Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3012

Appeal MA12-300

Mississippi Valley Conservation Authority

February 19, 2014

Summary: The appellant sought access to a draft environmental report and correspondence from the affected party to the MVCA which were withheld in their entirety under the mandatory third party information exemption in section 10(1) of the *Act.* This order finds that the section 10(1)(b) and (c) exemptions claimed do not apply to the records and orders the MVCA to disclose the records to the appellant.

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

Orders and Investigation Reports Considered: Order MO-1914 and Interim Order MO-1996-I.

OVERVIEW:

[1] The Mississippi Valley Conservation Authority (the MVCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> [A]ny and all documentation in any format whatsoever concerning the project by [named company] and/or [named company] to create a headpond and dam at Almonte Ontario to increase power generation. This request includes but is not limited to any memos, correspondence, studies, or environmental impact documentation concerning this project and created by any party including the conservation authority.

[2] The MVCA located records responsive to the request and identified a party that could be affected by disclosure of the records (the affected party). The MVCA notified the affected party and obtained its views on disclosure. The affected party did not consent to disclosure of the records.

[3] The MVCA then issued a decision granting access to complete copies of some of the responsive records. The MVCA denied access to two records in their entirety: a draft environmental report on the proposed expansion and redevelopment of an existing hydroelectric facility (the draft report); and a letter from the affected party to the MVCA responding to the MVCA's comments on the draft report. The MVCA relied on the mandatory exemption in section 10(1) (third party information) to deny access to the draft report and the letter.

[4] The appellant appealed the MVCA's decision to this office.

[5] During mediation, the appellant advised that additional records ought to exist, including correspondence between the affected party, the MVCA and the Algonquins of Ontario. The MVCA was advised by the mediator that the appellant had raised the issue of reasonable search, and in response, the MVCA conducted a second search for responsive records. The MVCA confirmed that no additional responsive records exist, and it also advised that one of the withheld records contains the documents and correspondence referred to by the appellant. As a result, the appellant withdrew the adequacy of the search as an issue in this appeal.

[6] Mediation did not resolve the issues in this appeal, and it was moved to the adjudication stage of the appeal process where an adjudicator conducts a written inquiry under the *Act.*

[7] During my inquiry, I sought and received representations from the MVCA, the affected party and the appellant, and shared these in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.*

[8] In this order, I find that the records are not exempt under section 10(1)(b) or (c) of the *Act*, and I order them disclosed.

RECORDS:

[9] The two records at issue are the draft environmental report, and a letter from the affected party to the MVCA regarding the draft report.

DISCUSSION:

[10] The sole issue for me to determine in this appeal is whether the mandatory exemption in sections 10(1)(b) or (c) of the *Act* applies to the records. These sections state:

> 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,
>
> (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;

[11] 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]

[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
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 10(1) will occur.

Part 1: type of information

[13] The affected party submits that the information contained in the records at issue is both scientific and technical in nature. These types of information have been defined in previous orders to mean:

> *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.[3]
>
> *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.[4]

[14] I adopt these definitions for the purpose of this appeal.

[15] The affected party adds that the technical and scientific information concerns the proposed project, and reflects the conceptual design information and project planning as of late 2011 and early 2012.

[16] The MVCA also submits that the records contain technical information. The appellant does not directly address this part of the test.

[17] Based on my review of the records, I agree with the MVCA and the affected party that both records contain technical information on environmental issues surrounding the expansion and redevelopment of the hydroelectric facility. However, I note there is some information in the draft report which is not technical, for example, the Site Location Map that appears at page 2, and the Area Plan that appears at page 29. In light of my conclusion below that none of the information at issue satisfies part three of the test for exemption, it is not necessary for me to identify more specifically, the portions of the records that do qualify as technical information, as they are not exempt from disclosure in any event.

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[3] Order PO-2010.
[4] *Ibid.*

Part 2: supplied in confidence

[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.[5]

[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.[6]

[20] 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.[7]

[21] 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.[8]

Representations

[22] The affected party explains that the proposed project is subject to the Class Environmental Assessment (Class EA) for Waterpower Projects and is categorized as a project associated with existing infrastructure. It continues that under the Class EA, projects associated with existing infrastructure do not require a formal public and regulatory review of the draft environmental report. It states that it issued the draft report to select government agencies and ministries for the purpose of facilitating an

[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.
[7] Order PO-2020.
[8] Orders PO-2043, PO-2371 and PO-2497.

efficient regulatory review of the final environmental report which would be subject to a formal 30-day public consultation period.

[23] The affected party further submits that after receiving review comments from several government bodies, including the MVCA, the project team issued a response letter to the MVCA; the second record at issue in this appeal.

