Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4007

Appeal MA19-00377

City of Ottawa

February 4, 2021

Summary: A media requester filed an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Ottawa (the city) for all reports on the environmental testing performed on a specified light rail vehicle to be used for the city's Confederation Line light rail system. After notifying affected parties of the request, the city decided to disclose the records in full. One of the affected parties appealed the city's decision under section 10(1) (third party information) of the *Act*, and another who was notified during the inquiry opposed disclosure as well. The original requester raised the issue of the public interest override at section 16 of the *Act*. In this order, the adjudicator finds that the records are not exempt under section 10(1), and dismisses the appeal.

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

Orders Considered: Orders P-561, PO-2520, PO-2435, PO-2758, PO-3009-F, PO-3327, MO- 2833 and MO-3628.

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *St Joseph Corp. v. Canada (Public Works and Government Services)*, 2002 FCT 274 (CanLII); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 FCT 254 (CanLII); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner),* 2004 CanLII 11768 (ON SCDC), affirmed 2005 CanLII 34228 (ON CA), application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

OVERVIEW:

[1] The City of Ottawa (the city) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a media requester:

> All reports on the environmental testing on [a specified light rail vehicle], including but not restricted to, tests performed by the National Research Council, performed for the City of Ottawa's Confederation Line light rail system.

[2] The city located responsive records and notified a number of parties whose interests might be affected by disclosure of the records (affected parties).[1] After these parties were given an opportunity to provide their views to the city about disclosure of the records, the city issued a decision granting the requester full access to the responsive records.

[3] One of the affected parties (now the appellant) objected to the city's decision to disclose the records and appealed that decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office), claiming that the mandatory exemption in section 10(1) (third party information) of the *Act* applies to the records.

[4] During mediation, the requester raised the application of the public interest override found in the *Act* (section 16), and as a result, that issue was added to the appeal.

[5] The parties could not resolve their dispute at mediation, and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[6] The adjudicator originally assigned to this appeal began her inquiry under the *Act* by inviting the city and the appellant to submit representations in response to a Notice of Inquiry, which set out the facts and issues of the appeal. The adjudicator later invited another affected party to provide representations regarding the disclosure of the records. (I will refer to this affected party as "the affected party" in this order, to distinguish it from the affected party that filed the appeal, which I will refer to as "the appellant.") The requester then provided representations in response. The appeal was transferred to me to continue its adjudication. The parties provided further representations, some of which were not shared between the appellant and the affected party due to confidentiality concerns.[2]

[7] For the reasons that follow, I uphold the city's access decision and dismiss the appeal. Since I find that the records are not exempt under section 10(1), it is not necessary to address whether the public interest override at section 16 applies.

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[1] Pursuant to section 21(1) of the *Act*.

[2] In accordance with *Practice Direction 7* of the IPC's *Code of Procedure*.

RECORDS:

[8] The 226 pages of records at issue in this appeal consist of two climate testing reports prepared by the National Research Council (NRC) and "Works Submittal Responses and Comment Response Sheets" (the work responses).

DISCUSSION:

[9] This appeal concerns disclosure of the environmental testing reports relating to a particular light rail vehicle of the Confederation Line in the City of Ottawa. After considering the views of affected parties about the disclosure of these records, the city decided that the records are not exempt under section 10(1) (third party information) of the *Act* and decided to disclose them. In this order, I will explain why I uphold the city's decision.

[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,
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> > (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;
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> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
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> > (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.[3] Although one of the central purposes of the *Act* is to shed light on the operations of

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[3] *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.*).

government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[4]

[12] For section 10(1) to apply, the institution and/or the third 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 paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

[13] In this appeal, the city and the requester were asked to make submissions but it is the appellant and the affected party, as the parties resisting disclosure, that have the onus of proof to establish that section 10(1) applies to the records at issue.[5]

[14] In addition, since section 10(1) is a mandatory exemption, I must also consider the content of the records themselves and the surrounding circumstances in deciding whether the records meet the three-part test for section 10(1).

Part 1: type of information

[15] The city, the appellant, and the affected party agree that the records meet part one of the test, and for the reasons that follow, I agree.

[16] As mentioned, the request was for all the environmental testing reports, including but not limited to, testing performed by the NRC, relating to a specified light rail vehicle.

[17] The responsive records are two climate testing reports prepared by the NRC and related working responses, which set out questions from the city regarding results of the climate testing reports and the responses provided by the appellant.

[18] The city, the appellant, and the affected party agree and submit that the records contain technical information. This is one of the types of information listed in section 10(1), and has been discussed in prior orders as follows:

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[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[5] The requester's submissions do not address the three-part test, but rather the cost of the light rail vehicles to taxpayers, the vehicles' apparent inability to withstand inclement weather conditions, and the effect this has had on the number of operational vehicles available for use. These submissions relate to the application of section 16, which I do not have to address, given my findings that the records are not exempt from disclosure under the exemption claimed by the appellant and the affected party.

