

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3726-F

Appeal MA16-27

City of Toronto

January 29, 2019

Summary: This final order disposes of the records remaining at issue following interim order MO-3432-I. In that order the adjudicator determined the records, relating to a company's involvement with the city's taxi and limousine services, were not exempt under section 12. Following the release of the interim order, this office provided notice to the affected party regarding the disclosure of the records at issue. The affected party argued that the records should be exempt under the discretionary exemption at section 7(1) (advice or recommendations), and the mandatory exemptions at sections 10(1) (third party information) and 14(1) (personal privacy). In this order, the adjudicator finds that the affected party has not established that it should be allowed to claim the discretionary exemption at section 7(1). Furthermore, the adjudicator finds that the mandatory exemptions do not apply and orders the city to disclose the records at issue.

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"), 7(1), 10(1) and 14(1).

Orders Considered: Orders P-257, MO-3432-I.

OVERVIEW:

[1] This is the final order disposing of the remaining issues in the appeal arising out of a request to the City of Toronto (the city). The appellant's request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) was for access to the following information:

...copies of the following communications and replies received and sent by the Mayor's office regarding [named company's] involvement with the City of Toronto's taxi and limousine industries. We request any and all emails, notes made regarding outbound and/or inbound telephone conversations plus the minutes of any staff meetings regarding the operations of [named company].

The request is to include any all and all communications from the Mayor's office to:

1. [named company] and replies
2. Toronto Municipal Licensing and Standards and replies
3. The Toronto Police Service and replies
4. The Insurance Bureau of Canada and replies
5. The Financial Services section of the Provincial government and the replies
6. The City of Toronto's Legal Department and the replies notwithstanding lawyer/client privilege
7. Communications to any and all City councillors and replies received
8. Notwithstanding, possible compromising of ongoing investigations, any and all communications from the Mayor's office and replies received by the: Toronto Police Service, Ontario Provincial Police, Royal Canadian Mounted Police

The time frame is from January 2014 up to and including the date of this application.

[2] In response to the request, the city issued a decision granting partial access to the records. The city denied access to parts of some records, and to other records in their entirety. In doing so, the city relied on the mandatory exemption in section 14(1) (personal privacy) and the discretionary exemption in section 12 (solicitor-client privilege). The city also withheld some information on the basis that it is not responsive to the request.

[3] The appellant appealed the city's decision to deny access under sections 12 and 14(1) of the *Act*.

[4] Mediation did not resolve the appeal. The adjudicator assigned to the file conducted an inquiry and issued interim order MO-3432-I. In that order, the adjudicator

determined that section 12 applied to all of the records at issue except for an email and attachment found at pages 345-348 for which the city had not claimed any other exemptions. Order provision 2 of that order stated the following:

This office remains seized of this appeal in order to address pages 345-348. This office will notify the affected parties referred to in this order and invite them to provide representations, and will invite additional representations from other parties if necessary, prior to determining the issue of access to these pages.

[5] The adjudicator then provided the author of the email at issue and the named company who is the subject of the request (affected organization) with an opportunity to provide representations on disclosure of the remaining records at issue. The adjudicator received representations from the author of the email and her employer (hereafter both referred to as "the affected party"). The affected organization declined to make submissions.

[6] The adjudicator then provided the city with an opportunity to reply to the representations made by the affected party as well as provide their own representations of the issues on appeal. The city provided representations noting that following order MO-3432-I, the city's position was that the email and attachment at pages 345 – 348 could be disclosed and no exemptions apply to exempt the records.

[7] The file was then assigned to me to complete the inquiry and render a decision.

[8] In this order, I find that pages 345 – 348 are not exempt under the mandatory personal privacy or third party information exemptions. Further, I find that the appellant cannot claim the application of the discretionary advice or recommendations exemption in section 7(1). I order the city to disclose the records to the requester.

RECORDS:

[9] The records at issue (pages 345-348) consist of an email and attachment.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and if so, to whom does it relate? Does the mandatory exemption at section 14(1) apply to the information at issue?
- B. Can the affected party claim the application of the discretionary exemption at section 7(1) of the *Act*?
- C. Does the mandatory exemption at section 10(1) apply to the information at issue?

DISCUSSION:

Issue A: Do the records contain "personal information" as defined in section 2(1) and if so, to whom does it relate? Does the mandatory exemption at section 14(1) apply to the information at issue?

[10] The city submits that the records do not contain recorded information about an identifiable individual and as such do not qualify for exemption under the mandatory personal privacy exemption in section 14(1). The affected party does not submit that the withheld information in the records is personal information but does appear to argue that the author of the email has a personal privacy interest in the disclosure of the records.