[24] The affected party submits that it supplied the records at issue in confidence to the MVCA at a time when the environmental assessment process was ongoing, and both it and the review agencies that received the draft report were aware that the draft report would be further revised upon regulatory review and additional public consultation. The affected party states that it advised all recipients of the draft report that the document was being circulated only to key parties in order to facilitate an efficient regulatory review of the final document.

[25] The MVCA echoes the affected party's submissions stating that the affected party supplied the draft report to it and various provincial and federal agencies for preliminary review and comment. It continues that because the draft report was marked "DRAFT" and because it did not have the consent of the affected party to do so, it did not release the record publicly. The MVCA submits that the affected party similarly supplied the letter at issue to it in response to the pre-consultation and review process, and the affected party did not consent to disclosure. The MVCA adds that upon being notified of the request, the affected party asked that both the draft report and the letter remain confidential.

[26] The appellant's representations do not address this part of the test.

Analysis and findings

[27] The affected party's submissions on this part of the section 10(1) test are based on the absence of a formal or legal requirement for the draft report to be inspected under the Class EA for projects associated with existing infrastructure. Its argument is that the records were "supplied in confidence" because it was not legally required to submit a draft report, but did so only in order to facilitate an efficient regulatory review of the final report. The affected party asserts that because it was not required to submit the draft report, it expected that its circulation of the draft report for review and comment to a number of organizations, and its subsequent letter to the MVCA responding to comments, would both remain confidential. The basis for the affected party's confidentiality concerns, as will be discussed in further detail below, is that some of the content of the draft report was substantially revised and is therefore, out of date.

[28] Given the affected party's understanding that it was circulating its draft report for facilitation and efficiency purposes and not for public dissemination; its knowledge that the environmental assessment process was ongoing at the time; and its expectation

that it would have an opportunity to finalize the draft report before public dissemination of the final document, I accept that it supplied the records with a reasonable, implicit expectation of confidentiality. I find that the second part of the section 10(1) test is met.

Part 3: harms

[29] To meet the final part of the test, the MVCA and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[9]

[30] 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.[10]

[31] 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).[11]

Representations

[32] The affected party argues that the harms in sections 10(1)(b) and (c) are made out in this appeal. Regarding section 10(1)(b), the affected party asserts that disclosure of the records at issue may result in draft project planning reports no longer being circulated for regulatory comment when it is in the public interest that such information continue to be supplied. It states that the distribution of a draft document to regulators in order to obtain valuable project planning feedback prior to initiating the mandatory review is valuable, although not formally required. It states:

> The early resolution of identified potential impacts is beneficial to the proponent, the public and regulatory review bodies, as the proposed project plans and mitigation measures presented to the public in the final environmental report will have incorporated as much of the regulators' advice and recommendations as possible, and will therefore be a closer representation of what would ultimately occur during the permitting and licencing phase and project implementation.

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[9] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[10] Order PO-2020.
[11] Order PO-2435.

[33] The affected party also asserts that disclosure of the records risks causing the harms in section 10(1)(c) because it would generate inquiries from the public regarding obsolete content to which it would have to respond. It adds that substantial investment in effort and cost on its part and on the part of its consultants would be required to respond to potentially repetitive inquiries from the public on content that is not contained in the final environmental report.

[34] Finally, the affected party states that the disclosure of the records could result in unnecessary confusion because of the outdated information contained in the draft report. It explains:

> Comments received by regulators in their review of the [draft report] as well as feedback received form the public during the public consultation process resulted in significant revisions to the conceptual engineering design and therefore to the impact assessment of key project components. These revisions reflected changes to project plans that were made in order to accommodate agency and public concerns. Additionally, the impact assessment originally presented in the [draft report] was expanded and discussed in greater detail, primarily to respond to comments and concerns received from the public in the months following the submission of the draft report to key regulatory agencies. These revisions are included in the Final Environmental Report which was issued December 17, 2012 . . . Both hard copies and electronic versions of the [final] report were made available to all interested parties and are available as hard copy for public review in the Town of Mississippi Mills and electronically at www.wesa.com.

[35] The affected party concludes by stating that circulation of the draft report in addition to circulation of the final environmental report, which is currently publicly available, risks causing unnecessary confusion.

[36] In its representations, the MVCA echoes the affected party's submission regarding section 10(1)(b) that disclosure may discourage pre-consultation where the project proponent is not obligated to circulate preliminary designs or consult with it prior to the release of an environmental report. It states that it encourages pre-consultation on projects as early as possible in the design process because this allows for optimal flexibility in designing effective mitigation measures against potential environmental impact, which is ultimately in the public interest. The MVCA adds that it is obligated under provincial policy, section 8.4 Policies and Procedures for Conservation Authority Plan Review and Permitting Activities, to meet mandatory timelines for the review of project applications to ensure a timely response. Pre-consultation with project proponents is accepted as a critical part of meeting this service standard, and failure to meet this standard can result in additional costs being incurred by it which would be contrary to the public interest. The MVCA states:

> Should project proponents of similar projects refuse to pre-consult or provide preliminary information to MVCA due to concerns that it may be released to the public thereby circumventing the established public consultation process, MVCA would be hampered from providing guidance on the most effective means of mitigating potential impacts which may result in degraded environmental conditions.

