Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3255

Appeal MA14-232-2

Algoma Public Health

October 23, 2015

Summary: The appellant sought disclosure under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA)* of meeting notes from a meeting between Algoma Public Health (APH) and an affected party and its experts about a property development. APH denied access, citing the mandatory third party information exemption in section 10(1). This order does not uphold APH's decision, as there was insufficiently detailed and convincing evidence to support a finding that the three-part test under section 10(1) has been met.

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

Orders and Investigation Reports Considered: Orders MO-3032, PO-3507.

OVERVIEW:

[1] Algoma Public Health (APH) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the following:

> Requesting information as described in the attached email including minutes of the meeting and the "clarification of the issues and concerns", presented on [date] by [name] and the developers", to the Algoma Public Health Unit.

[2] The appellant's representative attached to the request an email from APH's Chief

Building Official to the requester which stated:

> Our decision for approval on the [named] development [the development] was based on further information provided in subsequent meeting with [name] and the developers on July 4, 2013. At the meeting [name] of [company] clarified many of our issues and concerns. Based on that meeting, we had no further concerns regarding the installation of sewage disposal systems.

[3] In its access decision, APH indicated that there were no meeting minutes. It further stated that the only "clarification of issues and concerns" is contained in a report and that no other records relating to the request have been found to exist. It denied access to the report, citing the mandatory third party information exemption in section 10(1) of the *Act* and stating that the third party does not consent to disclosure.

[4] The requester, now the appellant appealed APH's decision.

[5] During mediation, clarification was obtained regarding the report and as well, a further search for additional records was conducted by APH.

[6] With respect to the report, the appellant disputed the application of the section 10(1) exemption. The appellant's representative confirmed that he already had a copy of the report and as a result, would not be pursuing access to it. Accordingly, the report is not at issue in the appeal.

[7] Also, during mediation, the appellant asserted that further responsive records, must exist, stating that he is seeking the additional information and reports that led APH to approve the third party's application. In support of his position that additional records exist, the appellant referred to certain correspondence between APH and City of Sault St. Marie (the city). APH agreed to conduct a further search for records.

[8] APH then issued a supplemental access decision indicating it had located some notes of the July 4, 2013 meeting between APH and the third party (the affected party). It indicated that these notes were contained in the personal notebook of an APH employee. It denied access to the notes, citing section 10(1), noting that as of the date of the supplemental decision, it had not obtained consent from the affected party to disclose this information. Following the supplemental decision letter, the mediator contacted the affected party who confirmed it was objecting to disclosure of these notes, pursuant to section 10(1).

[9] The appellant is of the view that section 10(1) does not apply to the notes and in addition, asserts that a public interest exists in disclosure of the notes. As the appellant has raised the issue of public interest, the public interest override in section 16 was added as an issue in this appeal.

[10] As the appeal was not resolved at mediation, it was transferred to the

adjudication stage where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[11] In this order, I do not uphold APH's decision under section 10(1) and order the disclosure of the record.

RECORDS:

[12] At issue in this appeal are the handwritten notes of an APH employee dated July 4, 2013 (4 pages).

DISCUSSION:

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

[13] 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,
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> > (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

[14] 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]

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

[15] 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.

Part 1: type of information

[16] APH states that the notes contain technical information and were made in relation to a meeting it held with the affected party, the affected party's experts such as engineers, and the affected party's legal counsel. It states that there were at least two of the affected party's engineers present at the meeting referenced in the notes.

[17] The affected party states that the notes contain scientific and technical information as it is information provided by the affected party's expert consultants. This information described the results of testing carried out by the experts on lands upon which the proposed development is to be situated and the impact of the development on the natural and ecological features of the property.

[18] The appellant did not address part 1 or part 2 of the test under section 10(1) in his representations.

Analysis/Findings

[19] The types of information set out in APH's and the affected party's representations as listed in section 10(1) have been discussed in prior orders, as follows:

> *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]

[3] Order PO-2010.

> *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.[4]

[20] The meeting that is the subject matter of the record included environmental engineers. Based on my review of the notes from this meeting, I agree with APH and the affected party that they contain technical information related to the development's water quality.

