

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3087

Appeal MA13-259-2

Township of Scugog

August 26, 2014

Summary: The township received a request for a number of records relating to the fill operation site of an identified company. The township disclosed many records, but withheld the locations of the source sites of the fill, on the basis of the exemption in section 10(1) (third party information). This order finds that the locations of the source sites do not qualify for exemption under section 10(1), and orders these records to be disclosed.

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

Orders Considered: Order PO-2520.

OVERVIEW:

[1] The Township of Scugog (the township) received a nine-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the fill operation site of a named company (the third party).

[2] In response, the township issued a decision granting access to certain records, and denying access to other records on the basis of the exemption in section 10(1) of the *Act* (third party information).

[3] The appellant appealed the township's decision, and appeal file MA13-259 was opened.

[4] During the mediation of that file, the township issued two additional decisions, provided an index of the records at issue, and granted access to additional records or portions of records. As a result, a number of issues raised in that file were resolved. However, issues remained regarding the township's response to parts 3 and 6 of the request, which read as follows:

3. All documentation ..., in order to determine the acceptability of source sites for (the third party), ie. any phase 1 or phase 2 reports for all source sites as well as the "soil management plans" from the source sites as detailed on page 2 of the fill quality control plan...
6. All documentation and reports submitted as a result of [an identified meeting] and as required by [an identified agreement between the township and the third party].

[5] The township responded to these two parts of the request in a revised decision. In that decision, the township confirmed that access was granted to parts of the responsive records, but that the section 10(1) exemption applied to certain withheld portions of those records. Specifically, the township's decision for items 3 and 6 read:

#3 - The table [provided to the appellant] lists all records responsive to this request. The exemption claimed relates only to the source sites. Partial access will be granted to the records, with all source site information redacted.

#6 - Partial access will be granted to the [third party's identified] Fill Operation Quarterly Progress report, with source site information redacted.

[6] The appellant confirmed that she was appealing the township's decision to deny access to the remaining portions of records. As a result, appeal file MA13-259 was closed, and the current appeal (MA13-259-2) was opened to address the issue of access to the withheld information relating to parts 3 and 6 of the request.

[7] During mediation, the appellant confirmed that she is only seeking the property addresses or locations from which the fill was taken, and not the names of the property owners. As a result, the withheld information remaining at issue is information contained in the records which identifies the sites or locations of properties that were the source of the fill for the third party's fill operation.

[8] Also during mediation, the third party confirmed that it did not consent to the disclosure of this information.

[9] In addition, during mediation the appellant indicated her belief that there is a public interest in the disclosure of the information at issue. As a result, the possible application of section 16 (public interest override) was added as an issue in this appeal.

[10] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the township and the third party, initially. Only the third party provided representations in response.

[11] After reviewing the third party's representations, I decided it was not necessary to hear from the appellant before issuing this order.

[12] In this order, I find that the information contained in the records which identifies the sites or locations of properties that were the source of the fill for the third party's fill operation does not qualify for exemption under section 10(1).

RECORDS:

[13] The records remaining at issue are the withheld portions of a number of reports prepared by an environmental consulting firm relating to the analysis of soil from various sources. All of the information in the records relating to the soil sample analysis has been disclosed. The names of the property owners of the source sites are not at issue.

[14] The information which has not been disclosed and which is at issue in this appeal is information which would reveal the location of the source sites (ie: the addresses of source sites, site maps which would reveal the source site, etc.).

DISCUSSION:

The only issue in this appeal is whether the mandatory exemptions at sections 10(1)(a), (b) or (c) apply to the portions of the records at issue.

[15] The third party takes the position that the information at issue in this appeal, which is the locations of the source sites for the third party's fill operation, qualify for exemption under sections 10(1)(a), (b) and (c), and it provides representations in support of its position. The township indicates that it defers to the third party, and does not provide representations on these issues.

[16] Section 10(1) states in part:

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

[17] 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

[18] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

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.

[19] For section 10(1) to apply, each part of the three-part test set out above must be satisfied.

Part 1: type of information

[20] In order for a record to fit within this part of the three-part test, its disclosure must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information. Commercial information has been defined 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.³ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁴

[21] The third party takes the position that the requested records reveal commercial information - that is - the locations of sites that are the source of fill deposited at the third party's property and, by extension, the identities of the third party's clients.

