

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3603

Appeal MA16-615-2

Region of Peel

May 4, 2018

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Region of Peel (the region) for a copy of the audio recording of a meeting regarding water fluoridation. The region disclosed a transcript of the meeting in part. The region is ordered to disclose a copy of the audio recording and transcript of the meeting, withholding some personal information the appellant does not want.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 10, 14, 23.

OVERVIEW:

[1] The appellant made a request to the Region of Peel (the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an audio recording of a meeting about water fluoridation.

[2] The region advised the appellant that it needed to create a transcript of the audio recording to adequately respond to the request.

[3] The region invited affected party speakers whose information was contained in the meeting transcript to provide their views on whether to withhold information in it under the exemption for third party information in section 10 of the *Act*.

[4] The region did not seek the affected parties' views on whether it should disclose

information the region had decided to withhold under section 14 (personal privacy).¹

[5] Three affected parties consented to the region disclosing information about them in the record to the appellant, though one of the three agreed with the region withholding a small amount of information about them under section 14. Two affected parties objected to their information being disclosed.

[6] The region subsequently granted partial access to the transcript of the audio recording, withholding some information under section 14 and all of one affected party's statements.

[7] The appellant appealed the region's decision, in part because she had requested a copy of the audio recording of the meeting, not a transcript. In addition, she continued to pursue access to the withheld information, except any personal contact information. The appellant also suggested there was a public interest in disclosing the record, thereby raising the application of section 16 of the *Act*.

[8] During mediation, the region confirmed that although its index of records referred to the section 10 and 14 exemptions, it was withholding information under section 14 only.

[9] The appeal was not resolved during mediation and proceeded to the adjudication stage, where an inquiry is conducted.

[10] The inquiry began by inviting representations from the region on the following issues:

- whether the audio recording was responsive to the appellant's request for the purposes of section 23 of the *Act*,
- whether section 14 applied to the information it had withheld in the transcript, and
- whether the public interest override in section 16 of the *Act* applied.

[11] The appellant was invited to provide representations on the same issues as the region and on the region's representations.

[12] I also invited the affected party whose statements the region withheld to provide representations on whether section 10 or 14 applied to those statements.

[13] This order finds that the region must disclose a copy of the audio recording to the appellant, withholding only some personal information identified in the order that

¹ Except for one affected party, who did have the information the region proposed to withhold under section 14 shared with him, as discussed further below.

the appellant does not want.

RECORDS:

[14] At issue in this appeal is the record of a January 21, 2016 Special Regional Council Meeting, in audio and transcript format.

[15] The region is withholding information in the transcript at pages 25, 26, 30, 45, 50, 57, 68, 69, 72, 73, 76 and 77 under section 14 of the *Act*.

[16] In addition, the region has not yet disclosed any statements of one affected party. The issue is whether the region must withhold any of the affected party's statements under sections 10 or 14 of the *Act*.

ISSUES:

The issues in this appeal are:

- A. Is the audio recording responsive to the appellant's request?
- B. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory exemption at section 14 apply to the withheld information?
- D. Does the mandatory exemption at section 10 apply to an affected party's statements in the record?
- E. Is there a compelling public interest in disclosing the record that clearly outweighs the purpose of any applicable exemptions?

DISCUSSION:

A. Is the audio recording responsive to the appellant's request?

[17] The appellant's initial request to the region was for a copy of the audio recording of the meeting at issue. The region did not disclose any of the audio recording to the appellant. Instead, the region transcribed the audio recording and partially disclosed that transcript to the appellant.

[18] Section 23 of the *Act* states:

Copy of record

23 (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.

Access to original record

(2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

Copy of part

(3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

[19] Previous orders have determined that where a requester seeks access to a record in a format other than that in which the record exists, the institution is required to effect the change of format where it is reasonably practicable for it to do so.² However, in this appeal, the record at issue in its original format is an audio recording. The region transcribed the audio recording in the course of responding to the appellant's request.

[20] In its representations, the region accepts that the audio recording is responsive to the appellant's request. It explains that it created the transcript for ease of administration when consulting with affected parties. The region acknowledges that it needs to provide an audio recording to the appellant. I agree that the audio recording is responsive to the appellant's request.

[21] Because the parties' representations reference page numbers in the transcript, for continuity I will continue to refer to the transcript pages in this order. However, it is clear that the region must disclose a copy of the audio recording to the appellant, with any applicable redactions made to it, to respond to the appellant's request.

