

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3098

Appeal MA13-617-2

City of Windsor

September 19, 2014

Summary: The appellant sought access to a map and lists of homes whose basements were flooded in the city during the years 2010 to 2013. The city located responsive records and denied access to them under sections 10(1) and 11. The appellant narrowed the scope of her request to include the addresses listed on the records with the final two digits removed and appealed the city's decision to deny access. In this order, the adjudicator finds that the exemptions in sections 10(1) and 11(a), (c) and (d) do not apply to the information contained in the records and orders that it be disclosed 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) and 11(a), (c) and (d).

Orders and Investigation Reports Considered: Order PO-2010.

OVERVIEW:

[1] The City of Windsor (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...

Data in Excel-readable format (.xls, .csv, etc.) used to make maps of basement flooding after major rain events since 2000. Will accept

address redactions to the hundred-block level but no further (e.g. convert "300 Ouellette Ave" to 3XX Ouellette Ave").

[2] The city issued an interim fee estimate and time extension decision. The appellant appealed the city's interim decision to this office and appeal MA13-617 was opened. During the course of mediation of that appeal, the appellant clarified the scope of the request to include only the following information:

Spreadsheet files created from calls about basement flooding made to the city's 311 line between 2011 and 2013. According to a Nov. 15 email from [named manager of geomatics] these spreadsheets can be found in a server called Tucker: Current/K:\Flooding.

. . . .

If multiple spreadsheets were created in relation to the same flood event, I am interested in the one that represents a complete database of all recorded flooding incidents for that flood event with the duplicates removed.

Geo-databases the city created to map flooding calls from 2010. Again, if multiple spreadsheets were created in relation to the same flood event, I am interested in the one that represents a complete database of all recorded flooding incidents for that flood event with the duplicates removed.

[Above-named city manager]'s Nov. 15 email suggests that spreadsheets of flooding incidents prior to 2010 may have been lost or destroyed. If that is in fact the case, I am interested in the maps [above-named manager] referred to as "measles maps" of all flooding events prior to 2010, preferably in electronic format.

. . . .

[3] The appellant further indicated that she is not seeking access to the paper copies of homeowner surveys, nor is she seeking any individual names, phone numbers or specific addresses. The city subsequently issued a revised fee estimate and time extension decision. The city advised that it is anticipated that partial access will be granted to the records, as some information may be severed pursuant to sections 10, 11 and 14 of the *Act*.

[4] The appellant subsequently paid the required deposit, and the city issued a final access decision on February 25, 2014 denying access to the requested information pursuant to sections 10(1) (third party information) and 11(a) (valuable government information), 11(c) and 11(d) (economic and other interests) of the *Act*. The city

further advised that no information is available for the year 2011. As the interim fee estimate and time extension decision was no longer at issue, appeal file MA13-617 was closed.

[5] The appellant appealed the city's February 25, 2014 decision to this office, which then opened appeal file MA13-617-2. The appellant advised the mediator that she is not appealing the city's decision that no records exist for the year 2011. Also during mediation, the appellant raised the possible application of the public interest override provision in section 16 of the *Act* and this has been added as an issue in this appeal.

[6] The parties were unable to resolve the remaining issues through mediation and the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the city, initially. Because of the manner in which I will address the application of the exemptions claimed below, it was not necessary for me to seek submissions from the appellant.

[7] In this decision, I find that the information at issue is not exempt from disclosure under sections 10 and 11 and I order that it be disclosed to the appellant.

RECORDS:

[8] The records at issue are comprised of a Map of Storm Relief Sewer Construction Priorities relating to basement flooding from 2000 to 2007, as well as lists of addresses indicating the origin of flooding calls for 2010 and lists of the addresses of flooded basements for 2012 and 2013. The appellant has indicated that she is only interested in obtaining access to addresses in the records with the final two digits of the street address redacted.

ISSUES:

A: Does the mandatory exemption at section 10(1)(a), (b) or (c) apply to the records?