[22] I am satisfied that the information at issue constitutes commercial information for the purpose of section 10(1) of the *Act*, as it identifies the locations of the source sites, and could therefore identify the third party's clients.

Part 2: supplied in confidence

[23] The third party takes the position that this part of the three-part test is met. It provides background information to the requested records.

[24] The third party begins by stating that, in order to undertake the fill program, the third party applied for and received a Site Alteration Permit from the township. This permit incorporates a comprehensive agreement that specifies a number of requirements for ensuring the quality of the fill to be placed at the property.

[25] The third party then states that, as required by the agreement, it retained the services of an independent qualified person ("QP") to ensure that the site alteration proceeded in accordance with sound environmental practices, the plans submitted by the third party, the township's by-law and the permit. The third party states that the QP is required to approve every new source site for fill to be received at the property.

³ Order PO-2010.

⁴ Order P-1621.

It also indicates that documentation relied upon by the QP to accept or reject a source site is posted and publicly available on an identified public portal, but that the source sites are not identified by name or location on the portal.

[26] The third party also states that the QP's approval of a source site is conditional upon acceptance by the township's Director of Public Works and Parks (the Director), who is provided with all of the information posted on the portal plus additional information on the source sites, including their locations. In addition, the QP submits quarterly reports to the Director, which also identify the locations of all source sites.

Supplied

[27] 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.

[28] 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.

[29] With respect to the question of whether the records were supplied to the township by the third party, the third party states that the records were directly supplied to the township by the third Party or by the QP at the direction of the third party. In the circumstances, I am satisfied that the records which contain the information at issue were supplied, either directly or indirectly (through the QP), by the third party to the township.

In confidence

[30] 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.

[31] 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.

[32] Regarding the question of whether the records were supplied "in confidence," the third party states that it had a reasonable implicit expectation of confidentiality when it entered into the agreement with the township to supply it with information on the identity of source sites. It refers to the following specifics in support of its position:

- (a) Only the third party, the QP and the township had access to the information.
- (b) The information is not available from sources to which the public has access, such as the Online Portal. Information on the identity of source sites was specifically excluded from the information posted on the Portal, which otherwise contains all of the soil quality information relied upon by the QP and the Director.
- (c) The Quarterly Report clearly states that it was prepared by the QP for the exclusive use of the third party and the township.
- (d) Information on the identity of source sites was submitted to assist the Director to better understand the nature of the fill to be deposited on the property and to make a decision on whether fill can be accepted from specific source sites. The Director's contractual duty to approve source sites does not entail public disclosure of the information.
- (e) It may be assumed that the third party's clients, the source site owners, have a reasonable expectation that information submitted to the third party would be treated with some level of confidentiality.

[33] I do not find that third party's representations on whether the information at issue was supplied "in confidence" to be persuasive.

[34] To begin, it is clear that the locations of the source sites of the fill were not supplied by the third party to the township with an explicit expectation of confidentiality.

[35] In its representations, the third party sets out five points in support of its position that the information was supplied with an implicit expectation of confidentiality; however, points (a) and (d) simply identify that the information was not shared with others. Point (e) refers to "assumptions" that could be made about the expectations of the third party's clients, without providing any evidence or information in support of such assumptions, and does not relate to the expectations of the third party in providing the information to the township.

[36] In point (c), the third party refers to the fact that the Quarterly Report clearly states that it was prepared by the QP for the exclusive use of the third party and the township. I have reviewed this reference in the Quarterly Report and note that, after making this reference, the author of the report states that it will not be responsible for any decisions other parties may make based on the report. This is not particularly supportive of the position that the information is provided to the township and the third party in confidence.

[37] Lastly, point (b) refers to the fact that the information about the location of the source sites is not available to the public, and the third party states that "information on the identity of source sites was specifically excluded from the information posted on the Portal." Although the locations of the source sites are not posted on the portal, it is unclear when this decision not to post them was made, or whether this was contemplated at the time the agreement was entered in to. I have not been provided with information about the terms of the agreement or whether any specific reference is made to the confidentiality of this information (the third party has not taken the position that there was an explicit expectation of confidentiality). One version of the agreement between the township and the third party, which is publically available, refers to certain information that is to be posted on the portal, but does not appear to "specifically exclude" information on the identity of source sites.