[21] Therefore, I find that part 1 of the test has been met as the record contains technical information.

[22] I cannot agree with the affected party that the notes contain scientific information. I have insufficient evidence based on my review of the notes that they relate to the observation and testing of a specific hypothesis or conclusion.

Part 2: supplied in confidence

Supplied

[23] 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.[5]

[24] 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]

[25] APH states that the information in the notes was supplied by the affected party since it arose from a meeting with the affected party and APH.

[26] The affected party states that the handwritten notes are a record of the information provided by it and its expert consultants to APH. As such it states that this information was "supplied" given as it would not have otherwise been available to APH to make such a record thereof.

Analysis/Findings re: supplied

[27] Based on my review of the notes, I agree with APH and the affected party that the information in the notes was supplied by the affected party to APH. In addition, I find that disclosure would reveal or permit the drawing of accurate inferences with

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[4] Order PO-2010.
[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.

respect to information supplied by the affected party at the meeting.

In confidence

[28] 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.[7]

[29] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure[8]

[30] APH states that the information contained in the notes was supplied by the affected party to it explicitly in confidence. APH states that it felt bound by the terms of the Confidentiality and Non-Disclosure Agreement (the agreement) between it and the affected party to hold the information from the meeting in the strictest confidence and not disclose nor authorize the disclosure to any third party or the public without the affected party's prior written consent. It states that this prior written consent was requested by APH on several occasions, but each time was denied by the affected party.

[31] The affected party states that the information at issue was not publicly available and was prepared for the sole purpose of assisting APH in assessing relevant health issues relating to the development. It states that, it disclosed the information to APH pursuant to the terms of the agreement. It states that but for the execution of this agreement, it would not have disclosed this information to APH. It states that pursuant to the terms of the agreement, APH agreed that "any disclosure, improper use, release, or dissemination" of the information it provided would cause the affected party "serious irreparable harm".

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[7] Order PO-2020.

[8] 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.

[32] The affected party states that APH agreed not only that it would hold the information confidential, but that it would not disclose the information to its officers, employees, or advisors unless they had a substantive need to know and had first agreed to be bound by the provisions of the agreement.

Analysis/Findings re: in confidence

[33] Based on my review of the record and the agreement, I agree with APH and the affected party that the information in the notes was communicated to the institution on the basis that it was confidential and that it was to be kept confidential. It was also treated consistently by the affected party in a manner that indicates a concern for confidentiality, not otherwise disclosed or available from sources to which the public has access, and prepared for a purpose that would not entail disclosure.

[34] Therefore, I find that part 2 of the test under section 10(1) has been met as the information in the record was supplied by the affected party to APH with a reasonable expectation of confidentiality.

Part 3: harms

[35] 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.[9]

[36] 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*.[10]

[37] APH relies on section 10(1)(a) and states that since the meeting was held in confidence and the information provided was captured by the Confidentiality Agreement, disclosure of the notes would significantly prejudice the competitive position of the affected party and interfere with APH's contractual obligations pursuant to the Confidentiality Agreement. It notes that a breach of the Confidentiality Agreement would expose APH to potential civil liability, as the last recital of the agreement states " ... any disclosure, improper use, release, or dissemination of the Confidential Information to other third parties, or into the public domain, would cause serious irreparable harm to the commercial, technical and business interests of [the

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

affected party]."

[38] The affected party states that the handwritten notes are a record of information supplied during a meeting with its expert consultants and APH. The purpose of this meeting was to address the health-related concerns raised by a named unlicensed geoscientist that had been engaged by the Sault Ste. Marie Region Conservation Authority (the "SSMRCA") to undertake a peer review of the affected party's studies pertaining to the development.