B. Does the record contain "personal information" as defined in section 2(1)? If so, to whom does it relate?

[22] Certain exemptions in the *Act* are relevant if a record at issue contains personal information. Therefore, it is necessary to determine whether the record contains "personal information," as defined in section 2(1) of the *Act*, and, to whom it relates.

² Orders PO-1775 and PO-2424.

Representations

[23] The region submits that information in the record falls within the categories set out in paragraphs (a) (pages 25, 26, 30, 45, 68, 69, 76, 77) and (b) (pages 25, 26, 30, 50, 57, 69, 72, 73) of the definition of "personal information" in section 2(1) of the *Act*. These paragraphs state that the definition of personal information includes:

a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

[24] The region submits that the personal information relates primarily to the speakers, including their national or ethnic origin, sexual orientation, marital and family status, and employment and medical history. The region also states that in several instances, the withheld information contains information about speakers' family members, including their medical history.

[25] The region submits that if the information identified above does not fall into the examples listed in 2(1) of the *Act*, or the information relates to a person in a professional, official, or business capacity, the information in the record should nevertheless qualify as personal information. The region argues this is because the list under section 2(1) is not exhaustive, and each identified instance of information in the record is about an individual in a personal capacity. The region cites Order MO-2344 in support of its submission.

[26] The appellant submits that she is not seeking personal information as defined in the *Act*. The appellant submits that her interest is in:

- statements made by anyone relating to the safety and efficacy of fluoridated water, fluoride and water fluoridation in general, and the region's fluoridation chemical, hydrofluorosilicic acid.
- the titles, designations, educational and professional qualifications and experience of the invited experts, and their relevant affiliations (i.e. relationships with lobby groups etc.).

[27] The appellant submits that the Region invited affected party speakers to the meeting on the premise that they are experts in the field of water fluoridation and/or toxicology and/or dentistry. She submits that if the speaker's qualifications are mentioned, that information ought to be disclosed, as it relates to the credibility and motivations of the experts and their suitability for inclusion in the meeting.

[28] Regarding information withheld on pages 50, 68 and 69, the appellant submits that she understood that the affected parties whose information is contained on these pages consented to all of their statements being released. The appellant notes that those redactions do not concern her if the affected parties did not consent.

[29] The affected party whose statements were withheld entirely by the region submits that portions of his representations at the meeting describe life experiences and oral health/oral disease descriptions of him, his children and patients.

Analysis and findings

[30] I have reviewed all of the withheld information in the transcript. I am satisfied that the information withheld by the region at pages 25, 26, 30, 50, 57, 68, 72-73 and 77 is personal information of affected parties. I am also satisfied that some of the withheld information on pages 45 and 69 is personal information. The personal information in the records reveals the ethnicity, medical history, marital and family status, assets or employment history of the speakers at the meeting and their families. In the one instance where the affected party is a councillor, the information relates to their medical history.

[31] Some of the information withheld by the region at pages 45 and 69 is not personal information, and none of the information withheld on page 76 is personal information.

[32] The personal information comprises a small portion of the information in the record. The vast majority of the information in the record is not personal information because it is information associated with the affected parties in a professional, official or business capacity, which is not considered to be about the individual.³ The context for the creation of the record is that speakers were invited to present to the region on the topic of fluoridation because of their professional knowledge and experience.

[33] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴ The information I identified above as personal information falls into that category.

Affected party consent

[34] As explained above, the region decided to seek affected parties' views only on whether section 10 might apply to the record. It did not seek affected parties' views on whether they consented to disclosure of the information the region withheld under section 14. This is why, despite the apparent unconditional consent of the affected

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

party whose information is withheld on page 50, there is not a valid consent to disclose this information. The region did not provide the affected party with a copy of the information the region withheld under section 14 on page 50, so the affected party's consent does not extend to disclosing that information.

[35] The region did send one affected party a copy of the information it intended to withhold about that affected party under section 14 and the affected party subsequently consented to the region disclosing some of it. The information the consent applies to is at page 57 of the record.

[36] Also, one affected party who advised the region they consented to disclosure expressed their consent in such broad terms that, unlike other affected parties' consents, I am satisfied that it unambiguously applies to all of the affected party's personal information in the records. The only information that is solely this affected party's personal information is some information on page 69.

