Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3494

Appeal MA16-120-2

Town of Iroquois Falls

September 15, 2017

Summary: The appellant submitted a nine-part access request to the Town of Iroquois Falls for records related to a named company's acquisition of a former pulp mill by a second named company. The town granted partial access to the asset purchase agreement and an amendment to that agreement under section 10(1) (third party information) of the *Act*. The town responded to some parts of the request by providing information, but took the position that no additional responsive records existed. Upon appeal of the town's decision, the appellant challenged both the denial of access and the town's search for records. In this order, the adjudicator partly upholds the town's decision to deny access under section 10(1)(a), orders the non-exempt information disclosed, and upholds the town's search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1)(a) and 17.

Orders and Investigation Reports Considered: Orders PO-2987, PO-2965, MO-2554, MO-3019 and MO-3105.

OVERVIEW:

[1] In October 2015, Abitibi Riversedge Inc. (Abitibi) acquired assets owned by Resolute FP (Forest Products) Canada Inc. (Resolute) in Iroquois Falls. Under the resulting agreement and a subsequent January 2016 document amending certain terms of the agreement between these parties, the Town of Iroquois Falls (the town) was a signatory with regard to several specific articles.

[2] Following the signing of the asset purchase agreement, an individual submitted an access request to the town under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. All records relating to an Asset Purchase Agreement between the town, Resolute Canada Inc. and Abitibi Riversedge Inc.;

2. The agenda and minutes of two identified meetings;

3. An agreement that documents the town's protection from environmental cleanup and where decommissioning responsibilities and costs are identified;

4. Documentation relating to future forestry uses and restrictions of the former Resolute FP paper mill;

5. Documentation that identifies who will be responsible for the Abitibi Trestle bridge;

6. Documentation relating to the town's Council research in selecting the proponent taking over the Resolute FP former paper mill and property;

7. The Request for Proposals related to the Asset Purchase Agreement;

8. Documentation relating to the town's cost for legal services to implement and execute the Asset Purchase Agreement; and

9. Documentation relating to the town's related costs to implement and execute the Asset Purchase Agreement.

[3] In response, the town notified the two companies named in the request under section 21(1)(a) of the *Act* as affected parties to seek their views on disclosure of records identified as responsive to the request. Subsequently, the town issued a decision letter to the requester, providing partial access to the Asset Purchase Agreement and an Amendment to the Asset Purchase Agreement said to be responsive to part 1 of the request.[1] Portions of these records, as well as the entire record responsive to part 4 of the request,[2] were withheld under the mandatory exemption in section 10(1) (third party information). The town advised the requester that records responsive to parts 2 and 6 of the request were available on-line. With respect to part 5 of the request, the town identified the owner of the trestle bridge, but did not identify responsive records. Lastly, with respect to parts 3, 7, 8 and 9 of the request, the town stated that no records exist.

---

[1] For ease of reference, I refer to these records in this order as the agreement and the amending agreement when I must distinguish, or as the agreement or agreements when referring to both.

[2] This position on part 4 of the request was later clarified when the town responded to the requester's concerns about the searches conducted. See the discussion of Reasonable Search, below.

[4] The requester (now the appellant) appealed the town's decision to this office and a mediator was appointed to explore resolution of the appeal. The mediator contacted the affected parties who objected to any further disclosure of the agreement. The town maintained its position that section 10(1) applies to the withheld portions of these records. The appellant challenged the town's basis for denying access and also the adequacy of its search. He maintained that records that are responsive to part 3, 5, 7, 8 and 9 must exist and, further, that additional records responsive to part 6 must also exist. As a result, the issue of reasonable search was added to this appeal.

[5] Ultimately, it was not possible to reach a mediated resolution of the appeal and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator first provided the town and the two affected parties with the opportunity to provide representations by sending a Notice of Inquiry outlining the issues, which they did. A Notice of Inquiry and the representations of these parties were then shared with the appellant in accordance with the confidentiality criteria in section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.* The appellant submitted representations, which were provided to the town for reply. At this time, the town also issued a revised decision to the appellant, providing additional disclosure of certain portions of the records according to the consent of the two affected parties, as communicated in their submissions.

[6] The appeal was subsequently transferred to me. In this order, I find some of the undisclosed portions of the agreement and its amending agreement are exempt under section 10(1) of the *Act* and I uphold the town's decision, in part. The non-exempt portions of the records must be disclosed to the appellant. I find the town's search for responsive records to be reasonable, and I uphold it.

RECORDS:

[7] The records at issue consist of the withheld portions of the Asset Purchase Agreement and the Amendment to the Asset Purchase Agreement.

