Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3237

Appeal MA13-594

City of Hamilton

August 27, 2015

Summary: This is an appeal from a decision of the city to disclose emails that passed between the appellant and the city manager. The appellant appealed the city's access decision on the basis that disclosure of the information in the records was exempt under the mandatory third party exemption in section 10(1) of the *Act*. The appeal is allowed and the city's decision to disclose some of the requested information is not upheld.

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

OVERVIEW:

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

> All email correspondence between [identified email address] and members of the senior management team (SMT) for 2012 and 2013 (up to July 14th, 2013) including [named employee, identified email address].
>
> All email correspondence between [identified email address] and all members of council, including the Mayor, for the year 2013 (up to July 14th, 2013).

[2] The city notified the third party identified in the requests[1] under section 21(1) of the *Act* to provide it with an opportunity to make submissions on the disclosure of the records. The third party did not respond to notification. Consequently, the city issued an access decision dealing with both requests which granted partial access to the records. Portions of some records were withheld under section 14(1) (personal privacy) of the *Act*.

[3] The third party, now the appellant, appealed the city's access decision to this office, which opened Appeal MA13-594 to address both requests. The appellant submitted that the mandatory section 10(1) (third party information) exemption applied to some of the records.

[4] During mediation, the original requester informed the mediator that he does not dispute the section 14(1) severances and for this reason he did not appeal the city's access decision. The appellant agreed to the disclosure of some of the information to the requester. The city prepared a revised index of records and sent it to the requester, along with the records that the appellant agreed could be disclosed. After reviewing the records, the original requester advised the mediator that he wished to pursue access to the records which the appellant asserts is exempt under section 10(1).

[5] During the inquiry into this appeal, the adjudicator sought representations from the appellant, the city and the requester. The adjudicator received representations from the city and the appellant only. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[6] Also during the inquiry, the appellant revised its position on disclosure of some of the records to the requester. The city subsequently issued a supplemental decision which released Record 6 and the drawings/renderings attached to Record 12. These records are no longer at issue. The file was then assigned to me to dispose of the issues on appeal.

[7] In this order, I allow the appeal and find that those portions of the records which the appellant objects to disclosing are exempt under section 10(1).

RECORDS:

[8] The following portions of records are at issue:

- Record 12 (#075) – email from [named individual] to [named individual] dated June 6, 2012 (1 page)

[1] The city assigned FOI numbers 075 and 076 to the two requests.

- Record 13 (#075) – emails between [named individual] to [named individual] dated June 6 and June 15, 2012 (4 pages)

DISCUSSION:

[9] The sole issue in this order is whether the mandatory third party information exemption in section 10 applies to the information at issue. 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;
>
> (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.[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]

[11] For section 10(1) to apply, the appellant 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.

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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.) (*Boeing Co.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[12] As background to its submissions, the appellant advised that it recently submitted an application to the Ontario Lottery and Gaming Corporation (OLG) in response to its first Request for Pre-qualification (RFPQ) for casino gaming in Southwest Ontario. The appellant further notes that if it is ultimately successful in the OLG bid process, it intends to work in partnership with Hard Rock International to collaboratively operate and manage a casino gaming facility in Southwest Ontario.

Part 1: type of information

[13] The appellant submits that the information withheld in Records 12 and 13 is commercial information. Commercial information has been defined in past orders as:

> *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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]

[14] In particular, the appellant submits:

> Redaction 1 relates to confidential information received by [the appellant] from its business partner, Hard Rock, regarding Hard Rock's future business plans in the Canadian and/or Hamilton market.
>
> …
>
> Redaction #2 relates to the specifics of [the appellant's] proposed building complex…The information contained in the Complex Redaction will form part of [the appellant's] business plan to be submitted to the OLG in the event its RFPQ application is approved.
>
> [The appellant] submits that the information contained in the Complex Redaction is "commercial information" because it relates to [the appellant's] OLG bid application. If the [appellant] is successful in the OLG bid, it will be providing gaming services pursuant to a license issued by the OLG.
>
> …

[4] Order PO-2010.
[5] Order P-1621.

> Redaction #3 concerns information relating to the subcontractor hired by [the appellant], including the identity of the subcontractor.. The subcontractor referred to in Subcontractor Redaction is an integral part of [the appellant's] business plan to be submitted to the OLG as part of its bid application (in the event its RFPQ application is approved).
>
> [The appellant] submits that the identity and duties of a subcontractor which forms part of a bid document qualifies as "commercial information".
>
> …
>
> Redaction #4 contained in Record 13 relates to site locations visited by the Hard Rock representatives during their visit to Hamilton in June, 2012. This information discloses potential location(s) for the new gaming facility which will be proposed by [the appellant] in the OLG bid process.

[15] I have reviewed the information identified by the appellant as exempt under section 10(1). I find that it qualifies as commercial information for the purposes of section 10(1) as it relates to the appellant's response to the RFPQ and the services it intends to offer to the OLG in order to manage the casino gaming facility. Accordingly, part 1 of the test for the application of section 10(1) is met.