[37] The appellant indicated that they do not want personal information. However, as I noted above, the appellant understood that some affected parties had consented to disclosing their information, so the region should not withhold it. For the two affected party consents discussed above, I agree with the appellant. The personal information of those affected parties should be disclosed to the appellant under section 14(1)(a) of the *Act* because the affected parties consented to it being disclosed. The information that falls into this category is some information on pages 57 and 69. I have highlighted in the copy of pages 57 and 69 accompanying the region's copy of this order the personal information of affected parties who did not consent to their personal information being disclosed that must continue to be withheld. The remaining (unhighlighted) information the region withheld on pages 57 and 69 must be disclosed.

Conclusion: personal information

[38] I am satisfied that other than expressing an interest in the personal information that affected parties consented to disclose, the appellant does not seek access to personal information withheld by the region. I am also satisfied that none of the withheld personal information is the type of information the appellant described as being interested in.

[39] Accordingly, I do not need to consider further the personal information the region withheld under section 14 that affected parties did not consent to disclose (Issue C), or whether the public interest override might apply to the information withheld under section 14 (part of Issue E).

[40] In a copy of pages 45, 57 and 69 that accompanies the region's copy of this order I have highlighted the information that is personal information. The appellant does not want this information so it can continue to be withheld, being outside the scope of the appellant's appeal. The remaining information the region withheld on these

pages and the withheld information on page 76 must be disclosed, for the reasons discussed above.

THIRD PARTY INFORMATION

D. Does the mandatory exemption at section 10 apply to an affected party's statements at the meeting?

[41] As noted above, the region's position is that section 10 does not apply to any information. However, one affected party objected to the region disclosing his statements at the meeting, so I will now consider whether section 10 applies to the affected party's statements that are not personal information.

[42] When an institution decides to disclose a record or part of a record where section 10 may apply, the burden of proof that the record or part of the record falls within that mandatory exemption falls upon the individual or entity resisting that disclosure, in this case, the affected party who objected to his statements at the meeting being disclosed.

[43] I note that while the affected party did not directly refer to section 10 in his representations, his representations are relevant to whether section 10 applies.

[44] Section 10(1) 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;
- (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
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[45] Section 10(1) is designed to protect the confidential "informational assets" of

businesses or other organizations that provide information to government institutions.⁵ 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.⁶

[46] For section 10(1) to apply, 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

[47] The types of information listed in section 10(1) have been discussed in prior orders. Of particular relevance in this appeal, Order PO-2010 states that 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.⁷

[48] I am satisfied that Part 1 is met, because the affected party's statements in the record comprise scientific information. The affected party is a known expert in public health, particularly relating to dental health. His purpose in speaking to councillors was to share his expertise from observations and research on the specific issue of water fluoridation. His statements at the meeting communicate his conclusions about fluoridation of public water supplies.

⁵ *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.*).

⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁷ Order PO-2010.

Part 2: supplied in confidence

Supplied

[49] 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.⁸

[50] 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.⁹

In confidence

[51] In order to satisfy the “in confidence” component of part two, the party 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.¹⁰

[52] 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 disclosure¹¹

[53] It is clear that the affected party speaking at the meeting satisfies the supplied requirement.

[54] I am also satisfied that the information was supplied in confidence.

[55] The meeting transcript clearly demonstrates that the region intended the meeting to be a closed and confidential meeting. The council subsequently found that it did not have the authority for the meeting to have proceeded on an in camera basis.

⁸ Order MO-1706.

⁹ Orders PO-2020 and PO-2043.

¹⁰ Order PO-2020.

¹¹ 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.

[56] The appellant submits that the invited speakers spoke in a room containing approximately 50 people. Regardless of the number of people in the meeting room, I am satisfied from my review of the record that the region took steps to ensure that only authorized individuals were present in the meeting room once the meeting proceeded in camera.

[57] The subsequent finding that the region's meeting was not validly in camera does not undermine the affected party's understanding that he was presenting to an in camera, and therefore confidential, meeting. The affected party's representations are clear that he was advised that the meeting was secure and only for those present, and he had no reason to question this. The region's actions at the meeting to ensure only authorized individuals were present support the reasonableness of this belief.

[58] I am satisfied that the affected party's expectation of confidentiality was reasonable. The affected party's statements therefore satisfy the supplied in confidence requirement of Part 2.