ISSUES:

A. Does the mandatory exemption at section 10(1) apply to the undisclosed portions of the records?

B. Did the town conduct a reasonable search for responsive records?

DISCUSSION:

[8] On an introductory note, the appellant provided lengthy and detailed representations, many parts of which raise issues that are not before me or which are

outside my jurisdiction in this appeal under the *Act*. As such, this order does not address the appellant's concerns about: the town's "obligation to disclose" the records in this appeal under section 5(1) of the *Act*;[3] the town's obligations under the *Municipal Act*; the town clerk's status as Head under the *Act*; or the corporate behaviour of any third party, including the affected parties in this appeal. I summarize only those portions of the appellant's representations that address the application of the mandatory exemption for third party information in section 10(1) to the Asset Purchase Agreement and the Amendment to the Asset Purchase Agreement, as well as the reasonableness of the town's search for records that are responsive to his request.

A. Does the mandatory exemption at section 10(1) apply to the undisclosed portions of the records?

[9] The town and the two affected parties rely on section 10(1)(a) as the basis for denying access to the withheld portions of the agreement and amending agreement. Section 10(1)(a) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[10] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

[11] For section 10(1)(a) to apply, the town and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is commercial or financial information; and

---

[3] Section 5(1) of the *Act,* which reads, "Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public." This provision is inapplicable in the circumstances of this appeal.

[4] *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.).

[5] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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 the harms specified in paragraph (a) of section 10(1) will occur.

[12] To the extent that the representations provided by Resolute mirror submissions of a similar nature by Abitibi, or vice versa, they are summarized together, below.

[13] Before conducting my analysis, I should note here that two different versions (each) of the "severed-as-disclosed" agreement and amending agreement were provided by the town. In one version of each of these records, the town appears to have disclosed all provisions that relate to it. In the other versions of each record, some of those very same provisions are withheld. Since it appears to have been the town's intention to disclose the "town-related" portions of the agreements – namely Articles 11 and 12 and certain other terms – the non-disclosure of provisions from the latter versions is incongruous. In the reasons below, therefore, I will review the application of section 10(1) to the former versions of the agreement and amending agreement – the versions that suggest more fulsome disclosures.[6]

Part 1: type of information

[14] The types of information listed in section 10(1) and which are identified by the town or affected parties in this appeal have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[7]

---

[6] The following items are marked as disclosed in version "5.3" of the agreement, but are redacted from version "7.2": the titles of sections 12.1 & 12.4 in the Table of Contents, the line for Schedule 12.1(a), "Products," on the list in section 1.2, sections 12.1(a) & (b), 12.4(a) & (b) and Schedule 12.1(a) "Products." In the unnumbered version of the amending agreement, section 2.w. is marked as disclosed, but is not in version "7.3."

[7] Order PO-2010.

> *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.[8] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[9]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[10]

[15] I adopt these definitions for the purpose of this appeal.

Representations

[16] Both Abitibi and Resolute emphasize that the transaction did not involve the acquisition, or sale, of land or assets belonging to the town. Rather, the transaction involved Abitibi acquiring from Resolute the former mill site, certain "largely non-functional" production equipment, the trestle bridge and parcels of vacant land outside the town. In this context, Abitibi submits, without elaborating further, that the undisclosed portions of the records contain its commercial and financial information, as well as its trade secrets. Abitibi does not identify specific examples of these types of information in the records.

[17] Resolute submits that the records contain its commercial and financial information. The commercial information consists of an account of its transaction-related assets and liabilities, as well as obligations, waivers and releases, closing schedules and conditions, representations and warranties, indemnification covenants, remediation clauses and supplementary provisions about the operation of the contract. The financial information comes in the form of amounts due under the contract, as well as payment timing, means of payment, and remedies for non-payment. Resolute also submits that the withheld parts of the agreement give an indication of the internal processes followed to attract purchasers of troubled assets, a signature strategy that is particular to Resolute and necessary to achieve its corporate mandate.

[18] The appellant argues that the town and affected parties have not established that the records amount to "informational assets" or that they contain trade secret or scientific, technical, commercial or labour relations information. The appellant argues that "there are no trade secrets in a 100-year old paper mill. The newest paper machine… was installed in 1983, some 33 years ago, so what trade secrets will antique

---

[8] Order PO-2010.
[9] Order P-1621.
[10] Order PO-2010.

technology furnish?" The appellant also argues that the type of services described in the agreements, "demolition services and write off of assets," do not reveal trade secrets or specialty technology.

[19] The appellant states, however, that based on his reading of the definition of financial information, "[financial records] can be redacted." The appellant clarifies later in his representations that by financial information, he means "prices and financial transactions matters."

Findings

[20] To begin, I am satisfied that the agreement and the amending agreement establish a contractual relationship between Abitibi and Resolute for the purchase and sale of the decommissioned mill property and assets. In my view, this is sufficient for me to find that the agreement reveals information that is "commercial information."