[38] I note that if an implicit expectation of confidentiality is to be found, it must have existed at the time the information was provided. In the circumstances, I have not been provided with evidence regarding when the decision to exclude the source site locations on the portal was made.

[39] I also note that, in order to find an implicit expectation of confidentiality, the information must have been treated consistently in a manner that indicates a concern for its protection from disclosure by the third party. I have no information from the third party that the locations of the source sites are treated as confidential by its employees, contractors, the source sites themselves, or others.

[40] In summary, on my review of the representations of the third party, I am not satisfied that I have been provided with sufficient evidence to satisfy me, on reasonable or objective grounds, that the third party had an implicit, reasonable expectation of confidentiality at the time the information was supplied to the township. As a result, I find that part two of the three-part test in section 10(1) has not been met.

[41] However, for the sake of completeness, I will also review the third part of the three-part test.

Part 3: harms

[42] To meet this part of the test, the party resisting disclosure must provide “detailed and convincing” evidence to establish a reasonable expectation of harm.⁵ Evidence amounting to speculation of possible harm is not sufficient.⁶

[43] 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.⁷

Section 10(1)(a) and (c)

[44] The third party’s representations on this part of the test for sections 10(1)(a) and (c) state:

There is a reasonable expectation that disclosure of the source site information could significantly affect the competitive position of [the third party]. The [third party] is currently engaged in a commercial fill enterprise The commercial fill business is extremely competitive. As a result of its comprehensive agreement with the Township, [the third party] incurs costs that are not common in the commercial fill industry. Disclosure of the source site information will, in effect, publicly disclose

⁵ In the recent decision of the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner) (Community Safety)*, 2014 SCC 31, the Court discussed the standard of proof required to establish the risk of harm from disclosure under access to information legislation, and provided general guidance on the application of exemptions that are based on risk of harm. The Court concluded that there should be one consistent formulation of the standard, requiring that a party resisting disclosure provide evidence establishing a “reasonable expectation of probable harm”. While proposing this single formulation, the Court also recognized that there was “no practical difference” between it, and the formulation applied by this office in previous decisions (para 53).

⁶ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

⁷ Order PO-2020.

[the third party's] customer list to its competitors, thereby affecting its competitive position in the fill marketplace. As a result, disclosure could also significantly interfere with contractual negotiations between [the third party] and its customers.

... disclosure of the source site information can reasonably be expected to result in undue loss to [the third party] in the form of a loss of business.

Findings

[45] In this appeal, I have not been provided with sufficient evidence to satisfy me that the disclosure of the locations of the source sites could reasonably be expected to prejudice significantly the third party's competitive position or interfere significantly with its contractual or other negotiations, nor that disclosure would result in undue loss or gain to any person.

[46] The third party's representations in support of the application of this exemption are general in nature, referring to the competitive nature of the commercial fill business, and the costs incurred by the affected party as a result of its agreement with the township. This information, alone, is not sufficiently detailed and convincing information to support a finding that the harms in either sections 10(1)(a) or (c) would result from disclosure.

[47] The third party also states that disclosure of the source site information will, in effect, publicly disclose its customer list to its competitors. It again refers to the wording of the harms set out in sections 10(1)(a) and (c).

[48] Aside from the reference to its "customer list," the third party simply refers to the wording of the sections of the *Act*. Again, simply referring to the harms in section 10(1)(a) and (c) is not sufficiently detailed and convincing information to support a finding that those harms would result from disclosure.

[49] I have, however, considered the third party's reference to the withheld information as a "customer list." Some previous orders have determined that the disclosure of an affected party's customer list could result in the harms set out in sections 10(1)(a) and/or (c), as these lists have been found to be "commercially valuable to third parties that hold them and their disclosure would give competitors an advantage over them."⁸ Order PO-3038 found that customer lists "are created and compiled as a result of a significant degree of work on the part of the company to whom the list relates, and disclosure could reasonably be expected to provide a

⁸ MO-2686.

competitor with a significant advantage facilitating its ability to compete with the appellant and attempt to solicit existing clients away from the appellant.”