[11] Personal information is defined in section 2(1) of the *Act* as recorded information about an identifiable individual, including,

(e) the personal opinions or views of the individual except if they relate to another individual.

[12] Sections 2(2.1) and (2.2) also relate to the definition of personal information and 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.

[13] 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.¹

[14] 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.²

[15] The city submits that the affected party was invited to participate at the public

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, MO-2344 and PO-2225.

meetings because of her position as a representative of a significant broker of insurance for the taxicab industry (her employer) and would have participated in the meetings in a business capacity. The city notes that the affected party identifies herself in such a capacity by using her business title, company name, and company contact information in the closing signature on the email at issue in this appeal. The affected party would be known to the taxicab industry and she would have been participating in the meetings as a representative of her business and not as an individual in a personal capacity.

[16] The city cites order P-427 and notes that the facts in this appeal are similar. The city states:

Stakeholders participated in a consultation process and were asked for their input in their professional capacity as members of the taxi industry, therefore, not considered their personal opinions. The information contained in the email documents at issue [does] not contain anything that can be construed as being of "a personal nature" about the Affected Party. It is the city's position that the information contained in the record does not qualify as personal information as per the definition in section 2(1)(e).

[17] The affected party submits that she was asked to provide assistance to the city to better understand the insurance aspects of the taxicab industry and ride services. The affected party argues that she was essentially retained by the city as a "subject matter expert" in the insurance area to assist the city. The affected party confirms that she provided her email (which is the record at issue in this order) in her "capacity as an insurance subject matter expert".

[18] When the affected party was initially contacted regarding her position on disclosing the record she noted a number of concerns including the following:

- The comments contained in the documents were contemporaneous and are no longer accurate.
- In the intervening period, changes were made to the definition of fleet under the *Insurance Act* and the Financial Services Commissioner of Ontario (FSCO) approved a new policy to cover [named organization's] operations.
- As such, the attached material (to the email) if released, could cause confusion to the public, the taxi industry and [the named organization] concerning this insurance issue.
- By releasing an aged document that has become obsolete, it could cause legal ramifications for the affected party and inflame the taxi industry if the document is mistakenly construed as a current assessment of the [named organization's] insurance situation.

- A news organization republished the affected party's obsolete quote and the affected party had to spend an entire day doing significant damage control and arranging for a formal printed retraction.
- There could be legal ramifications to releasing this document at this late stage because it is now a completely inaccurate assessment of the situation. [Named organization] could rightly take exception to the release of a document that could potentially be misleading.³

[19] I find that these concerns relate to the possible consequences of disclosure of the records and do not establish that the information at issue is the affected party's personal information. Based on my review of the information at issue, I find that it is not recorded information about an identifiable individual. The affected party's views relate to insurance coverage for the affected organization and do not relate to her in a personal context. As such, I find that pages 345 – 348 do not contain personal information as defined in section 2(1) of the *Act*. As the personal privacy exemption in section 14(1) can only apply to personal information, I find that it does not apply in the circumstances of this appeal.

[20] I will proceed to consider the other exemptions claimed by the affected party.

Issue B: Can the affected party claim the application of the discretionary exemption at section 7(1) of the *Act*?

[21] The affected party claims that the discretionary exemption at section 7(1) applies to exempt pages 346 – 348 of the records. This section states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[22] Under the *Act*, the "head" (an official or body⁴ designated to make decisions under the *Act*) is given the discretion to rely on this exemption. This raises the question of whether an affected party is entitled to claim and rely on a discretionary exemption.

[23] In Order P-257, former Assistant Commissioner Tom Mitchinson considered the question of when an affected party may be entitled to claim and rely on one of the discretionary exemptions in the *Act*. He stated:

³ As stated above, the named organization was given notice of the issues on appeal and declined to submit representations.

⁴ See section 3 of the *Act*.

As a general rule, with respect to all exemptions other than [the mandatory exemptions in] sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record....

In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

[24] The affected party was asked to provide evidence that the circumstances of this appeal was one of the "rare occasions" when it should be entitled to claim the section 7(1) exemption even though the city has not.

[25] The affected party submits that given its concerns about disclosure of the records set out above (in paragraph 18), it should be permitted to raise the discretionary exemption in section 7(1). Further, the affected party submits that the city may have inadvertently not claimed section 7(1) and it should be given an opportunity to do so.