[21] In addition, several of the withheld clauses of the agreement establish specific financial commitments or penalties, payable by, or to, Abitibi and Resolute. I find that this specific information, which is in dollar amounts, qualifies as "financial information." Given the appellant's submissions on this point, I find that this particular information is removed from the scope of the appeal.

[22] However, I am not satisfied by Abitibi's representations on the subject that there is any undisclosed information in the agreement and amending agreement that amounts to a trade secret, satisfies the definition of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism", or otherwise meets the definition of a "trade secret" as contemplated by section 10(1).

[23] Regardless, since I have concluded that the information remaining at issue in the records qualifies as "commercial information," I find that the requirements of part 1 of the section 10(1) test have been met. I must now determine whether this information was "supplied in confidence," as required by part 2 of the section 10(1) test.

Part 2: supplied in confidence

[24] 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.[11] 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.[12]

---

[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.

[25] 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.[13]

[26] 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.[14]

Representations

[27] As background, the town notes that while it signed the agreement, its involvement in the transaction, aside from receiving title to certain lands, was limited to the obligations described in Articles 11 and 12. Specifically, the town agreed not to "change the use" of any of the transferred parcels of land, subject to its powers as a municipality, from their existing industrial or commercial uses to a "more sensitive type of property use," without first fulfilling certain other obligations. The town also agreed, again subject to its powers as a municipality, not to use the property subject to the agreement to compete with Resolute in the production of pulp, paper and related products.

[28] The town confirms its understanding that the appellant seeks an unredacted copy of the agreement and amending agreement, but submits that the withheld portions consist of information supplied to it by Abitibi and Resolute. The town maintains that it was not involved in the negotiations resulting in the agreement and the information was supplied when the agreements were presented to the town for signature acknowledging the terms specifically affecting the town. The town submits that it understood that the undisclosed portions of the records were to be kept confidential, unless Resolute and Abitibi consented to disclose them. According to the town, therefore, the affected parties supplied the information "with a reasonable expectation of privacy."

---

[13] Order PO-2020.
[14] Orders PO-2043, PO-2371 and PO-2497.

[29] Abitibi notes that the agreement was supplied to the town strictly for its signature regarding the identified articles about change of use and non-competition. As the agreement was negotiated between Resolute and Abitibi only, the "immutability exception" under section 10(1) applies. Further, Abitibi submits that it is implicit in the nature and extent of the town's limited involvement in the transaction that the parties expected the terms of the agreement to remain confidential. Further, Abitibi submits that the undisclosed information about the transaction in the records is not for public disclosure, is not otherwise available from any source other than the parties to the agreement, and has always been treated as confidential by the contracting parties.

[30] Resolute submits that the records were negotiated between, and mutually generated by, Resolute and Abitibi only. The agreements were supplied to the town solely in its role as intervener, as evidenced by the explicit statement to that effect on the signature page, under which the town "intervenes to this Agreement to acknowledge and agree to the provisions of Article XII." Resolute maintains that the records were supplied to the town with a reasonable and explicit expectation of confidentiality and bolsters this argument with references to relevant provisions in its confidential (withheld) representations. These provisions, Resolute argues, support the assertion that it prepared, viewed and treated the records in a manner that demonstrates an ongoing concern for confidentiality. Resolute concludes that by not having made the agreements available on any registry or through sources to which the public has access, it has established that they were supplied in confidence to the town with a reasonably held expectation that they would not be disclosed.

[31] The appellant questions how one could know that the records were "supplied" since "there is no record, no legal counsel, and not one minute from the meetings on [three listed dates.]" In the appellant's view, the town was "much more than an intervener;" he maintains that this is a tri-party agreement and suggests that the two affected parties "didn't understand public exposure with a public partner, the Town." To honour the town's public responsibilities, he argues, there should be public disclosure of the town's agreement with Resolute and Abitibi. Further, the appellant states that "… it strongly appears there is no prior agreement to confidentiality and privacy" and he suggests that any expectation of confidentiality in these circumstances could not be reasonable. The appellant also suggests that the partial disclosure of portions of the agreement brings into question the confidentiality of the agreement overall.

Findings

Supplied

[32] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1) of the *Act*. This is because the provisions of such contracts are viewed as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from

a single party. A number of decisions of the Divisional Court have affirmed this office's approach to section 10(1) (and section 17(1) of *FIPPA*).[15]

[33] However, what happens when neither of the parties to a contract are institutions under the *Act*? Based on the existence of the town's obligations under articles 11 and 12 of the agreement, the appellant argues that the town is a party to it. He maintains there should be full public disclosure of what he views as the town's agreement with Resolute and Abitibi because, he argues, it was not supplied. I do not accept this argument. In my view, which is based on a review of the representations and the records at issue, the undisclosed portions of the agreement and the amending agreement, with one exception addressed below, speak exclusively to the obligations and entitlements of two private parties under a contract they negotiated.

