

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3669

Appeal MA16-471

Conservation Halton

October 5, 2018

Summary: Conservation Halton received a request for a number of records relating to a fill operation on a specified site. The conservation notified affected parties, one did not consent to disclosure of the identified records, one provided consent to disclose and another did not provide representations. Ultimately, the conservation issued an access decision granting access to all of the records. One affected party appealed this decision, opposing any disclosure of the records claiming that the exemption at section 10(1) (third party information) applies. In this order, the adjudicator upholds the decision of the conservation and dismisses the appeal.

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

Orders and Investigation Reports Considered: Orders M-169, P-1605.

BACKGROUND:

[1] The Conservation Halton (the conservation) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records relating to a fill operation site on an identified property:

1. Soil control prepared by [named company #1]
2. Environmental Sediment Sampling and Chemical Analysis Report, prepared by [named company #2]; dated 15 November 2015

3. Weekly monitoring reports
4. Daily summary log re: loads shipped to site
5. Results of any post-filling testing
6. Revised CH permits

[2] The conservation identified records and prior to issuing an access decision notified one affected party. After considering the affected party's submissions, the conservation issued a decision indicating that it was granting access to items 1, 2, 5 and 6. The conservation also indicated that records responsive to item 3 of the request "were not available at this time, as they have not been provided by the Contractor," and with respect to item #4, that the decision to release this item was pending based on the decision of the adjudicator in a related appeal.

[3] The affected party (now the appellant) appealed the conservation's decision.

[4] In mediation, the mediator spoke to the original requester, the conservation and the appellant.

[5] The conservation subsequently notified two additional affected parties. The affected party that might be affected by the disclosure of a record responsive to item 1 of the request did not provide submissions. The affected party that might be affected by the disclosure of a record responsive to item 2 of the request indicated that it did not object to the disclosure of this record to the requester, as a result, this record was disclosed to the requester.

[6] The conservation issued a subsequent decision to the requester and appellant, for clarification purposes, indicating that it was granting full access to all of the records, pending the outcome of this appeal. It also issued an index of records, listing the records from 1 to 5 as follows:

| | | |
|----------|--------|---|
| Record 1 | 3-24 | Clean Fill Project Plan, [named company #1] |
| Record 2 | 25-28 | CH Permit |
| Record 3 | 36-53 | Characterization of Sediment Material [named company #1] |
| Record 4 | 56-70 | Environmental Sediment Sampling and Chemical Analysis (Nov.15/15) [named company #2] |
| Record 5 | 73-121 | Weekly Monitoring reports and Daily Summary Log re: load shipped to site-one in the same document |

[7] The original requester indicated that they continue to seek access to all the

records at issue in this appeal.

[8] The appellant consented to the disclosure of conservation permits (Record 2) but continued to object to the disclosure of the remaining records. The conservation subsequently issued a decision disclosing Record 2 to the requester. As a result, this record is no longer at issue in this appeal.

[9] The appellant indicated that the remaining records should not be disclosed to the requester, as the third party exemption in sections 10(1)(a), (b) and (c) apply.

[10] As mediation did not resolve the dispute, this appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. As the adjudicator in this appeal, I invited the parties to provide representations including eight affected parties. Representations were received from the appellant and the original requester. No other party provided representations in this appeal. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[11] The affected parties were invited to provide representations on the issue of third party information under section 10, as this was the issue raised by the appellant. The affected parties were also invited to provide representations concerning whether the records contained their personal information and if so whether disclosure of that personal information constitutes an unjustified invasion of personal privacy under section 14 of the *Act*. As a result, the issue of personal privacy was added to the appeal.¹

[12] In this order, I uphold the decision of the conservation and dismiss the appeal.