[26] The city submits that section 7(1) does not apply to the records as the affected party was not retained by it in any capacity. The city states:

As previously noted, the affected party was one of many industry experts invited to participate in the 2012-2014 taxicab industry review stakeholder consultations because her company is a provider of insurance for the taxicab industry. There was never any contract between the city and the affected party – formal or informal – she was invited to participate along with many other stakeholders...The city conducts consultations with the public on a number of issues, for example, the Scarborough Subway Extension. The public can choose whether or not to participate in such consultations, but at no time does the city ever consider participants to be "retained by the city".

[27] The city also notes that the harms identified by the affected party above, in paragraph 18, may relate to other exemptions but not section 7(1).

[28] In the circumstances, I find that the affected party has not established that this appeal is one of those *rare occasions* when it should be allowed to claim the discretionary section 7(1) exemption. I accept the city's submissions that it did not retain the affected party as a consultant to provide advice or recommendations. Instead, I find that the city invited the affected party to participate as an industry stakeholder in a public consultation. Section 7(1) applies to information that would reveal the advice or recommendations of an officer or employee of an institution or a consultant retained by an institution. The affected party identified the potential harms in disclosure above and those harms do not relate to the disclosure of advice or recommendations that it provided to the city as a retained consultant. I find that these harms do not establish that this appeal is one of those rare occasions in which the affected party should be able to claim section 7(1). Accordingly, I will not consider the application of this exemption in this order.

Issue D: Does the mandatory exemption at section 10(1) apply to the information at issue?

[29] While the city does not claim the application of section 10(1), the affected party has argued for its application. 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;

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

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.*).

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

[31] 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

[32] The affected party submits that the records contain commercial information as they detail insurance coverage under former policies relating to a named company and to the taxicab industry, as well as detail the US named company driver contracts and monetary insurance coverage requirements under Ontario statutes.

[33] The city submits that while the information may be characterized as commercial information, it is not the commercial information of the affected party. Instead, the city submits that the records contain the commercial information of the named company.

[34] Commercial information has been defined in past orders of this office as information that relates solely to the buying, selling or exchange of merchandise or services.⁷

[35] Based on my review of the records, I find that they contain information relating to the provision of insurance coverage which I accept is a commercial activity for the purposes of section 10(1). I find that the affected party has met part 1 of the test for the application of section 10(1).

Part 2: Supplied in confidence

[36] Both parties agree that the information at issue was supplied by the affected party to the city. They disagree on “in confidence” portion of the part 2 test.

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

⁷ Order PO-2010.

[37] The affected party submits that the information in pages 345 to 348 was provided to the city with an expectation of confidentiality. The affected party states:

Our client's reasonable expectation was that the information and opinions provided would be used internally by the city in determining its next steps regarding [the named company] and the Taxicab industry and would not be disclosed to anyone who requested them.

[38] The city submits that it did not offer the affected party confidentiality, implicitly or explicitly, in the public consultation process. The city states:

The invitation to participate in the stakeholder groups made no mention of any confidentiality being offered for any opinions or statements offered by the affected party (the invitation is contained in the affected party's representations). As part of stakeholder sessions, all discussions and opinions expressed would have been heard by a large group of various industry experts and City staff. Furthermore, the affected party has spoken publicly on a number of occasions with respect to [named company], [named company's] policies and [named company] insurance rates.

The city provided hyperlinks to media articles where the affected party provided statements regarding the named company.

[39] Pages 345 to 348 of the records consist of emails and an attachment and I find that there is no explicit statement of confidentiality by the affected party or the city in these pages. Any expectation of confidentiality by the affected party would have been implicit.

[40] The parties disagree on the circumstances under which the affected party provided the information at issue. Based on my review of the parties' submissions and the information at issue, I find that the affected party's expectation of confidentiality was not reasonable. The email was authored by the affected party and comprises pages 345 -348. This email references the fact that the information was referred to in an earlier meeting between the affected party and the city. I find that the contents of the email support the city's position that the affected party was participating in meetings as a stakeholder and any discussions and opinions expressed would have been provided in the context of a larger discussion with other stakeholders. Accordingly, I find that the affected party has not established part 2 of the test for the application of section 10(1). As all three parts of the test must be established for the application of section 10(1), I do not have to go forward to consider part 3.

[41] I find that the affected party has not established that section 10(1) applies to exempt the information at issue.

ORDER:

1. I order the city to provide a copy of pages 345 – 348 of the records to the appellant by **March 6, 2019** but not before **March 1, 2019**.
2. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the record disclosed to the appellant in accordance with order provision 1.

Original signed by: _____
Stephanie Haly
Adjudicator

January 29, 2019