[34] Several past orders have addressed situations where private contracts entered into by non-governmental entities find their way into an institution's records, despite the fact that an institution is not party to the agreement. In those cases, the information in such records has been found to qualify as having been supplied in confidence as required by part 2 of the section 10(1) test.[16] In this appeal, I accept the representations of the town and the affected parties that the town is simply an intervener to the agreement. In effect, therefore, the agreement between Abitibi and Resolute is of a hybrid nature under part 2 of section 10(1) of the *Act.* In this context, the town intervenes to the agreement between Abitibi and Resolute, not as a party with a set of substantial and direct interests in it, but as a party with limited, discernible interests in certain terms. On my review of the severed record, the town has disclosed almost all terms of the agreement that delineate its own interests. Therefore, I find that all of the undisclosed provisions of the agreement (except one) and the amending agreement were not mutually generated between the town and the affected parties. Accordingly, these records were supplied for the purpose of part 2 of the test for exemption under section 10(1).

[35] The minor exception is that section 6.5(g) of the agreement, which relates to the transfer of property to the town, is withheld. However, the amending agreement's corresponding provision, section 2.p., which revises section 6.5(g) of the agreement, was disclosed. This appears incongruous, since both relate to the provision under which the town was to receive title to certain property. Also withheld from the amending agreement were the Directions for Title – signifying the title transfer – which feature

---

[15] This approach was approved by the Divisions Court in *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.) at para. 18; *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 at paras. 46 and 56; *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario,* 2012 ONSC 3496 at para. 10; *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 at para. 27 and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario* 2015 ONSC 1392 at para 13.

[16] Orders PO-2020, MO-3019 and MO-3105.

signatures by town authorities, as well as the corresponding list of properties in Schedule A. In this particular context, and with consideration of the well-established treatment of agreed-upon terms in agreements between institutions and third parties, I am not persuaded that these specific portions of the agreements were "supplied" for the purpose of section 10(1) of the *Act.* Since these parts do not meet the test for exemption under section 10(1), I will order them disclosed.[17]

In confidence

[36] As for the requirement that information be supplied *in confidence* under part 2 of the test under section 10(1), I am satisfied that the town's decision to disclose certain portions of the agreements does not, by itself, refute the reasonableness of any expectation of confidence in the undisclosed portions. The town argued that it understood that it ought not to disclose the remaining portions of the records, unless Resolute and Abitibi consented. Pointing to certain provisions of the agreement in its confidential representations, Resolute and Abitibi maintain that the undisclosed portions of the agreement have always been treated as confidential and continue to be unavailable through public sources. For his part, the appellant argues that any expectation of confidentiality in these circumstances could not be reasonable because the two parties knew in advance that they were dealing with an institution subject to access to information legislation.

[37] In the circumstances, I accept that the agreement between Abitibi and Resolute, to which the town intervened to acknowledge certain ancillary obligations, is not publicly available. I also accept their submission that as a matter of practice, the terms of such agreements are not disclosed. In my view, the expectation of confidentiality here is somewhat diminished, given the absence of any express provisions in the agreement signaling that the agreement was communicated to the town on the basis that it was confidential and that it was to be kept in confidence. The provisions referred to by the affected parties[18] in support of the reasonableness of their expectation speaks to communication with the public, not any confidence with which the agreement might be held once in the town's record holdings.

[38] Overall, however, I am satisfied that the affected parties held an implicit (if not explicit) expectation of confidentiality with respect to the disclosure of the undisclosed portions of the agreement and that the expectation was reasonable. Therefore, I find that the "in confidence" requirement of part 2 of the section 10(1) test has been established with respect to these portions.

---

[17] Regarding the properties to which the town assumed title with the closing of the Asset Purchase Agreement, it appears from the appeal file that they were already identified and disclosed to the appellant, although he seems to have expressed concern about the format and/or sufficiency of this disclosure.

[18] These provisions in Article 15 of the agreement were disclosed to the appellant during the inquiry.

[39] In sum, I find that the relevant portions of the agreement and the amending agreement, which were entered into by Abitibi and Resolute, were supplied in confidence to the town for the purpose of binding the town to its limited, ancillary use and non-compete obligations. Therefore, I find that the second part of the section 10(1) test has been met.

Part 3: harms

[40] To meet this part of the test, the town and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[19]

[41] 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.[20]

[42] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1).[21] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[22]

Representations

[43] The town states that it provided the appellant with the records the affected parties agreed to disclose by consent under section 10(2),[23] but it withheld the remaining information because its disclosure could reasonably be expected to result in the harms enumerated in section 10(1)(a). The town does not elaborate on that position.

