> As the development process moves towards completion, and a sale of the lands becomes a possibility, release of the record in question could result in the disclosure of information which could affect the value and salability of the property.
>
> Disclosure of the record could also be exploited by competitors who would, in essence, be benefitting from the time, effort and monies expended by the property owner. This would diminish the owner's competitive advantage as well as perhaps having a "chilling effect" on the willingness of other developers/owners to involve themselves in such projects in the future.

[35] The third party submits that the record "informs the value of the property" and that its release "would reasonably be expected to impact on the value of the land and [our] ability to deal with the land all of which amount to a reasonable expectation of harm should the information be released."

[36] The third party acknowledges that the appellant has a mortgage on the property, which is the subject matter of ongoing litigation between them. According to the third party, therefore, the release of the record to the appellant would result in undue gain to the appellant because it would benefit from the report without having commissioned it or paid for it. The third party argues that the information could also be exploited by the marketplace and disseminated to the public.

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[11] Order PO-2020.

[37] The appellant's representations on part three of the test under section 10(1) are succinct and state:

> Disclosure of the record would not significantly prejudice the position of any person, group of persons or organization. [The appellant] is not in competition with the [third party]. It is a lender attempting to enforce its security under the provisions of the *Mortgages Act.*
>
> Disclosure of the record would not result in any undue loss or gain to any person, group, committee, or financial institution or agency. In fact, disclosure of the record will fulfill the contractual obligations undertaken by the owner but not adhered to.

Analysis and findings

[38] In reviewing part three of the section 10(1) test, I am mindful that the *Act* is not intended to shield third party information from disclosure unless it is clear that the disclosure could reasonably be expected to result in harm of the kind described in paragraphs (a) or (c) of section 10(1).[12]

[39] In the circumstances of this appeal and with regard for the submissions of the city and the third party, I am not convinced that the disclosure of the information contained in the environmental assessment report could reasonably be expected to significantly prejudice the negotiating or competitive position of the third party as contemplated by section 10(1)(a). I am also not persuaded that disclosure of the site environmental assessment could reasonably be expected to result in undue gain or undue loss as contemplated by section 10(1)(c).

[40] With particular reference to the type of record at issue, this conclusion is consistent with past orders, including those relied on by the city in its representations.[13] Indeed, in none of those orders was the exemption of the environmental site assessment report at issue under section 10(1) upheld.

[41] One of the orders relied on by the city in its representations is Order MO-1263. In that order, former Assistant Commissioner Tom Mitchinson addressed the denial of access to an environmental site assessment under section 10(1)(a) and (c) in a factually comparable set of circumstances. The Assistant Commissioner rejected the City of Toronto's submission on harm, starting at page 6, as follows:

> I do not accept the City's position that disclosure of the record could reasonably be expected to prejudice the affected party's competitive position in the marketplace, or result in undue loss to the affected party.

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[12] See Order PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis, supra.*
[13] Orders MO-1263, MO-1503, MO-1974. See also Order PO-2558.

The need for remediation efforts to deal with potential environmental contamination on the property developed by the affected party is a known fact. As the City explains in its representations:

> Environmental Site Assessments and Remedial Work Plans are an integral part of the City's planning and development process. It is not a separate process and is carried out as part of official plan amendment, rezoning, and site plan approval.
>
> The purpose of an environmental site assessment and remedial work plan is to ensure that the environmental quality of a proposed site is appropriate for the proposed land use and does not constitute a hazard to health or the environment.
>
> An application for a site where there may be environmental concerns may require the submission of detailed site information, including a plan for remedial or clean up of the site. Such plans are generally carried out by qualified environmental consultants. Developers are asked to submit such reports to [the relevant city department] for its review. ...
>
> In the present case, [the affected party] wished to develop residential housing on vacant lands situated at [a specified address]. Previous site investigations (Phase I and Phase II assessments) conducted by another company identified some environmental concerns. [The named environmental consultant] was then asked to complete further investigations and to remediate the site prior to its development for residential use. The report details the work done by [the named environmental consultant].

[42] Presumably, in this situation, as in Order MO-1263, successful remediation of any environmental contamination at the site is prerequisite for developmental approval. Although the third party suggests that disclosure could reasonably be expected to (adversely) affect the value of the land and its "ability to deal with the land," no further details of how specifically this could occur were provided by the third party to explain how this might significantly prejudice or interfere with the third party in the manner contemplated by section 10(1)(a). For example, I note that the reference to "ongoing contractual negotiations" appears in correspondence from the third party's legal counsel that is nearly five years old; neither the city nor the third party are able to point to any specific, *current*, contractual or sale negotiations that may be adversely affected by

disclosure. The third party's argument that the information could also "be exploited by the marketplace and disseminated to the public" is similarly lacking in detail and speculative. Significant implications for the third party's competitive position are not adequately detailed. As the representations of the parties resisting disclosure do not reach the requisite level of "detailed and convincing evidence," I am not, therefore, satisfied that there is a reasonable expectation of the harms in section 10(1)(a) coming to pass if the record were to be disclosed.

[43] In addition, and aside from there not being "detailed and convincing" evidence from the city or the third party, I do not find anything on review of the record to substantiate the claim that disclosure could result in loss or gain to "any person, group, committee or financial institution or agency". This evidentiary gap is particularly pronounced when the argued loss or gain is measured against the requisite qualifier that such loss or gain be *undue*, as required by paragraph (c). Therefore, I conclude that the harms in section 10(1)(c) are not established by the evidence provided by the city or the third party.

[44] Based on the foregoing reasons, I find that the parties bearing the onus have failed to establish a reasonable expectation of harm, and I conclude that such harm cannot be inferred in the circumstances. Accordingly, I find that part three of the test for exemption under section 10(1) has not been met.

[45] In conclusion, as all three of the requirements for the application of section 10(1) have not been met, I find that the record does not qualify for exemption under section 10(1) of the *Act*. There being no other exemptions claimed and no mandatory exemptions that apply, I will order the record disclosed to the appellant.

ORDER:

1. I order the city to disclose the record to the appellant by sending him a copy by **September 4, 2013** but not earlier than **August 29, 2013**.

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

Original Signed by: July 29, 2013
Daphne Loukidelis
Adjudicator