Part 2: supplied in confidence

Supplied

[16] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[6]

[17] 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.[7]

In confidence

[18] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[8]

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

[19] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered.[9]

[20] The appellant submits that the OLG bid process is a closed one wherein the nature and specifics related to each applicant bid are not disclosed to the public or to any of the applicant's competitors. Furthermore the appellant submits that the information in all the redactions was supplied to the City Manager by the appellant with a reasonable expectation of confidentiality. Specifically, the appellant states that the information in the redactions was:

a) communicated by the appellant to the City Manager on the basis that it was confidential and that it was to be kept confidential;

b) was treated consistently by the appellant and the City Manager in a manner that indicates a concern for confidentiality;

c) was and is not otherwise disclosed or available from sources to which the public has access; and,

d) was prepared for a purpose that would not entail disclosure.

[21] The appellant also provided an affidavit from its Chief Executive Officer who affirms that he approached the City Manager to discuss various ideas and potential sites for a new gaming facility in the Hamilton area. He states:

> …I believed that [the City Manager] was in the best position to advise me of any potential red flags or roadblocks that [the appellant] might encounter should it proceed with any of my proposals.
>
> In my communications with [the City Manager], I shared highly sensitive and confidential commercial and proprietary information that could be used against [the appellant] by its competitors. Therefore, it was clearly implied that all information I provided to [the City Manager] was to be kept strictly private and confidential. To this end, to the best of my knowledge and belief, [the City Manager] has never disclosed to any third party (other than the City of Hamilton in response to this proceeding) the sensitive commercial and proprietary information that I disclosed to him.
>
> The confidential information that I communicated to [the City Manager] in the Redactions is information that I have not disclosed to anyone outside [the appellant's] senior management team and/or anyone not directly

[9] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

> involved in [the appellant's] OLG application given the closed nature of the OLG bid process.

[22] It is evident from the nature of the records, specifically the emails from the appellant to the City Manager, that the information at issue was supplied by the appellant to the city. Moreover, I accept the appellant's submissions that the information at issue is not otherwise available from other sources and was communicated by the appellant to the city on the basis that it was to be kept confidential.

[23] Accordingly, I find the appellant has met the part 2 test for the application of section 10(1).

Part 3: harms

[24] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences. [10]

[25] 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 the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[11]

[26] The appellant submits that disclosure of the information in the records could reasonably be expected to significantly prejudice its competitive position and cause undue loss to its business partner and undue gain to its competitors. Regarding the specific records, the appellant submits that disclosure of the first redaction in Record 12 would disclose confidential information relating to Hard Rock's business plans. It states:

> Should the information contained in the Hard Rock Redaction be disclosed to the requester, and consequently, the public at large, confidential information relating to Hard Rock's business plans will not only be divulged without its authorization and consent, but the release of this information could cause irreparable damage to its business. Moreover, if the information is disclosed and Hard Rock discovers that that the disclosure was a result of my communications with [the City Manager], I

[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[11] Order PO-2435.

> verily believe that [the appellant's] partnership with Hard Rock will be irreparably damaged to the extent that Hard Rock will conclude that it can no longer trust [the appellant] with sensitive confidential information about its business.

[27] Regarding the information about the appellant's subcontractor in Record 12, the appellant submits that disclosure of this information will give its competitors significant insight into its business plan to be submitted in support of its OLG bid, which will lead to competitive harm. The appellant states, "This result is inevitable because the subcontractor is well known in the industry as are its strategies and business models."

[28] For the two severances in Record 13, the appellant submits that disclosure of the site locations visited by the Hard Rock representatives would significantly prejudice its competitive position. The appellant submits that this information contains the potential locations for the new gaming facility it intends to propose in the OLG bid process. This information is a critical element of its business plan.

[29] I have reviewed the information identified by the appellant in Records 12 and 13, as well as its representations and affidavit evidence. Based on this, I find that disclosure of the information could reasonably be expected to significantly prejudice the appellant's competitive position. The information at issue is clearly commercial information that was supplied by the appellant to the city for the purpose of assessing the feasibility of its business plan. I find this information to be fairly specific and detailed such that its disclosure would result in the appellant's competitors gaining a commercial advantage through obtaining insight into the appellant's plans. I further accept the appellant's position that disclosure of the information would jeopardize its relationship with Hard Rock such that its competitive position would be significantly prejudiced. Accordingly, I find that the information in Records 12 and 13 is exempt from disclosure under section 10(1)(a) of the *Act*.

ORDER:

I allow the appeal and order the city to withhold the information on Records 12 and 13 as identified in the highlighted copy of the records enclosed with the city's copy of this order. To be clear, the information highlighted **should not** be shared with the requester.

Original signed by: August 27, 2015
Stephanie Haly
Adjudicator