> *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.[6]

[19] Based on my review of the records, I find that they contain technical information. I agree with the appellant's characterization of the testing reports as "extremely detailed documents setting out the results of extensive testing of the various aspects of the systems of the [specified light rail vehicle] under a range of climactic conditions." As the appellant notes, these testing reports were prepared by a professional engineer at the NRC. Likewise, I find that the work responses also contain technical information because they consist of comments and questions from the city about the testing reports, and answers provided by the professional engineers and other relevant field experts, discussing specific details about the testing results and the performance of various technical aspects of the light rail vehicle.

[20] Since the records contain technical information, I find that part one of the test has been met and it is not necessary for me to discuss other types of information listed in section 10(1) that were raised in the parties' representations.

Part 2: supplied in confidence

[21] The city, the appellant, and the affected party also submit that the records at issue were supplied to the city in confidence, and therefore, meet part two of the test.

Supplied

[22] 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.[7]

[23] 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.[8]

[24] The appellant and the affected party state that the testing reports were provided by the NRC to a specified third party, which then provided the testing reports to the appellant, which, in turn, shared the records with the city through a password-protected

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[6] Order PO-2010.

[7] Order MO-1706.

[8] Orders PO-2020 and PO-2043.

portal. The appellant also states that it was able to respond to the city's comments and questions and provide the city with the work responses authored by the professional engineers and field experts through that same password-protected portal.

[25] In these circumstances, I am satisfied that the records at issue were "supplied" to the city.

In confidence

[26] 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.[9]

[27] 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 disclosure.[10]

[28] Here, the city states that the records were implicitly provided to it in confidence.

[29] In addition, the city, the appellant, and the affected party all point to the city's contractual obligations to keep information that the city received from affected parties confidential.

[30] The city, the appellant, and the affected party also argue that the records were marked in a way that is consistent with finding that they were to be treated confidentially. While the markings on the records are relevant, they are not necessarily determinative of an objective expectation of confidentiality.

[31] What I find most persuasive in the circumstances regarding the expectation of confidentiality is the fact that the records were supplied to the city through a password-

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[9] Order PO-2020.

[10] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

protected portal. The appellant states that in Order MO-3628, this office held that records relating to the same light rail project and supplied to the city through the same password-protected system were found to meet the "in confidence" element of part two of the test. The appellant argues that the analysis in Order MO-3628 equally applies to the records at issue in this appeal because the same process was in place. Specifically, the appellant states that city was given password-protected access to the records with the expectation that the information would remain confidential. Only a small number of city employees are said to have had access to the password-protected system in the first place. In addition, the appellant submits that records were not accessible to the public in any way, and that they were prepared for the purpose of testing the light rail vehicles. Taking all of these factors into consideration, I am satisfied that the records at issue were supplied to the city in confidence, and therefore meet part two of the test.

Part 3: harms

[32] As I will explain below, neither of the parties resisting disclosure has established that the records meet part three of the test, and I am not satisified that the contents of the records themselves demonstrate that the records meet part three of the test either.

[33] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[11]

[34] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[12] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[13]

The appellant's evidence

[35] Apart from stating that disclosure will not harm it, the appellant states that it cannot comment on harm because the information at issue belongs to another party.[14]

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[11] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.

[12] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.

[13] Order PO-2435.

[14] Under part one (type of information), the appellant referred to IPC Order P-561, which found that testing reports relating to Toronto's SkyDome, as it was then named, contained information that qualified as trade

The affected party's evidence

[36] Turning to the affected party,[15] I am also not satisfied that it has established that part three of the test applies. Its representations were brief and speculative, and insufficiently supported by evidence. It has not presented any evidence that goes "well beyond the merely possible or speculative" relating to harms. Although the affected party did not specifically cite any paragraph of section 10(1) in its representations, it appeared to allude to the harms set out in sections 10(1)(a), (b), and (c). I will address each below. Due to confidentiality concerns, I will address these arguments only in general terms, but I have carefully reviewed the affected party's representations in coming to my conclusions.

Sections 10(1)(a) (prejudice to competitive position) and 10(1)(c) (undue loss or gain)

[37] The affected party states that if the information at issue is disclosed, disclosure would provide commercial competitors in the industry with a competitive advantage, and result in undue losses. In my view, the affected party's submissions were broad, vague and speculative in nature, and insufficiently supported by detailed evidence. In their brevity and lack of detail, I found that the affected party's submissions read as if the harms being claimed were self-evident, but I did not find that to be the case on the basis of their representations, the contents of the records themselves or the surrounding circumstances.

[38] The affected party argues that the records contain technical information and trade secrets. While I have already found that the records contain technical information, the presence of this type of information does not by itself necessarily establish that the records meet part three, or more specifically, would reasonably be expected to lead to the harms contemplated by sections 10(1)(a) and/or 10(1)(c). I am not persuaded, either by the affected party's representations or by the records themselves, that the performance of the light rail vehicles under various environmental conditions reflects "trade secrets".[16]

[39] In addition, the affected party presented arguments related to future bidding opportunities in Canada. However, it is worth noting that this office has long held that the fact that a third party contracting with the government may be subject to a more competitive bidding process in the future, does not in itself significantly prejudice its

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secrets and also met the harms part of the test for section 10(1). However, it is not clear from the evidence presented by the appellant or the affected party, or the records themselves, that the circumstances in that case and the current appeal are sufficiently similar such that I should consider following the approach taken in Order P-561.

