Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3516

Appeal MA17-51

City of Greater Sudbury

November 6, 2017

**Summary:** The City of Greater Sudbury received a request under the *Act* for records relating to asphalt testing. The city decided to disclose all responsive records on the basis that the exemption for third party information in section 10(1) of the *Act* did not apply to the records. The appellant appealed the city's decision. There is no evidence the records were supplied in confidence and no evidence of harm from disclosure of the records. Therefore, the section 10(1) exemption does not apply to the records. The city's decision to disclose the records is upheld.

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

## OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Act* for records, including test results, relating to the quality of the asphalt used by a named company which held contracts with the city.

[2] The city notified the appellant and other affected parties of the request and sought their views regarding disclosure of the responsive information.

[3] After considering the appellant's submissions, the city decided to grant full access to the responsive records. The appellant appealed the city's decision.

[4] Mediation did not resolve the issue of whether the records qualified for exemption under section 10(1) of the *Act,* so the appeal proceeded to adjudication, where an inquiry is conducted.

[5] The inquiry began by inviting representations from the appellant, who bears the burden of proof, on whether section 10(1) applies to the records. The appellant did not respond to the invitation to provide representations. I therefore reviewed the records at issue and the appellant's correspondence with the city to determine whether section 10(1) applies to the responsive records.

[6] This order finds that section 10(1) does not apply to the responsive records and upholds the city's decision to disclose them to the requester.

## RECORDS:

[7] Fifty-seven records are at issue in this appeal. The records comprise asphalt test results, reports and letters relating to the test results, contract documents and an application form the appellant sent to the city.

## DISCUSSION:

[8] The sole issue in this appeal is whether the mandatory exemption at section 10(1) of the *Act* for third party information applies to the information at issue. 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.

[9] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[2]

[10] When an institution decides to disclose a record or part of a record where section 10(1) may apply, the burden of proof that the record or part of the record falls within that mandatory exemption lies upon the individual or entity resisting that disclosure, in this case, the appellant. For section 10(1) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

**Part 1: type of information**

[11] Prior orders have described "commercial information" as relating solely to the buying, selling or exchange of merchandise or services.

[12] I find that the information at issue is commercial information because it relates to commercial arrangements between the appellant and the city.

**Part 2: supplied in confidence**

[13] The requirement that the information was "supplied" to the institution reflects the purpose of section 17(1) to protect the informational assets of third parties.[3]

[14] 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.[4]

[15] The contents of a contract involving an institution and a third party will not

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[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] Order MO-1706.
[4] Orders PO-2020 and PO-2043.

normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated 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.[5]

[16] There are two exceptions to this general rule, known as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[6] The "immutability" exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[7]

[17] Some of the information at issue is clearly not supplied, comprising contracts for which there is no evidence to suggest that the inferred disclosure or immutability exceptions apply.

[18] Other information, such as the letters to the city and the test results, may meet the "supplied" requirement. However, supplied records must also satisfy the "in confidence" component of part two. To do so, the appellant must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[8] Absent evidence from the appellant, I cannot establish that any of the information at issue was supplied in confidence. The appellant has therefore not satisfied the requirements of Part 2 of the section 10(1) test. While my finding regarding Part 2 means I do not need to consider Part 3 of the section 10(1) test, I will nonetheless briefly address whether disclosure of the record gives rise to a reasonable expectation of any of the harms in section 10(1).

## Part 3: harms

### *General principles*

[19] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact

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[5] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[6] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[7] *Miller Transit*, above at para. 34.
[8] Order PO-2020.

result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[9] However, 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.

[20] In applying section 10(1) to government contracts, 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).[10]

[21] From my review of the records at issue and the appellant's correspondence with the city, I am unable to infer harm from disclosure of the information at issue, absent representations from the appellant. Accordingly, I find that part 3 of the section 10(1) test is not met.

**Summary**

[22] As the second and third parts of the section 10(1) test are not met, the section 10(1) exemption does not apply to the records at issue. I therefore uphold the city's decision to disclose the records at issue to the requester.

## ORDER:

1. I uphold the city's decision to disclose the records at issue.

2. I order the city to disclose the records at issue to the requester by **December 13, 2017** but not before **December 7, 2017**.

Original Signed by: November 6, 2017
Hamish Flanagan
Adjudicator

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