Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3411

Appeal MA16-58

Conservation Halton

February 14, 2017

Summary: Conservation Halton received a request for a number of records relating to the fill operation site on an identified property. The conservation disclosed many records but withheld other information pursuant to section 10(1) (third party information). At issue in this appeal are the daily load count sheets. The adjudicator finds that the daily load count sheets 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, section 10(1)(a)(b)(c).

Orders and Investigation Reports Considered: MO-3046, MO-3087.

BACKGROUND:

[1] The appellant made a sixteen-part request to Conservation Halton (the conservation) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a fill operation relating to a particular site.

[2] In response, the conservation issued a decision granting access to certain records and denying access to other records on the basis of the mandatory exemption in section 10(1) (third party information) and section 14(1) (personal privacy). Prior to issuing this decision, the conservation notified one individual whose interests would be affected by disclosure of the records at issue (the affected party), pursuant to section 21 of the *Act* seeking their view with regard to disclosure. The affected party objected

to disclosure of the records.

[3] The requester (now the appellant) appealed the conservation's decision and a mediator was assigned to the appeal.

[4] During mediation, the mediator spoke with the appellant, the conservation and the affected party. The appellant confirmed that she was only interested in pursuing access to the records responsive to parts 3, 6 and 7 of her original sixteen-part request and accordingly the information responsive to all remaining parts of the original request are no longer at issue in this appeal. Parts 3, 6, and 7, set out below, relate to the Daily Load Count reports:

> 3. Documentation to indicate the quantity of fill that has come to the site to date. Documentation that indicates how many truckloads have come in to date.
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> …
>
> 6. A list of source sites to date.
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> …
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> 7. Any source site soil reports or approval letters from the source site QP (qualified person) for soil coming into the site and any source site management plans

[5] At mediation, the conservation confirmed that it was continuing to deny access to the relevant records pursuant to section 10(1)(a) and 10(1)(b) and was no longer relying on section 14.

[6] In addition, the appellant indicated on the appeal form, 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.

[7] As mediation did not resolve this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry under the *Act*. I invited and received representations on the issues from the parties. Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and *Practice Direction 7*.

[8] During the sharing of representations process, the affected party raised an allegation of a "breach of privacy" in relation to the appellant having in her possession 2 documents that he states are private and to his knowledge never released pursuant to a request under the *Act*. This allegation is not under consideration in this appeal, which is not a privacy complaint investigation. Rather, this appeal addresses the issue of access to the records. There is an established process for filing a privacy complaint with this office which the affected party should follow if he wishes to initiate such a

complaint.[1]

[9] In this order, I find that the information contained in the records does not qualify for exemption under section 10(1).

RECORDS:

[10] The records at issue consist of the Daily Load Count sheets – Pages 14-91

DISCUSSION:

[11] The sole issue to be determined in this appeal is whether the mandatory exemption at section 10(1) applies to the records at issue.

[12] 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

[13] 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

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[1] An explanation of the complaint process is found at https://www.ipc.on.ca/privacy/processing-privacy-complaints/. The complaint form is found at https://www.ipc.on.ca/wp-content/uploads/Resources/cmpfrm-e.pdf.

[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.*).

parties that could be exploited by a competitor in the marketplace.[3]

[14] For section 10(1) to apply, the institution and/or the affected 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

[15] 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.

[16] The types of information listed in section 10(1), and relevant to this appeal have been discussed in prior orders:

> *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]
>
> *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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]

[17] In his representations, the affected party stated that it was clear that the information in the record is technical in nature. The conservation did not address this

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[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] Order PO-2010.
[5] Order PO-2010.
[6] Order P-1621.

issue in its representations.

[18] The appellant, in her representations, agrees that source site soil reports and source site management plans contain technical information. She submits that load counts or volume of fill received is not information that reveals a trade secret or scientific, technical, commercial, financial or labour relations information as defined by the *Act*.

[19] In reviewing the record, while it appears they contain commercial information, I also am satisfied that they contain technical information as defined, as it includes "information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing."

Part 2: supplied in confidence

[20] The conservation, in its representations, commented briefly on the issue of the document being supplied by the affected party. It states that the affected party did his due diligence by submitting all required documents. The conservation states that the affected party had an expectation that his initial submission and future documents would be confidential as they related to his property.

[21] The affected party takes the position that this part of the three-part test is met. In his representations, the affected party does not comment on whether the document was supplied by him or that it was supplied in confidence.

[22] The appellant, in her representations, states that she does not believe that the information in the records was treated consistently by the affected party in a manner that indicates concern for confidentiality. She refers to the minutes of a public meeting held by a local municipality that show the affected party's contractor indicating several source sites by name. The appellant also points to the permit issued by the conservation to the affected party for the placement of fill on the land noting that the permit sets out three conditions and is silent on the issue of confidentiality. The appellant states that no evidence has been provided that indicates that the records were supplied to the conservation with an expectation of confidentiality, explicit or implicit.

