

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3759

Appeal MA18-221

City of Thunder Bay

April 26, 2019

Summary: The City of Thunder Bay (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a “tax extension agreement” with a company. The city located responsive records and notified the company of the request. The company did not consent to the disclosure of the records. The city then issued an access decision, granting the requester full disclosure of the responsive records. The company appealed the city’s decision on the basis that section 10(1) of the *Act* (third party information) applied. In this order, the adjudicator finds that the information at issue is not exempt under section 10(1) of the *Act*, 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 10(1).

OVERVIEW:

[1] The City of Thunder Bay (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a “tax extension agreement” with a company. The city located responsive records, consisting of a one-page letter to the company enclosing a three-page agreement. It then notified the company of the request and sought its representations on disclosure of the information at issue, pursuant to section 21(1)(a) of the *Act*.

[2] The company advised the city that it objected to the disclosure of the records. The city considered the company’s representations and issued a decision granting the requester full access to all four pages. The company appealed the city’s decision, becoming the appellant in this appeal.

[3] During mediation, the company took the position that section 10(1) (third party information) of the *Act* applied to the information at issue.

[4] The appeal was not resolved during mediation and the file was transferred to the adjudication stage where an adjudicator may conduct a written inquiry pursuant to the *Act*. I began this inquiry by sending a Notice of Inquiry to the city and the appellant and asked them to provide representations on the issues set out in that notice.

[5] The city provided representations in support of its decision that section 10(1) does not apply to the information at issue. The appellant did not provide any representations in support of its position that section 10(1) applied. After reviewing the information at issue and the city's representations, I decided that I did not need to seek representations from the original requester.

[6] For the reasons that follow, I find that the mandatory third party information exemption at section 10(1) does not apply to the information at issue. I uphold the city's decision to disclose the information at issue and I dismiss this appeal.

DISCUSSION:

[7] The letter and enclosed agreement at issue in this appeal relate to taxes the appellant owed to the city and the terms of repayment agreed to by the parties.

[8] The appellant, as the party resisting disclosure, has the onus to prove that section 10(1) applies to the information that the city is prepared to disclose.¹ As noted earlier, the appellant did not provide any written representations in support of its appeal.

[9] Without representations from the appellant, the only evidence before me is the city's representations (which assert that section 10(1) does not apply) and the records themselves. However, because the section 10(1) is a mandatory exemption, I will independently assess whether it applies to the information at issue.

[10] Section 10(1) says:

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,

¹ Order P-42.

(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;

(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.

[11] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² 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.³

[12] For section 10(1) to apply, the party resisting disclosure must prove that each part of the following three-part test applies:

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.

Findings and analysis

Part 1: type of information

[13] I find that the information at issue contains financial information. “Financial information” has been defined as information relating to money and its use or

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

distribution and must contain or refer to specific data.⁴

[14] The letter and the enclosed agreement between the city and the appellant relate to a repayment schedule. Both items set out specific amounts of money to be paid by one of the parties to the other and specify when the payments are due.

[15] As such, I find the first part of the section 10(1) test is met.

Part 2: supplied in confidence

[16] Part two of the three-part test itself has two parts: the information at issue must have been “supplied” to the institution, and must have been supplied “in confidence,” either implicitly or explicitly.

[17] If the information was not supplied to the institution, section 10(1) will not apply and there will be no need for me to decide whether the “in confidence” element of part two of the test is met.

[18] As set out in the Notice of Inquiry that was provided to the appellant when it was invited to make representations in this inquiry, information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where the disclosure of the information would reveal or permit the drawing of accurate inferences with respect to information that was supplied.⁵

[19] The Notice of Inquiry also specified that the contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 10(1). This is because the provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by a 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.⁶

[20] There are two exceptions to this general rule: 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 to the institution.⁷ 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

⁴ Order PO-2010.

⁵ Orders PO-2020 and PO-2043.

⁶ 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*).

⁷ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

designs.⁸

[21] In my view, the information at issue is contractual in nature. The letter specifies it is attaching a true copy of the agreement between the city and the appellant regarding the payment of a debt. The signatures on the agreement indicate that the parties agreed to the terms.

[22] As outlined above, this office typically treats the contents of contracts as mutually generated, rather than "supplied" by a third party, unless it is established that one of the exceptions applies. I have reviewed the letter and the agreement and do not see any information that suggests the inferred disclosure or immutability exceptions apply.

[23] Furthermore, the city submits that it, rather than the appellant, supplied the information used to calculate the amount of taxes owing and the monthly payment amount that are set out in the agreement and the letter. As part of its representations, the city provided additional information, including emails and policy documents, in support of its assertion that it was the source of that information.

[24] In the absence of further evidence or explanation from the appellant, I accept the evidence the city provided. I find that the appellant has failed to establish the information at issue was supplied to the city, as required by part 2 of the three-part test in section 10(1) of the *Act*.

[25] Since the appellant must meet all three parts of the test to establish that section 10(1) of the *Act* applies, I do not need to consider the second part of part 2 of the test (whether the information at issue was supplied in confidence) or part 3 of the test (whether the disclosure could reasonably be expected to result in any of the harms set out in that section).

ORDER:

1. I uphold the city's decision to disclose all of the information at issue.
2. I order the city to disclose the information at issue by **June 3, 2019** but not before **May 28, 2019**.
3. 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 sent to the requester, pursuant to order provision 2 of this order.

Original signed by _____

April 26, 2019

⁸ *Miller Transit*, above at para. 34.

Meganne Cameron
Adjudicator