[39] The affected party submits that it was not under any obligation to address the named geoscientist's concerns to APH; nevertheless, it did so to ensure that APH was accurately informed about the development and was not misled by this geoscientist. It states that it would not have disclosed the information in the record to APH otherwise. The affected party states:

> Disclosure of the handwritten notes at issue would represent an undue gain to the appellant in the sense that it would grant the appellant a benefit arising only as a result of the illegal and inappropriate actions of [the geoscientist]. It is noteworthy that the appellant is the President of the [named association], a group that has a long history of vehement opposition to the development and which sought to proffer [the geoscientist] as an expert witness before the [Ontario Municipal Board (OMB)] during in the above-noted proceeding…
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> There is a public interest in ensuring that institutions such as APH are not used as pawns or "dupes" by those like [the geoscientist] who would seek to do so for their own misguided reasons. This public interest is served by enabling those, like the [affected] party, to engage in open information sharing with institutions like APH in these circumstances without concern that information benevolently being shared will be provided to the very people whose interests are furthered by such duplicitous dealings. Put differently, allowing such disclosure would encourage individuals opposing initiatives such as the development to mislead institutions such as APH for the purpose of furthering either their own or a like-minded parties' agenda by affording them the ability to indirectly access information that they would otherwise not be able to directly.

[40] The appellant addressed the qualifications of the geoscientist in his representations. He also states that he sees no reason why the information at issue would establish harm on anyone's part other than to demonstrate that the decision to approve the development was not made in the best interest of public health and was done without the proper studies and sufficient information.

[41] In reply, APH states that this appeal involves whether or not the notes should be disclosed and is not concerned with the merits of the proposed development, the

qualifications of experts, or the proceedings at the OMB. Furthermore, it states that this appeal should not be construed as a review of APH's decision regarding the proposed development.

[42] The affected party's reply representations focus on the geoscientist's qualifications.

Analysis/Findings

[43] In this order, I am only making a finding as to whether the record is exempt by reason of section 10(1).

[44] I have reviewed the record at issue, which are point-form handwritten notes. Most of the points in this record consist of only two or three words.

[45] Neither the affected party nor APH addressed the harms under part 3 of the test that could reasonably be expected to arise should the actual information set out in the record be disclosed with any particularity. I agree with APH that this appeal involves whether or not the notes should be disclosed, and is not about the actual merits of the development.

[46] I also find that the qualifications of the geoscientist, who may have raised concerns about the development that ultimately resulted in the meeting where the record was created, and the motive of the association that opposes the development is irrelevant to my determination. Who the requester may be or who was the impetus for the record's creation is not relevant to my determination. Disclosure of the record is considered disclosure to the world. As stated by Adjudicator Stephanie Haly in Order PO-3507:

> Prior decisions of this office have established that disclosure to the appellant is disclosure to the world. For instance, in Order MO-2986, Adjudicator Daphne Loukidelis considered whether the appellant's identity and intentions should be considered by the adjudicator in making her finding. She states:
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> > In Orders P-1537 and PO-2461, the sought-after records related to research facilities using animals and the provision of animal care, control and pound services, including inspections, respectively. In the latter decision, Senior Adjudicator John Higgins adopted the following reasoning of former Assistant Commissioner Tom Mitchinson in the former order:
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> > > My decision is not based on the identity of the appellant, but rather on the principle that disclosure of the records must be viewed as disclosure to the public generally. If disclosed, the information in the records would be

> potentially available to all individuals and groups involved in the animal rights movement, including those who may elect to use acts of harassment and violence to promote their cause.
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> The senior adjudicator agreed with this reasoning and held that even if the concerns identified by the parties opposing disclosure of the information did not relate to the appellant, it was appropriate to consider the consequences of disclosure of the records into the public domain in the *particular circumstances of each appeal.* Accordingly, even though the nature of the relationship between the parties in this appeal may not suggest concern, I accept that disclosure of the records is tantamount to disclosure to the world.

[47] I have also considered and do not accept the affected party's objection to disclosure based on its position that "The appellant is clearly attempting to use the MFIPPA process to obtain discovery of documents he would not otherwise be entitled to access." I do not agree with the affected party that the access request in this appeal results in APH being used as a pawn or being duped by the appellant.