Part 3: harms

General principles

[59] The party resisting disclosure 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.¹²

[60] 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 cannot 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*.¹³

[61] As noted above, the affected party's representations did not refer to section 10. However, the representations contain several arguments that address whether harm would occur if the affected party's statements are disclosed. I will outline the affected party's arguments and then consider whether any of the section 10(1) harms are established. I note that several of the affected party's arguments regarding harm are predicated on the information at issue being personal information. As no personal information of the affected party is at issue, those arguments are not relevant to considering whether disclosure will result in harm for the purposes of section 10(1). The affected party's arguments regarding harm that are relevant to section 10(1) are:

¹² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹³ Order PO-2435.

- Disclosing the affected party's presentation will break the patient-doctor confidentiality relationship and this could hurt the affected party's credibility, reputation, practice and have pecuniary ramifications affecting his livelihood.
- If the affected party had known the region was recording his presentation or that it may be made public, he would have presented it differently.
- The presentation is the affected party's intellectual property, which he invested heavily in developing. He submits that it is a part of his livelihood and should not be made public without his permission because it may then be used in the media, press, mass communications, internet or social media, impacting his livelihood.
- The affected party is not comfortable with providing detailed evidence based scientific information to strangers, without appropriate context and scientific resources. He submits to do so is not in keeping with the communication and progress of science and the public's best interest.

[62] I set out the categories of harm under section 10(1) above. The harm in section 10(1)(d) relates to information supplied in a labour relations dispute so clearly does not arise in this appeal. I will discuss the other categories of harm in turn.

Section 10(1)(a): prejudice to competitive position

[63] I am not satisfied that the affected party has established that disclosing the record demonstrates a risk of significant prejudice to his competitive position or significant interference with any contractual or other negotiations. The affected party's evidence regarding his intellectual property is the only argument that may raise the issue of harm to the affected party's competitive position. However, the affected party's representations are brief and do not support a connection between disclosure of the information in the records and the harm alleged. As the affected party's own representations state, he is an internationally recognized expert who has given hundreds of presentations in several countries. His views are well known publicly, including being published in prominent academic journals, and he has been widely recognized for his expertise. The information at issue explains the scientific basis for his conclusions regarding water fluoridation. Setting aside the issue of whether the affected party's expertise is a service being offered in a competitive marketplace, given the context I have outlined, I am not satisfied that disclosing information of the type at issue creates a risk of significant prejudice to the affected party's competitive position that is beyond speculative.

Section 10(1)(b): similar information no longer supplied

[64] I find that the affected party has not established to the requisite standard that disclosing the record will result in similar information no longer being supplied to the institution. The affected party submits that had he known that information shared at

the meeting would become public he would have presented the information differently. However, this falls short of establishing that the affected party would not have presented the type of information he did present. As noted above, the affected party states that he presents frequently on public health issues. He is widely published and a known advocate on the issues the record relates to. I am satisfied therefore that disclosing the record would not result in experts, including the affected party, not making similar presentations to the one at issue in the future. Accordingly, I am not satisfied that disclosing the information at issue would deprive the region of access to the type of information in the record.

Section 10(1)(c): undue loss or gain

[65] I find that the affected party has not established to the applicable standard that disclosing the record will result in undue loss or gain.

[66] The affected party's arguments raise the risk of impact to his livelihood from disclosure of the records. However, the affected party does not establish how this could arise, except by referring to a breach of the patient-doctor confidentiality relationship. As discussed above, I am satisfied that any personal information in the record has been withheld, so patient-doctor confidentiality is not an issue. As noted above, the affected party's advocacy for certain public health measures is well known, and his presentation in the record is consistent with his public position. I therefore do not accept that disclosing the record will impact the affected party's livelihood, and certainly not cause him undue loss.

[67] In summary, I am satisfied that the affected party has not established that the prospect of disclosure of the record gives 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. As the record does not meet Part 3 of the section 10(1) test, all three parts of section 10(1) are not established and the section 10 exemption does not apply to the record. I therefore do not need to consider whether the public interest override applies to the record.

ORDER:

1. I order the region to disclose to the appellant by **June 11, 2018** but not before **June 7, 2018** a copy of the audio recording of the meeting at issue and a copy of the transcript of the meeting, withholding only the information identified in 2. below.
2. I order the region to continue to withhold the information it withheld under section 14 at pages 25, 26, 30, 50, 68, 72, 73 and 77 of the transcript and the information highlighted at pages 45, 57 and 69 of the transcript in the copy of pages 45, 57 and 69 accompanying the region's copy of this order.

Original Signed by: _____
Hamish Flanagan
Adjudicator

_____ May 4, 2018