[44] Abitibi argues that there is a reasonable expectation of probable harm with disclosure[24] of the redacted portions of the records, which describe:

- assets acquired by Abitibi from Resolute

---

[19] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[20] Order PO-2020.
[21] Order PO-2435.
[22] Order PO-2435.
[23] Section 10(2) states: "A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure."
[24] Relying on *Merck Frosst*, cited above.

- prices paid by Abitibi,
- terms upon which Abitibi acquired the property, and
- obligations assumed by Abitibi.

[45] According to Abitibi, a third party with knowledge of the details of the transaction and amounts paid will have an advantage in any future negotiations with Abitibi respecting the acquired assets. Further, Abitibi submits that disclosure would reveal the structure of agreements used by Abitibi to acquire environmentally challenged properties, information which is not publicly available and which would provide an advantage to its competitors in such acquisitions, with corresponding detriment and prejudice to Abitibi's competitive position in future transactions. Providing a complete copy of the agreements to the appellant would permit him to realize an economic benefit by selling information to a third party, which in turn, would "interfere significantly in contractual negotiations between Abitibi and third-parties involving on-going and future dealings" related to the property and assets.

[46] Resolute quotes from Order MO-1706, where Adjudicator Bernard Morrow observed that the exemption in section 10(1) is intended to recognize that while carrying out public responsibilities, government agencies often receive confidential information about the activities of private businesses. Adjudicator Morrow noted that the purpose of section 10(1) is to protect the 'informational assets' of businesses that provide information to the government, as is the case in this appeal. Resolute submits that the release of the undisclosed commercial terms and details of the agreement would expose its informational assets to significant exploitation by competitors for the purpose of section 10(1)(a) because knowing details such as the price or its obligations would hand them an economic advantage. Resolute's representations regarding the harm to its future negotiations with disclosure of information about its internal processes for attracting purchasers and negotiating agreements are similar to those provided by Abitibi.

[47] Both Resolute and Abitibi submit that there is no compelling public interest in disclosure because this is a commercial arrangement between two private entities and there is no issue of "public accountability" associated with the withheld information. Abitibi notes that no aspect of the agreement makes the town liable for environmental clean-up costs for the former mill and, in any event, any provisions of the agreement that relate to the town have already been disclosed.[25] Resolute submits that there is no evidence of public discussion or concern raised about the propriety of the asset sale outlined in the records.

---

[25] As noted, Abitibi consented to the disclosure of additional portions of the agreement in its representations (6.1-6.3, 6.7, 7.1, 7.3, 9.2, 14.1, 14.2 and XV); as stated, the town disclosed this information during the inquiry.

[48] The appellant submits that there can be no harm to the affected parties resulting from disclosure of a complete, unredacted copy of the agreement and amending agreement since "the demolition of a paper mill … cannot prejudice significantly anything." He explains that "the competitors are thanking Resolute for mothballing it and now bulldozing it, [because] more tonnage out of the marketplace maintains higher prices and margins for all, … how could they exploit a demolition?" The appellant also argues that since Resolute has already sold its interest in the mill property and assets, there is no longer inherent value to Resolute and, by extension, no possibility of harm to Resolute with disclosure of the agreement.

[49] As for harms to Abitibi's business interests in "environmentally challenged properties," the appellant submits that there are thousands of companies in the demolition business and disclosure of the agreement could not possibly be detrimental in this context. The appellant submits that Abitibi has merely "been hired to demolish the paper Mill, and sell some of the antique operational equipment… [so spinning this situation] into the atmosphere of 'prejudice significantly' is totally unfitting."

[50] Regarding the alleged harm related to him (the appellant) selling the information to competitors, thereby leading to a reasonable expectation of financial loss to the affected parties, the appellant responds by noting that he is "… not in the business of historic paper mill parts, antiques, metal and bulldozing." Further, the appellant questions what future negotiations there are, or could possibly be, in respect of the mill property: "they bought the whole 130 acres, building and bridge, so what is there to do to tilt anything?"

[51] Finally, regarding the public interest position taken by the affected parties, the appellant states that there is a compelling interest "to warrant exposure" of the entire agreement. Since "our community is the big loser here; they should know what's going on." Regarding the purpose of section 10(1) described in Order MO-1706 (and quoted by Resolute), the appellant submits "This is 'How to Demolish a Paper Mill 101', that's it. Shed light on the operation of government? What does this have to do with disclosure?"