[48] In Order MO-3032, Adjudicator Daphne Loukidelis dealt with a similar argument. In that appeal, the records were a letter written by a consultant to the developer, and a cover letter to a report addressed to the institution by the developer. She stated:

> Section 4(1) of the Act states, in part: "Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless …". Section 4(1) creates an express and unambiguous right of access to records "in the custody or under the control" of an institution, such as the Sault Ste. Marie Region Conservation Authority.[11] In reviewing the decision of an institution, I must give effect to the clear access rights of the appellant under the Act, subject to the exemptions in sections 6 through 15 and section 38. These exemptions are applied on a case-by-case basis, and in accordance with the requirements of the particular exemption.[12]
>
> In this context, I reject the assertion that there is anything improper about the appellant, or other opponents of the development, obtaining access to the information at issue under the Act, if it is not exempt. Access to information legislation exists to ensure government accountability and to facilitate democracy.[13] In Order MO-1924, former

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[11] Orders PO-2520 and PO-2599.
[12] See, for example, Order PO-3176.
[13] *Dagg v. Canada* (Minister of Finance), [1997] 2 S.C.R. 403.

> Senior Adjudicator John Higgins observed that "requesters may also seek information … to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions." I agree. Furthermore, past orders confirm that the fact that an appellant may publicly disclose the content of records, if granted access to them, does not mean that his or her reasons for using the access scheme under the Act are not legitimate.[14]

[49] From my review of the request and the notes, it appears to me that the record concerns the quality of the development's water, however, neither the affected party nor APH has actually focused their representations on what exact information in the record could reasonably be expected to result in the harms set out in part 3 of the test under section 10(1). Neither are these harms apparent to me from my review of the record and the parties' representations.

[50] Although APH has raised the application of section 10(1)(a) and the affected party has specifically referred to sections 10(1)(b) and (c), I find that I do not have sufficient evidence that part 3 of the test has been met for any of these exemptions.

[51] In particular, I do not have sufficient evidence to find that disclosure of the notes "… would significantly prejudice the competitive position of the affected party and interfere with APH's contractual obligations pursuant to the Confidentiality Agreement" as submitted by APH.

[52] Concerning the terms of the confidentiality agreement, neither APH nor the affected party can contract out of the disclosure requirements of *MFIPPA*. Furthermore, although APH states that disclosure would significantly prejudice the competitive position of the affected party, it has not provided details regarding this prejudice and how it could reasonably be expected to result from disclosure.

[53] With respect to the affected party, its representations are focused on the qualifications of the geoscientist whose concerns were being addressed in the meeting, as well as whether the appellant is a member of a group that opposes the development. The affected party is concerned with:

> …allowing such disclosure would encourage individuals opposing initiatives such as the development to mislead institutions such as APH for the purpose of furthering either their own or a like-minded parties' agenda by affording them the ability to indirectly access information that they would otherwise not be able to directly.

[54] However, this submission does not address the harms that could reasonably be expected to result from disclosure of the contents of this record. Even if the appellant

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[14] See, for example, Orders M-1154 and PO-3325-I.

or his associates have raised concerns about the development which resulted in a meeting where the notes were generated, that opposition or concern does not automatically result in the disclosure of exempt information. Instead, records created as a result of this meeting can only be subject to disclosure if the information therein is not exempt under *MFIPPA*.

[55] I find that there is insufficient detailed and convincing evidence regarding the application of part 3 of the test under section 10(1) to this particular record. In making this finding, I have considered the content of the record and the consequences of disclosure of the record into the public domain in the particular circumstances of this appeal.

[56] Accordingly, I find that part 3 of the test under section 10(1) has not been met and the record is not exempt under that section. As no other mandatory exemptions apply and no discretionary exemptions have been claimed, I will order the record disclosed.[15]

ORDER:

1. I order APH to disclose the record to the appellant by **November 27, 2015** but not before **November 23, 2015**.

2. In order to verify compliance with order provision 1, I reserve the right to require a copy of the record disclosed by APH to the appellant to be provided to me.

Original Signed by: October 23, 2015
Diane Smith
Adjudicator

[15] As the record is not exempt by reason of section 10(1), it is not necessary for me to consider the application of the public interest override in section 16 to the record.