[23] In his reply representations, the affected party states that "all documents to [the conservation] were submitted in envelopes marked private and confidential." The affected party also states that he believes that he and the conservation have explained some of the ways the information was provided with the implicit expectation of confidentiality. The affected party confirms that he and his contractor provided the names of several source sites at the public meeting referenced by the appellant. The affected party asserts that this information was provided in good faith but notes that he has had to deny further information due to significant harms sustained by himself and some of the source sites via harassment. Despite releasing this information, the

affected party takes the positon that it is his right to decide what to release about his private property/business and his right to change his mind.

[24] In its reply representations, the conservation states that although the records were not marked as confidential, the affected party submitted them with the understanding that they would be kept confidential. The conservation stated that without the assurance of confidentiality, many private landowners will avoid contacting the conservation resulting in similar information no longer being supplied and leading to violations, fines and/or court cases. The conservation stated that it does its best to promote privacy in order to encourage landowners to apply for a permit fee for large fill applications which ensures that environmental or hazardous issues do not occur.

[25] In my review of the records and the parties' representations, I find that the records were supplied by the affected party to the conservation but were not supplied to the conservation with an expectation of confidentiality.

Supplied

[26] 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.[7]

[27] Information may qualify as "supplied" if it was directly supplied to an institution by a affected party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a affected party.[8]

[28] I find that the records were supplied to the conservation by the affected party or his contractor on behalf of the affected party. The records are not documents that can be negotiated with the conservation and instead are documents supplied to the conservation to assist in its exercise of due diligence.

In confidence

[29] 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.[9]

[30] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

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

- communicated to the conservation on the basis that it was confidential and that it was to be kept confidential
- 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
- prepared for a purpose that would not entail disclosure.[10]

[31] Previous orders of this office have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis.[11]

[32] After a review of the records and the parties' representations, I am not convinced that the records were supplied to the conservation in confidence, either explicitly or implicitly.

[33] In reviewing the actual records, I find that there is no information that suggests that they are confidential, despite the affected party's assertion that the envelope containing the records indicated that the records were confidential. In circumstances where parties want a document to remain confidential, it would appear odd if this would only be indicated on the mailing envelope, which is often discarded, and not on the actual document itself. Also, both the appellant and the affected party provided a copy of the permit where the conservation granted permission to the affected party to complete his project and included conditions for the project. This permit is silent on the issue of confidentiality.

[34] Given this evidence, I find that there is no explicit expectation of confidentiality.

[35] In his representations, the affected party in addition to noting that the envelopes would have been marked confidential, focuses his comments on the confidentiality being implicit in nature.

[36] I also find that there is no implicit expectation of confidentiality. In order MO-3087, Senior Adjudicator Frank DeVries noted 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." In this instance, it does not appear that the information was treated in a consistent manner. For example, a number of source sites had been divulged by name to the public at a town hall meeting.

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[10] 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.
[11] Orders M-169 and P-1605

[37] The conservation indicated the affected party's expectation that his submissions and future documents would be confidential. However, without specifics from the conservation, and in reviewing the appellant's representations, this does not seem to be the case. The appellant pointed out in her representations that many of the documents submitted by the affected party were actually released in the local municipality's council agendas as well as released by the conservation as a result of freedom of information requests including to the appellant. The appellant included these documents as attachments to her representations and a review shows that they include the control plan for the fill operation commissioned by the qualified person retained by the affected party, emails regarding daily inspection of sediment, details of the information that would be recorded on the daily load count sheet and a hydrological assessment addressed to the affected party.

[38] Although the affected party states that the abovementioned documents were provided in good faith, I find that by releasing these documents, the conservation and the affected party cannot now say that the affected party had the expectation that his submissions and future documentation would be treated as confidential. Order MO-3087 supports the premise that for a finding of implicit expectation of confidentiality, the information must be treated consistently in a manner that indicated a concern for its protection from affected parties. Given the release of the abovementioned information, I find that neither the affected party nor the conservation have established that the information contained in the records was consistently treated with an expectation of confidentiality.

[39] Some of the conservation's representations on the supplied in confidence test actually speaks to potential harm. It appears the conservation is suggesting that if it did not treat these records as confidential, then going forward, affected parties may choose not to apply to the conservation for land alterations leading to violations, fines and court cases. This is not a valid argument to support either an implied or an explicit expectation of confidentiality, especially when some of this information has already been released. I will deal with the bulk of this argument under harms.

[40] In summary, on my review of the representations of the affected party and the conservation, I am not convinced that I have been provided with sufficient evidence to satisfy me that the affected party had an expectation of confidentiality at the time the information was supplied to the conservation, implicit or explicit. 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.[12] Evidence amounting to speculation of possible harm is not sufficient.[13]

[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.[14]

Representations

[44] In the affected party's representations on this part of the test, he states that similar information released in the past has resulted in financial harms and delay in the completion of the project. The affected party submits that the evidence of legal expenses should be sufficient to show harms.[15] The affected party submits that he completed all legal requirements and additional changes requested by the local municipality which can be confirmed by it. The affected party also submits that he is engaged in a legal proceeding with the municipality and the release of any information prior to the hearing could cause undue prejudice and/or jeopardize the ability to settle.