[37] The MVCA also asserts that excessive confusion could result from disclosure of the draft report.

[38] Regarding the harm in section 10(1)(c), the MVCA repeats the argument of the affected party that disclosure would result in numerous inquiries about a project design that is no longer valid and would require detailed responses from the affected party's consultant.

[39] In her representations, the appellant notes that the final environment report has been released to the public. The appellant asserts that the exemption in section 10(1)(b) does not apply and she responds to the affected party's and the MVCA's submissions on this section as follows:

> The submission of certain documentation for pre-consultation may be voluntary but it is prudent and is in the interest of the company to, as the [MVCA] states, harmonize regulatory requirements of other levels of government within certain timelines. It is unlikely that release of this documentation would result in the company or other companies refusing to submit documentation to the MVCA when ultimately they would have to do so to receive permission to commence the project. Even if the third party declined to submit draft proposals to the MVCA, it would need to submit its proposals for permission and these might well need to be redrafted in light of the MVCA's requirements.

[40] Regarding section 10(1)(c), the appellant asserts that any questions the affected party might be asked about designs that have been changed do not constitute "undue loss", but inconvenience at most. She states that the public can handle the concept of revised plans and is well aware that the final environmental assessment has been released. She adds that the hydroelectric project is of great public concern and is controversial, so it is perfectly legitimate for the public to question changes that may have been made and to see the original designs that the company submitted, particularly given that there is no competitive issue at play. The appellant asserts that the exemption in section 10(1)(c) does not apply.

Analysis and findings

[41] I have considered the representations of the parties and the records themselves, and I am not convinced that the harms in sections 10(1)(b) or (c) could reasonably be expected to occur. The submissions of both the affected party and the MVCA on the harms part of the section 10(1) test are speculative and general, and lack the detailed and convincing evidence required to establish a reasonable expectation of harm.

[42] I agree with the appellant that disclosure cannot reasonably be expected to result in similar draft environmental reports not being supplied to the MVCA as contemplated by section 10(1)(b), because it is in the interests of both the MVCA and the affected party to engage in this kind of voluntary pre-consultation. I also note that the affected party's and the MVCA's submissions on this section are tentative and state that disclosure "may" result in the harm under section 10(1)(b). As I have not been provided with detailed and convincing evidence that the harm in section 10(1)(b) could reasonably be expected to occur, I find that it does not apply to the records.

[43] I similarly agree with the appellant that the harm in section 10(1)(c) has not been established by the affected party and the MVCA. The possibility that the affected party and its consultants would have to answer questions from the public, cannot be characterized as an "undue loss"; at most, if questions were to arise, the time and effort to respond to such questions could be considered an inconvenience. However, it is possible that no questions from the public would arise as a result of the disclosure of the records, considering the final environmental report is available publicly and contains details of the agency, provincial, federal and public consultations that appear to have been the impetus for revisions to the draft report. Again, as I have not been provided with detailed and convincing evidence that the harm in section 10(1)(c) could reasonably be expected to occur, I find that it does not apply to the records.

[44] Finally, I reject the suggestion that disclosure of the draft report would result in confusion. The "confusion" argument has been made in previous appeals where draft records were at issue and has been dismissed on the basis that the possibility of such a misunderstanding is minimal.[12] I adopt the same reasoning in this appeal because the draft report is clearly marked "DRAFT" with a large watermark across each page and a "DRAFT" notation at the top of each page where the name of the report appears; thus, it is simply not plausible to suggest that anyone looking at the report could mistake it for the final version. Moreover, the final report, dated 2012 and 92 pages long, is publicly available, and can be compared to the draft report dated 2011 and 64 pages long.

[12] See for example, Order MO-1914 and Interim Order MO-1996-I.

[45] Having found that part three of the section 10(1) test has not been met, I find that the records at issue are not exempt under this mandatory exemption. As I will order the records at issue disclosed, it is not necessary for me to consider the possible application of the public interest override in section 16 of the *Act.*

ORDER:

1. I order the MVCA to disclose the draft report and letter to the appellant by **March 26, 2014**, but not before **March 21, 2014.**

2. In order to verify compliance with Order provision 1, I reserve the right to require the MVCA to provide me with proof of its disclosure of the draft report and letter to the appellant.

Original Signed by: February 19, 2014
Stella Ball
Adjudicator