Analysis and findings

[52] As indicated previously, I am proceeding with my analysis of the harms issue on the basis that any "financial information" in the agreements falls outside the scope of the appeal, in accordance with the appellant's submissions on the subject.[26]

[53] As I stated in Order PO-2987, the determination of the reasonableness of the expectation of harm under part 3 of section 10(1) "must be approached thoughtfully, with consideration of the tests developed by this office, as well as an appreciation of the commercial realties of a procurement process and the nature of the industry in

[26] See discussion under Part 1 of the section 10(1) test, above.

which the procurement occurs …"[27] Order PO-2987 specifically addressed records relating to a government procurement process, but the observation is equally relevant here, where the records at issue arise in the context of an agreement between two private parties. Further, the quality and cogency of the evidence presented, including the positions taken by affected parties about the commercial realities and nature of the industry in which they operate, the passage of time, and the nature of the records and the information at issue in them must be considered. The strength of an affected party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability.[28]

[54] I find the fact that the agreement at issue here does not reveal a joint business venture between the town and either of the third parties to be relevant. Rather, based on the parties' representations and the content of the records themselves, I accept that the town simply "intervenes to this Agreement to acknowledge and agree to the provisions of Article XII." The amending agreement clarifies that the town also acknowledges and agrees to "section 11.2 of the agreement." I accept that these terms and the intervening acknowledgment clarify the town's limited obligations respecting change of use and non-competition in this agreement between Abitibi and Resolute.

[55] Based on the evidence provided, I am satisfied that, with a few exceptions, disclosure of the withheld provisions and schedules of the agreement could reasonably be expected to result in section 10(1)(a) harms to Abitibi or Resolute. There are certain undeniable realities about the challenges and decline faced by the pulp and paper industry in northern Ontario and other parts of Canada which support the reasonableness of Abitibi's desire to protect from disclosure the structure of the agreements it uses to acquire environmentally challenged properties. Likewise, I am satisfied that the disclosure of the agreement provisions corresponding to Resolute's obligations in divesting itself of the mill property could reasonably be expected to lead to similar section 10(1)(a) harms to it, in the context of its business imperative to attract purchasers for such properties and assets. That is to say that, in this particular context, I accept the reasonableness of the expectation of harm with disclosure of certain key withheld terms.

[56] The appellant dismisses the suggestion that he could personally realize an economic benefit by selling the withheld information to a third party. However, the appellant's own use of any disclosed information cannot be viewed in isolation from the potential use to which it could be put generally, if made public. It is accepted that disclosure under the *Act* is disclosure to the world. The appellant dismisses the arguments of the affected parties, in part, because he does not believe that the physical assets of the old mill property have much value themselves. However, this misses the

---

[27] See also Orders PO-2965 and MO-1888.
[28] Orders PO-2987 and MO-2496-I.

point. Clearly, the assets themselves are not at issue here. Rather, the real value to the affected parties lies in the approaches taken by each of them in successfully negotiating these types of agreements. I accept that there is a reasonable expectation of harm to future dealings and negotiations related to the property and assets of the Iroquois Falls mill and other similar properties if these approaches and methods as conveyed in the agreement are disclosed. In my view, the appellant has not provided any submissions to effectively dispute or challenge the reasonableness of such an expectation of harm.

[57] Therefore, I am satisfied that disclosure of certain withheld portions of the agreement and amending agreement could reasonably be expected to interfere significantly with contractual negotiations between Abitibi and third parties involving ongoing and future dealings involving the property acquired from Resolute, future acquisitions made by Abitibi or, further, sales made by Resolute. Specifically, I am satisfied that the affected parties have established part 3 of the test for exemption under section 10(1) and that it applies to the terms of the agreement and amending agreement related to purchase and sale, the parties' representations and warranties, terms of indemnification, remediation, other transactions related to the main agreement and the corresponding schedules.

[58] As stated above, however, there are exceptions to my finding that section 10(1) applies to the undisclosed portions of the records. The town has disclosed nearly all provisions that affect its interests, thereby reflecting, for the most part, the transparency objective of the *Act.* However, the evidence provided by the parties opposing disclosure was not sufficiently persuasive to support a reasonable expectation of probable harm resulting from disclosure of the severed parts of the Table of Contents relating to *disclosed* terms, provisions that are inextricably connected to ones already disclosed, or definitions and terms that are so generic or ubiquitous in nature as to belie the reasonableness requirement of the expectation of harm under section 10(1).

[59] Additionally, as noted, the appellant was granted access to additional portions of the agreement during the inquiry, based on consent by Abitibi and Resolute under section 10(2) of the *Act.* However, terms in the amending agreement that modify some of those same provisions between Resolute and Abitibi that were disclosed to the appellant remain withheld. In my view, the disclosure of the original terms diminishes the expectation of harm with disclosure of the amended terms, in the absence of convincing evidence otherwise from the affected parties or the town. Accordingly, I find that the requisite expectation of harm for the purpose of part 3 of section 10(1) is not established for sections 2.m, 2.t and 2.y of the amending agreement, which deal with the disclosed sections 6.1, 6.7(g) and 14.1(h) of the agreement. I will order these terms disclosed.