[15] The affected party's representations cannot be reproduced in this decision due to confidentiality concerns.

[16] *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which (i) is, or may be used in a trade or business, (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. See Order PO-2010.

competitive position, under section 10(1)(a).[17] I see no reason to depart from that approach in this case.

[40] In a similar vein, I am not persuaded that disclosure which could reveal problems, if any, with the performance of the vehicles under certain environmental conditions is harm that is contemplated by section 10(1)(c). The requester presented evidence that the light rail vehicles in question "have experienced issues, including arcing, that appear to be made worse during inclement weather," and included the link to a media report describing such problems in her representations.[18] Given the issues with the trains that have been reported in the media, any losses that the affected party may experience would not necessarily be undue, under section 10(1)(c).

[41] In addition, the affected party states that the project to which the records relate is ongoing and there are regular contractual discussions and negotiations between various parties and the city. It states that disclosure of the technical information in the records would therefore "necessarily interfere" with these discussions and negotiations. This appears to be a reference to section 10(1)(a). I find that such brief references to these disputes are insufficient evidence to support a conclusion that disclosure of the records would reasonably be expected to "interfere significantly with the contractual or other negotiations of a person, group of persons, or organization," under section 10(1)(a).

[42] For these reasons, I do not accept the affected party's position that disclosure of the records could reasonably be expected to significantly prejudice competitiveness and result in undue loss, as contemplated by sections 10(1)(a) and 10(1)(c).

Section 10(1)(b): information no longer provided

[43] The affected party argues that disclosure of the records at issue "would have a chilling effect on the sharing of technical information between private and public entities on any future procurement or contract." This argument may be relevant to whether section 10(1)(b) applies.

[44] The affected party points to the efforts taken to provide the city with the information at issue in confidence. It argues that it had a reasonable expectation that the information would be treated confidentially, and that "any" release of such protected information, after reliance on written promises not to disclose, "would result in a disruption of the market and future disclosure of confidential and technically sensitive information" by both the affected party and its competitors in the market.

[45] While I appreciate the affected party's arguments regarding the marking of the records and the contractual terms relating to confidentiality, government entities cannot

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[17] Order PO-2435.

[18] https://www.cbc.ca/news/canada/ottawa/arc-flash-ottawa-lrt-1.5442342.

"contract out" of disclosure obligations, if any, under the *Act*. This principle has been upheld by the courts,[19] and consistently applied by this office.[20] I have accepted that the records were provided in confidence, but the issue now is whether their disclosure could reasonably be expected to result in any of the harms listed in section 10(1).

[46] Furthermore, I find the argument about chilling or otherwise disrupting the market, besides being speculative and unsupported by sufficient evidence, to be unpersuasive. It does not reflect the commercial reality of doing business with a government entity. As reasoned in Order PO-2758, such an argument:

> ignore[s] an absolutely fundamental fact of the marketplace. That is to say, if a competitor . . . truly wishes to secure a contract with [an institution], it will do so by charging lower fees to [the institution] than its competitor, resulting in a net saving to [the institution] . . . . To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

[47] Based on my own review of the records, it is not clear to me why section 10(1)(b) would be relevant, especially in light of the commercial reality discussed above.

[48] In summary, I find that there is insufficient evidence before me to conclude that the harms contemplated by section 10(1)(b) could reasonably be expected to occur if the records were disclosed.

[49] For these reasons, I find that the records do not meet part three of the test.

[50] Since all three parts of the test must be met, and part three has not been met, I find that the section 10(1) exemption does not apply to records, and I will order city to disclose them to the requester, in full.

[51] Given my finding that the records are not exempt, it is not necessary for me to examine whether the public interest override at section 16 of the *Act* applies.

ORDER:

1. I uphold the city's access decision and dismiss the appeal.

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[19] Among others, see *St Joseph Corp. v. Canada (Public Works and Government Services)*, 2002 FCT 274 (CanLII); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 FCT 254 (CanLII); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner),* 2004 CanLII 11768 (ON SCDC), affirmed 2005 CanLII 34228 (ON CA), application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

[20] See, for example, Orders PO-2520, PO-2917, PO-3009-F, PO-3327 and MO-2833.

2. I order the city to disclose the records to the requester, in full, no later than **March 16, 2021**, but no earlier than **March 8, 2021**.

3. In order to verify compliance with this order, I reserve the right to require the region to provide me with a copy of the records disclosed pursuant to order provision 2.

4. The timeline noted in order provision 2 may be extended if the region is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting time extension request.

Original Signed by: February 4, 2021

Marian Sami
Adjudicator