[50] In certain circumstances, the fact that a record is an affected party’s customer list may constitute one of the “exceptional circumstances” where the claim for exemption could be inferred, even if a third party failed to provide detailed and convincing evidence in support of the exemption. However, in the absence of detailed and convincing evidence in this appeal, I am not satisfied that the disclosure of the location of the source sites would result in the harms in sections 10(1)(a) or (c).

[51] I make this finding because I have not been provided with sufficient evidence to satisfy me that the locations of the source sites for fill in this appeal are similar to regular “customer lists” found in other industries. I have not been provided with evidence of how the commercial fill industry operates, or the nature of the competition for fill. Without more information, it would appear that information about the locations of source sites for fill in the commercial fill industry involve a “one-time” customer. Once a site has been used as a source site for fill, how can it be used again? It is unclear how the ordinary value of a “customer list,” which may include repeat contact with customers, applies in these circumstances.

[52] In addition, unlike situations where lengthy and extensive customer lists may exist on databases, the number of “customers” referenced in the records in this appeal are few. As noted under the discussion under part two of the test, above, I have no information from the third party that the limited number of locations of the source sites are treated as confidential by its employees, contractors or others. Although the number of “customers” alone is not definitive of the issue, without information about how confidential the identities of the locations are, and given the relatively small number of them, the characterization of the information as a “customer list,” alone, does not support a claim that the harms in sections 10(1)(a) or (c) would apply to the disclosure of the source site locations.

[53] As a result, in the circumstances, and in the absence of specific representations on harms resulting from the disclosure of information, I am not satisfied that the harms in sections 10(1)(a) or (c) have been established, and I find that they do not apply to the withheld portions of the records.

Section 10(1)(b)

[54] The third party’s representations on this part of the test for section 10(1)(b) state:

... The information was supplied to the Township pursuant to the terms of [an identified agreement]. That Agreement carefully attempted to

balance the right of the public to information about the fill operation against [the third party's] need for some degree of confidentiality. As a result, the agreement requires most of the information about fill coming to the Airport property to be posted on a publicly-accessible website. The parties agreed that the identity of the source sites would not be publicly disclosed, but that the Director would have access to the information in order to discharge his duty under the Agreement to approve all source sites. It will be necessary in the near future for a new ... permit to be issued for the [third party's] operation. This will necessitate the negotiation of a new agreement between [the third party] and the Township. [The third party] will be very reluctant to agree to the same arrangement if the source site information cannot be protected from public disclosure.

[55] I am not satisfied that the disclosure of the withheld portions of the records could reasonably be expected to result in similar information no longer being supplied to the township where it is in the public interest that similar information continue to be so supplied.

[56] Leaving aside the question of whether the agreement actually addresses the issue of the disclosure of the locations of the source sites, as noted above, the agreement entered into between the township and the third party resulted from the third party's application for a Site Alteration Permit from the township. The agreement specifies a number of requirements for ensuring the quality of the fill to be placed at the property.

[57] Although the third party states that it will be "reluctant to agree to the same arrangement" if the information at issue is disclosed, the issue before me is not whether the third party will enter the same arrangement, but whether disclosure could reasonably be expected to result in similar information no longer being supplied to the township. I am not satisfied that disclosure could reasonably be expected to result in the information no longer being supplied to the township if the township requires this information in order to issue a permit to the third party in the future.

[58] I also note that, regardless of the contents of any agreement to the contrary, the right of access under the *Act* must be decided "within the four corners of the statute," and a party cannot contract out of its obligations under the *Act*.⁹

[59] As a result, in the circumstances, I find that I have not been provided with sufficiently detailed and convincing evidence to establish that section 10(1)(b) applies.

⁹ Order PO-2520.

[60] In summary, I find that the withheld portions of the records at issue do not qualify for exemption under section 10(1).

[61] As I have found that the exemption in section 10(1) does not apply, there is no need to review the possible public interest override in section 16 of the *Act*.

ORDER:

I find that the withheld portions of the responsive records which reveal the locations of the source sites for the fill operation do not qualify for exemption under section 10(1), and order the township to disclose these portions of the records to the appellant by **October 1, 2014** but not before **September 26, 2014**.

Original Signed by: _____
Frank DeVries
Adjudicator

August 26, 2014