B: Do the discretionary exemptions at section 11(a), (c) or (d) apply to the records?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1)(a), (b) or (c) apply to the records?

[9] The city submits that the records at issue are exempt under section 10(1)(a), (b) and (c) of the *Act*, which 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

[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

[11] For section 10(1) to apply, the party resisting disclosure, in this case the city, 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.

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.

Part 1: type of information

[12] The city argues that the records contain technical information within the meaning of section 10(1). Technical information has been defined in previous orders as:

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.³

[13] The city's representations on this aspect of the section 10(1) exemption do not elucidate how the information in the records belongs to "an organized field of knowledge of applied science", beyond simply stating that it does.

[14] The records consist of a map and lengthy lists of street addresses indicating where flooding had occurred in 2010, 2012 and 2013. The information contained in these records was not prepared by a professional in the field of engineering or the applied sciences and does not describe "the construction, operation or maintenance of a structure, process, equipment or thing."

[15] In my view, the records do not contain information which can reasonably be considered to qualify as "technical information" within the meaning of section 10(1). Nor do the records contain any of the other types of information protected under section 10(1). As a result, I find that the city has failed to establish the application of the first part of the test under section 10(1). As all three parts of the test must be satisfied in order to find the records exempt, I find that section 10(1) has no application to the records at issue in this appeal.

Issue B: Do the discretionary exemptions at section 11(a), (c) or (d) apply to the records?

[16] The city takes the position that the records at issue are exempt under the discretionary exemptions in sections 11(a), (c) and (d), which state:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

³ Order PO-2010.

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[17] The sole submission made by the city with respect to these exemptions consists of the following:

The release of the information has the potential of injuring the city's financial interest in exposing the city to unreasonable and unfounded damage claims.

[18] The city has not, however, provided any further explanation as to the nature of the information in the records under section 11(a); nor has it described how the disclosure of the information in the records could reasonably be expected to result in the harms described in sections 11(c) or (d). The records themselves also serve as evidence and I will examine them with a view to determining the application of the section 11 exemptions claimed.

[19] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report)⁴ explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[20] For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.⁵

⁴ Toronto: Queen's Printer, 1980.

⁵ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[21] 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 11.⁶ Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁷

[22] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution’s economic interests, competitive position or financial interests.⁸

Section 11(a): information that belongs to government

[23] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

[24] In my discussion of section 10(1) above, I found that the information in the records cannot properly be characterized as “technical” information for the purposes of section 10(1). For the same reasons, I find that the information does not satisfy the definition of “technical” information under section 11(a). As a result, I find that this exemption has no application to the information in the records.

Section 11(c): prejudice to economic interests

[25] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁹

[26] This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic

⁶ Orders MO-1947 and MO-2363.

⁷ Order MO-2363.

⁸ Orders MO-2363 and PO-2758.

⁹ Orders P-1190 and MO-2233.

monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.¹⁰

[27] Again, the city has failed to provide any submissions which might support its position that the disclosure of the information in the records could reasonably be expected to result in the harms described in section 11(c). On its face, the information in the records does not lead one to that result either. Accordingly, I conclude that I have not been provided with sufficient evidence to enable me to find that the exemption in section 11(c) applies to the information in the records.

Section 11(d): injury to financial interests

[28] In the absence of any submissions in support of the application of the section 11(d) exemption or a clear indication on the face of the records themselves that it applies, I find that the records are not exempt from disclosure under this exemption.

[29] Because of the manner in which I have addressed the application of section 10(1) and 11(a), (c) and (d) to the information at issue, I find that I do not have to consider whether the "public interest override" provision in section 16 applies.

ORDER:

1. I order the city to disclose the information contained in the records, with the addresses modified as described above, by providing the appellant with copies by no later than **October 27, 2014** but not before **October 22, 2014**.
2. In order to verify compliance with order provision 1, I reserve the right to require the city to provide me with copies of the records, as disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

_____ September 19, 2014

¹⁰ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.