[60] Before I conclude, I will address the appellant's submissions, and those of Resolute and Abitibi, on the subject of the public interest. While the possible application of the "public interest override" in section 16 to override section 10(1) was not specifically raised in this appeal, each of these parties commented on the public interest

in their submissions. The appellant's view is that the full, unredacted agreement should be made public because the people of the town have a right to know the fate of the mill property and assets, given the significance of the mill in the town's history. Conversely, the affected parties take the position that there is no compelling public interest in disclosure of the withheld terms of this commercial arrangement between two private entities.

[61] For section 16 to apply to override the application of section 10(1), the evidence would have to establish, first, that a compelling public interest exists in disclosure of the specific records and, second, that the interest clearly outweighs the purpose of the mandatory third party exemption. Therefore, the first – and key – consideration is whether a compelling public interest exists *in the exempt portions of the agreement*. In the circumstances, I am satisfied that there is no compelling public interest in the portions of the agreement and amending agreement that are to remain withheld. This conclusion takes into account that the town already disclosed, or will be ordered to disclose as a consequence of my findings, the parts of the agreement that directly impact or affect the town's interests. In my view, this disclosure permits scrutiny of the town's involvement in the Resolute-Abitibi transaction by the public.[29] In the circumstances of this appeal, therefore, the first part of the test for the application of section 16 of the *Act* is not established, and I find that the public interest override does not apply.

[62] In summary, I find that section 10(1) applies to some portions of the agreement and amending agreement and that these portions are exempt accordingly. I will order the town to disclose the portions that are not exempt, as they are identified in the discussion, above, and in the order provisions, below.

B. Did the town conduct a reasonable search for responsive records?

[63] As stated previously, the appellant believes that there must be records or more records responsive to items 3, 5, 6, 7, 8 and 9 of his request. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[30] If I am satisfied that the search carried out by the town was reasonable in the circumstances, I will uphold its decision. If I am not satisfied, I may order further searches.

[64] The *Act* does not require the town to prove with absolute certainty that further records do not exist. However, the town was required to provide sufficient evidence to

---

[29] See the discussion of the purpose of access to information legislation and democracy in *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20 (CanLII), 93 O.R. (3d) 563; and *Dagg v. Canada (Minister of Finance),* 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, [1997] S.C.J. No. 63, at para. 61.
[30] Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records[31] within its custody or control.[32] To be responsive, a record must be "reasonably related" to the request.[33]

[65] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[34]

[66] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[35]

Representations

[67] The town's representations address this issue by providing responses to each part of the request that was identified as remaining at issue at the end of the mediation stage: parts 3 and 5 to 9. I set out the appellant's representations below the town's submissions on each outstanding part of the request.[36] Abitibi and Resolute also address these other parts of the request, but since their comments do not add materially to the evidence provided by the town about the existence and locating of responsive records, these submissions are not fully outlined here.

> *Part 3 – "town's protection from environmental cleanup:"* there is no aspect of the agreement that exposes the town to, or protects it from, environmental clean-up costs relating to the past operation of the mill; under the agreements, certain remediation will be performed and paid for by Abitibi, but no information or documentation about that work has been provided to the town by either company.[37]
>
> The appellant's representations on part 3 do not address what records he believes ought to exist in the town's record holdings.

---

[31] Orders P-624 and PO-2559.
[32] Order MO-2185.
[33] Order PO-2554.
[34] Orders M-909, PO-2469 and PO-2592.
[35] Order MO-2246.
[36] Overall, the appellant expresses consternation with the town's perceived: lack of communication, openness and transparency, refusal to follow certain processes under the *Municipal Act* (etcetera), failure to "do its homework," and "negligence" in failing to protect the community from costs and other liabilities he believes are associated with the decommissioned mill property. These submissions are outlined only insofar as they touch upon the reasonable search issue. As stated at the beginning of the order, I have no authority to address these matters otherwise.
[37] This statement is also reflected in Abitibi's representations.

Part 5 – "trestle bridge ownership:" Abitibi owns it but the town has no records about that or, in fact, any documentation respecting Abitibi's assets, property or business.

The appellant comments that the sign posted on the trestle bridge states (Abitibi) Riversedge and the Town of Iroquois Falls. He questions why the town's name is on the sign and seems to be concerned that there is some sort of arrangement between the town and Abitibi about which there must be records. The appellant mentioned meeting minutes that might show council approving the showing of the town's name on the sign.

In reply, the town notes that the sign merely identifies the location of the bridge within the town, not any particular relationship with Abitibi.