RECORDS:

[13] The records remaining at issue were described by the conservation in the index of records, as follows:

| | | |
|----------|-------|--|
| Record 1 | 3-24 | Clean Fill Project Plan, [named company #1] |
| Record 3 | 36-53 | Characterization of Sediment Material [named company #1] |
| Record 4 | 56-70 | Environmental Sediment Sampling and Chemical Analysis (Nov.15/15] [named company #2] |

¹ The issue of personal privacy was added to the appeal as it was possible that one or more of the reports was delivered to a residential address and therefore the parties were given an opportunity to submit if it was their personal information.

Record 5 73-121 Weekly Monitoring reports and Daily Summary Log re: load shipped to site-one in the same document

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 10(1) apply to the records?

DISCUSSION:

Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[14] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[15] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.²

[16] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[17] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.³

[18] 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

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[20] As noted, the affected parties who were not involved in the mediation were invited to make representations in this appeal. None of these affected parties submitted representations, therefore, I have no submission suggesting that the records contain personal information.

² Order 11.

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.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[21] After a review of the records in dispute, I find that they do not contain the personal information of the affected party, or the appellant. The information at issue in the appeal does not qualify as personal information as it is not recorded information about an identifiable individual.

[22] Since the records do not contain any personal information the personal privacy exemptions at section 14(1) and 38(b) cannot apply to the records. I find below that the mandatory third party information exemption also does not apply and I will order disclosure of these records.

[23] In my review of Record 5, identified by the conservation as "Weekly Monitoring reports and Daily Summary Log," I note that severances appear at the top of each page (except for one) where the page states "dump location" and "foreman on site." It is not clear if these severances were completed by the conservation or if they already appeared in the record prior to it being retrieved. In any event, having reviewed the one page without the severance, I find that this information is not personal information as it pertains to individuals in a business or professional context.

[24] As I will be ordering the conservation to disclose Record 5, if the conservation did the referenced severances, it should ensure that no severances appear on this record given its original decision of full disclosure.

Issue B: Does the mandatory exemption at section 10(1) apply to the records?

[25] The appellant claims the application of the third party exemption at section 10(1).

[26] Section 10(1) states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(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

[27] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁶ 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.⁷

[28] 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

[29] In order for a record to fit within this part of the three-part test, its disclosure must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

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

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.⁸

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.⁹ The fact that a record

⁶ *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.*).

⁷ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁸ Order PO-2010.

⁹ Order PO-2010.

might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹⁰

Representations and finding

[31] The appellant submits that it is clear that the information in the records is technical in nature, or related to technical documents.

[32] The original requester did not speak to this issue in their representations except to note that they did not take issue with the suggestion that the information at issue is scientific or technical in nature.

[33] In reviewing the records, I am satisfied that they all contain technical information, as defined, as they include "information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing." Although Record 1 has been described by the conservation as one record, in my review, it contains the identified "Control Plan" but it also contains another report that does not appear to be an attachment. I am satisfied that both documents contain technical information. Records 3 and 4 identified as "Characterization of Sediment Material" and "Environmental Sediment Sampling," respectively, each contain information constituting technical information. Finally, while it appears that Record 5 contains commercial information, I am also satisfied that this record contains technical information as defined above.

Part 2: supplied in confidence

Supplied

[34] 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.¹¹

[35] 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

[36] None of the parties who provided representations commented on whether the records were supplied to the conservation. In my review of the first 5 pages of Record 1, I conclude that this was a report that was supplied to the conservation by the appellant as it is evident that the report was commissioned by the appellant to provide to the conservation. The remaining report in Record 1 along with Records 3 and 4 also appear to have been supplied to the conservation as they are not documents that

¹⁰ Order P-1621.

¹¹ Order MO-1706.

¹² Orders PO-2020 and PO-2043.

appear to have been commissioned by the conservation or sent directly to it by the authors of the various records. Therefore, I find that, at some point, they were supplied to the conservation by a third party.