[45] The affected party also submits that some of the requested information could be used to determine how he is able to complete the project and if a competitor is able to access this information, before his project is concluded, this could negate his advantage over his competitors.

[46] The appellant stated in her representations that it is unclear how revealing the sources of the fill, load counts or fill volumes could impact the affected party's competitive position. In response to the affected party's assertion that release of the records would lead to financial harms by delaying the project, the appellant points out that similar information has already been released, the appellant states that the affected party's representations are vague leaving many unanswered questions. The appellant submits that the affected party has not adequately addressed how his competitive position would be impacted resulting in undue loss.

[47] In his reply representations, the affected party indicates that he was willing to sit down with this office in order to provide further proof of undue harm and loss that has

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[12] *(Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* (*Community Safety*), 2014 SCC 31, (para 53).
[13] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[14] Order PO-2020.
[15] No actual evidence of legal expenses was provided.

occurred from the good faith release of related documents and further explain what he means when he states that he will lose his competitive advantage. The affected party states that providing this information in written form was not appropriate for this process. Further, the affected party states that if the records are ordered disclosed it will result in an increase of illegal dump sites as people will stop applying for permits and simply prefer asking for forgiveness in the event they are caught.

[48] In its representations, the conservation states that if a landowner develops on their property without contacting the conservation in order to obtain the appropriate permits, violations can occur leading to fines and court actions. It states that without the assurance that the documents submitted will not be released, private landowners will avoid contacting the conservation resulting in similar information no longer being supplied.

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

[49] In this appeal, I have not been provided with sufficient evidence to satisfy me that the disclosure of the withheld records could reasonably be expected to prejudice significantly the affected 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.

[50] Although the affected party indicated his willingness to attend the IPC to discuss his harms in more detail, the appeal process is completed in writing. The affected party was afforded two separate opportunities to make representations in this appeal and declined to provide the evidence to sufficiently establish the harms.

[51] Even though the IPC appeal is completed in writing, the Notice of Inquiry speaks directly to the sharing of representations including how to deal with confidential information that the party does not want the other party to see. The process allows the IPC to withhold confidential parts of the representations so that the adjudicator, at least, has the argument to consider. In this appeal that was not done. The affected party seemed to take the position that the information regarding harms was none of the appellant's business and decided not to include any detailed or convincing evidence in his representations. Therefore, given the lack of information provided by the affected party, I find that the affected party's representations are vague and insufficient to establish the identified harms.

[52] 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)

[53] During the processing of this appeal, the parties referred to the [specified

property] Clean Fill Project Control Plan (commissioned by the affected party). The plan confirms that only clean topsoil or clean subgrade material would be accepted at the property. A procedure for screening proposed clean fill sources is set out in the control plan as well as a ticket process for tracking the loads of fill at the site of the project. The control plan specifies that the affected party's project will comply with the local municipality's relevant bylaw.

[54] This bylaw is meant to protect the municipality against the importation of contaminated fill and sets out a requirement for on-site verification and environmental monitoring. This is a statutory condition. For example, Schedule B to the bylaw notes that the intent of the quality control "is to prevent the importation of material that is of lower chemical quality than on-site material." An operational flow chart, also set out in Schedule B, requires "visual inspection to ensure that the fill does not contain unauthorized material." Also, the Schedule confirms that the "Fill Screening Procedure" includes a visual inspection and a sample "Fill Inspection Checklist" is attached.

[55] Based on the above, it appears that the records at issue were created and supplied as a result of a statutory requirement. Therefore, I do not accept the argument that if the records are disclosed further similar information will no longer be supplied. As Commissioner Brian Beamish stated in MO-3046, the IPC has found in many instances that "where there is a statutory obligation to provide information to an institution, disclosure cannot reasonably be expected to result in similar information no longer being supplied to an institution."[16]

[56] Given that there is a statutory condition to provide the information contained in the records, I find that the argument that similar information will no longer be supplied is not applicable in this appeal. As stated in MO-3046, "[t]he harm of losing future access to information will not be made out where there exists a statutory authority to compel production, in spite of any reluctance to comply on the part of the supplier of information."

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

[58] In summary, I find that the withheld portions of the records at issue have not met parts 2 and 3 of the test and do not qualify for exemption under section 10(1).

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

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[16] Orders PO-1666, PO-2170, PO-2629

ORDER:

1. I find that the withheld responsive records, being the daily load count sheets, do not qualify for exemption under section 10(1), and order the conservation to disclose these records to the appellant by **March 22, 2017** but not before **March 17, 2017**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the conservation to provide me with a copy of the record disclosed to the appellant.

Original Signed by: February 14, 2017

Alec Fadel
Adjudicator