Part 6 – "town's research in selecting Abitibi:" Abitibi, not the town, acquired assets under the agreement from Resolute. The town entered into agreements about the former Resolute mill property with another company in March and May 2015, pursuant to specific By-laws, which are available on-line.[38]

The appellant submits that there must be documentation of town "… council's actions/research, homework, etc. including a credit check [and reference check] in selecting the new proponent in taking over Resolute Forest Product former paper mill and property." The appellant seems to be taking issue here with the form, and extent, of disclosure of the records related to the parcels of land transferred to the town by Abitibi pursuant to the agreement.

Part 7 – "request for proposal" related to the agreement: the assets subject to the agreements belonged to Resolute, not the town and no documentation regarding any process followed by Resolute before entering into that agreement was provided to the town.

Other than asserting that the town, as a "partner" to the agreement, ought to have advertised more widely for bids to take over the Resolute mill, the appellant's submissions on this part of the request do not identify records that ought to exist in the town's record holdings.

Part 8 – "town's costs for legal services to implement and execute" the agreement: no such costs were incurred by the town because Abitibi and

---

[38] The town's representations did not contain this detail about the agreements with the third company; instead, the town refers to information contained in its initial access decision, which I reproduce here. The March 2015 agreement related to a pre-feasibility study done on the mill property, while the May 2015 agreement dealt with putting out options for potential investors.

> Resolute paid them and did not provide any documentation to the town regarding this payment.
>
> The appellant questions why the town did not retain its own legal counsel for the transaction but his representations do not identify any specific responsive records that he believes ought to exist in the town's record holdings.
>
> *Part 9 – "town's related costs to implement" the agreement:* the town played a very limited role in implementing the agreement. Title to parcels of vacant land and a residential property were conveyed and the related documents are on public record. Abitibi and Resolute paid the associated professional fees but no documentation was provided to the town regarding this payment.
>
> The appellant's submissions do not address this part of the request.

[68] The appellant questions why the town did not comment on records responsive to part 2 of the request (agenda and minutes of two specific council meetings) and argues that the town "denied agenda, meeting notice, minutes etc." The appellant's representations also challenge the town regarding its alleged non-response regarding records responsive to part 4 (future forestry uses/restrictions for the mill). I note that the town's search for records responsive to parts 2 and 4 of the request had not been challenged by the appellant on appeal (until these representations) and the town was not, therefore, asked to comment on these parts. However, as part of its section 10(1) submissions, the town states that the only documentation of the future factory uses and restrictions relating to the former Resolute paper mill (part 4) are the relevant provisions contained in the agreement.

Analysis and findings

[69] Having considered the evidence before me, I am satisfied that the search conducted by the town for records responsive to the appellant's request was reasonable and is in compliance with the town's obligations under the Act.

[70] As previously explained, a reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends reasonable effort to locate records that are reasonably related to the request. In the circumstances of this appeal, I find that the town provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and to locate responsive records within its custody or under its control.

[71] As I observed above, although a requester will rarely be in a position to indicate precisely which records an institution has not identified, he must still provide a reasonable basis for concluding such records exist. While I acknowledge that the appellant is of the view that additional records should exist to demonstrate that the

town participated in the asset purchase agreement having "done its homework," I have not been provided with a reasonable basis for concluding that any additional such records exist in the town's record holdings. Indeed, although the appellant's position is articulated at length, the aspects of it that relate to the types of records he believes ought to exist are largely speculative in nature and are premised on the assumption that the town is an equal party in this agreement, which I accepted, above, it is not. In this regard, I refer specifically to the existence of records related to the research or procurement processes he believes the town participated in, or ought to have participated in. As discussed in greater detail under my analysis of section 10(1), above, this is an agreement between two private parties under which the town's status as an intervening party circumscribed its role and obligations.

[72] In this context, therefore, I find that I have not been provided with a reasonable basis to conclude that additional records responsive to parts 3 and 5 to 9 of the request that would document the town's protection from, or liability for, responsibilities and costs related to this asset purchase agreement exist in the town's record holdings, but were not located by the town's searches. I note here that the town provided answers or explanations for those parts of the request regarding which no records were identified. The fact that the appellant may not accept the explanations provided to him for there not being records responsive to the various parts of his request does not, by itself, render his belief that additional responsive records should exist a reasonable one.[39]

[73] As stated, the town's obligation under the Act is to demonstrate that it has made a reasonable effort to identify and to locate responsive records in its custody or under its control. In the circumstances of this appeal, I accept that it has done so. On that basis, I uphold the town's search and dismiss that aspect of the appeal.

ORDER:

1. I uphold the town's decision under section 10(1) of the *Act*, in part. The portions of the records that are exempt are highlighted in orange on the copies of them provided to the town with this order. These portions are not to be disclosed.

2. I order the town to disclose the remaining non-exempt portions of the records to the appellant by **October 20, 2017** but not before **October 16, 2017.**

3. I uphold the town's search for records.

Original Signed by: September 15, 2017
Daphne Loukidelis
Adjudicator

[39] Order MO-2554.