[37] However, in reviewing Record 5, there is no indication that this was supplied to the conservation by the appellant or any other affected party. This record, identified by the conservation as "Weekly Monitoring reports and Daily Summary Log re: load shipped to site," contains information that accounts for loads of fill and it is not apparent when reviewing this record if the document was prepared on behalf of or by the conservation or if it was completed by a third party and ultimately supplied to the conservation. Since no representations were made regarding whether this record was supplied to the conservation, I find that it was not supplied to the conservation by a third party and therefore does not meet this part of the test. As Record 5 does not meet the first component of part 2 of the test, that it was supplied to the conservation, I will order that it be disclosed to the original requester. In the alternative, I find that there is no evidence that this record was supplied with an expectation of confidentiality (see below).

In confidence

[38] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹³

[39] 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 disclosure¹⁴

¹³ Order PO-2020.

¹⁴ 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.

Representations and Finding

[40] In this appeal, I contacted all of the affected parties, eight in total, in order to give them the opportunity to provide representations. None of the affected parties made representations in this appeal except the appellant.¹⁵ In the appellant's representations, including his reply representations, the appellant did not address whether or not the records he provided to the conservation, or any other record in this appeal, were provided to the conservation with an expectation of confidentiality.

[41] Since I do not have specific representations on whether or not the records at issue in this appeal were provided to the conservation with an expectation of confidentiality, and noting the conservation's position was to disclose this information, I will address this requirement by reviewing the records themselves.

[42] Previous orders of this office have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis.¹⁶

[43] After a review of the records and the parties' representations, I am not convinced that any of the remaining 4 records in this appeal (including Record 5) were supplied to the conservation with an expectation of confidentiality, either explicitly or implicitly. None of the remaining records at issue contains an explicit expectation of confidentiality. I also find that there is no evidence of an implicit expectation of confidentiality within the records.

[44] In reviewing Record 1, identified by the conservation as a "Clean Fill Project Plan," I find that the content suggests that the information in the records would not have been supplied with an expectation that it would remain confidential. As noted, included within the pages identified as Record 1 is a letter with an attached report that does not appear to be a part of the Clean Fill Project Plan. In reviewing this portion of Record 1, I also find that given the content of the report, there is no reasonable basis to conclude that there was an expectation of confidentiality.

[45] Further, in my review of Records 3, 4 and 5, identified by the conservation as "Characterization of Sediment Material," "Environmental Sediment Sampling and Chemical Analysis" and "Weekly Monitoring Reports and Daily Summary Log," I also find that there is no implicit indication to suggest that these records should remain confidential. In my review, I find that the content of these records suggests that the contained information was not meant to remain confidential.

[46] Nor do I find that there is any evidence that these records were communicated

¹⁵ One of the affected parties was sent a Notice of Inquiry by courier. Several attempts were made to deliver the Notice of Inquiry, however, it was refused and returned to the IPC.

¹⁶ Orders M-169 and P-1605.

to the conservation on the basis that they were confidential and that they were to be kept confidential. There is also no evidence that these records were treated consistently by a third party in a manner that indicates a concern for confidentiality. I also have no evidence that the records were not otherwise disclosed or available from sources to which the public has access. In fact, with regard to the second report in Record 1, this report is published in full on the internet and therefore is publically available thereby not meeting the "in confidence" part of the test.¹⁷ It is also not evident when reviewing the records that they were prepared for a purpose that would not entail disclosure.

[47] I have found that the appellant has not shown that the records were supplied "in confidence" therefore not meeting part two of the three part test. Since all parts of the test must be satisfied for the section 10 exemption to apply, there is no need for me to also consider if disclosure of the information in the records would give rise to a reasonable expectation that the harms in paragraph (a), (b) and/or (c) of section 10(1) will occur. Therefore, I find that the records at issue do not qualify for exemption under section 10(1).

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

ORDER:

I order the conservation to provide Records 1, 3, 4 and 5 to the original requester by **November 6, 2018** but not before **October 31, 2018**.

Original Signed by: _____

Alec Fadel
Adjudicator

October 5, 2018

¹⁷ This record was discovered online when attempting to find the contact information for the author. The affected party named in this record was provided with a Notice of Inquiry which specifically stated that it was apparent that the document may be publicly available and invited the affected party to make representations. As noted, the affected party did not provide representations.