Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3786

Appeal MA17-355

Toronto and Region Conservation Authority

June 12, 2019

Summary: This order addresses a third party's appeal of the Toronto and Region Conservation Authority's (the TRCA's) decision to disclose a management agreement to the individual who requested access to it under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The third party appellant argues that the mandatory exemption for third party information at section 10(1) applies to the agreement. In this order, the adjudicator finds that section 10(1) does not apply. She upholds the TRCA's decision and orders it to disclose the management agreement, in its entirety, to the requester.

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 Toronto and Region Conservation Authority (the TRCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a management agreement "as referenced in the City of Vaughan Council Meeting Minutes, Item 18, report No. 14, of the Committee of the Whole" on a specified date.

[2] The TRCA identified the responsive record, a 32-page management agreement, and notified third parties who might be affected by the disclosure of the record in order to obtain their views regarding disclosure.

[3] Subsequently, the TRCA issued a decision granting access to the management agreement in its entirety. The decision advised all parties, including the third parties, that they could appeal the TRCA's decision to this office.

[4] One of the third parties, now the appellant, appealed the TRCA's decision to disclose the management agreement on the basis that it contains third party information subject to the mandatory exemption at section 10(1) of the *Act*.

[5] During mediation, the appellant consented to the disclosure of portions of the management agreement. As a result, the TRCA disclosed portions of three pages to the requester. The portions of the management agreement that have not been disclosed remain at issue.

[6] As the parties did not reach a mediated resolution, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the appellant, initially. The appellant did not submit representations. I determined that it was not necessary to seek representations from any other party.

[7] The sole issue to be determined in this appeal is whether the mandatory exemption for third party information at section 10(1) applies to the portions of the management agreement that have not been disclosed.

[8] In this order, I find that the mandatory exemption for third party information at section 10(1) of the *Act* does not apply. I order the TRCA to disclose the management agreement to the requester in its entirety.

RECORD:

[9] The record at issue is a 32-page management agreement, portions of which have been disclosed to the requester.

DISCUSSION:

Does the mandatory exemption at section 10(1) apply to the portions of the management agreement that remain at issue?

[10] The appellant submits that the mandatory exemption at section 10(1) of the *Act* applies to the portions of the management agreement that have not been disclosed.

[11] 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;
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> (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.

[12] 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]

[13] For section 10(1) to apply, the third party 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

[14] To satisfy the first part of the section 10(1) test, the party resisting disclosure (in this case the appellant) must show that the records reveal information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

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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.

[15] The appellant has not made any submissions on whether the information at issue qualifies as any of the types set out in section 10(1). However, considering the definitions taken from previous orders and the content of the record, I accept that the management agreement qualifies as commercial information as previously defined by this office:

> *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.[3] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[4]

[16] As I find the management agreement contains commercial information, part one of the section 10(1) test has been met.

Part 2: supplied in confidence

[17] 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.[5] 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.[6]

[18] In order to satisfy the "in confidence" component of the second part of the test, 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.[7]

[19] The appellant has not made submissions on whether they supplied any of the information in the management agreement to the TRCA and, if so, whether it was supplied in confidence.

[20] From my review of the management agreement it is clearly a contract between the appellant and the TRCA. This office has consistently held that the contents of a contract involving and institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third

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[3] Order PO-2010.
[4] Order P-1621.
[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.
[7] Order PO-2020.

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.[8]

[21] There are two exceptions to the general rule that contracts will not normally qualify as having been "supplied" to an institution for the purpose of section 10(1). They are described 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.[9] The immutability exception applies 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.[10]

[22] As indicated above, the appellant has not provided representations. Therefore, they have not made any submissions that support a conclusion that any of the information at issue is subject to either of the exceptions described above. From my review of the management agreement and in the absence of specific representations on the issue, I find that I do not have sufficient evidence before me to conclude that either of the exceptions apply. Based on the evidence before me, I do not accept that the disclosure of the record would permit accurate inferences to be made with respect to underlying non-negotiated confidential information or reveal information that is not susceptible to negotiation.

[23] As a contract between the TRCA and the appellant, to which neither of the exceptions apply, I find that none of the information in the management agreement was "supplied" to the TRCA, as required by part two of the section 10(1) test. It is not necessary for me to consider the "in confidence" portion of part two of the test. Part two has not been met.

Finding

[24] All parts of the three-part test must be met for section 10(1) to apply and I have found that the management agreement was not "supplied" to the TRCA as required by part two. Therefore, I find that the management agreement, including the portions that have not yet been disclosed to the requester, is not exempt from disclosure under section 10(1). I uphold the TRCA's decision to disclose it.

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[8] 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*),.
[9] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[10] *Miller Transit*, above at para. 34.

ORDER:

1. I uphold the TRCA's decision to disclose the management agreement in its entirety.

2. I order the TRCA to disclose the management agreement to the requester, in accordance with its original decision, by **July 18, 2019** but not before **July 12, 2019.**

3. With respect to provision 2, I reserve the right to require the TRCA to provide me with a copy of the record disclosed to the requester.

Original Signed By: June 12, 2019

Catherine Corban
Adjudicator