

Information and Privacy Commissioner,
Ontario, Canada



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

Final ORDER MO-4043-F

Appeal MA18-00894

The Corporation of the Town of Midland

April 28, 2021

Summary: This final order deals with the remaining issue raised as a result of an appeal of an access decision made by the Corporation of the Town of Midland (the town). The town granted access, in part, but denied access to three records, claiming a number of exemptions. In Interim Order MO-4025-I, the adjudicator found that two settlement agreements contained the personal information of two identifiable individuals, and were exempt from disclosure under the mandatory exemption in section 14(1) (personal privacy). The adjudicator also found that a third record, which was a memorandum of understanding, did not contain personal information and was not exempt from disclosure under the discretionary exemption in section 11 (economic and other interests). However, the adjudicator reserved any findings regarding the possible application of the mandatory exemption in section 10(1) (third party information) to this record, pending notification of a third party. Lastly, the adjudicator found that the public interest override in section 16 did not apply to any of the records.

Following the issuance of Interim Order MO-4025-I, the adjudicator notified a third party about the appeal and provided it with the opportunity to provide representations on the possible application of section 10(1) to the remaining record at issue. The third party did not provide representations. In this final order, the adjudicator finds that the record is not exempt from disclosure under section 10(1) and orders the town to disclose it to the appellant, in full.

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] This final order disposes of the remaining issue raised as a result of an appeal of

an access decision made by the Corporation of the Town of Midland (the town). The access request, received under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), was for copies of all Collective Agreements between the Midland Police Services Board and the Midland Police Senior Officers' Association and/or its Members, over four specified years. The requester also indicated that should formal collective agreements not yet be ratified, he was requesting copies of any contracts, memoranda of understanding, addendums or agreements of any kind, that address collective bargaining or compensation matters for the same years.

[2] The town located four records responsive to the access request. It issued a decision granting access to one record. The town denied access to the other three records, claiming the application of the discretionary exemptions in sections 11(c) and 11(d) (economic or other interests).

[3] The requester (now the appellant) filed an appeal of the town's decision to this office.

[4] During the mediation of the appeal, the town issued a revised decision in which it confirmed that it was still denying access to the records under sections 11(c) and 11(d) of the *Act*. It also claimed, for the first time, the mandatory exemptions in sections 10(1)(a) and 10(1)(d) (third party information), as well as section 14(1) (personal privacy). Further, the town also added the application of the discretionary exemptions in sections 11(a), 11(e) (economic and other interests) and 11(g) (proposed plans, projects or policies).

[5] The appellant advised that he wished to proceed to the adjudication stage of the appeals process to seek access to the three withheld records. He further advised that he believed there was a public interest in the disclosure of the records. As such, section 16 (public interest override) of the *Act* was added as an issue in this appeal.

[6] The file was then transferred to the adjudication stage of the appeals process, where an adjudicator may conduct a written inquiry under the *Act*. Following the inquiry, I issued Interim Order MO-4025-I, finding that two records were exempt from disclosure under section 14(1). I also found that sections 11 and 16 did not apply to any of the records. I reserved my decision regarding the possible application of the mandatory exemption in section 10(1) to the third record, pending notification of a third party. During the inquiry, staff of this office sought further information from the town regarding the provision of policing services in the town. In response, the town advised that the Ontario Provincial Police took over policing services in Midland in February, 2018. The Midland Police Services Board is now a "section 10" board, and the Midland Police Senior Officers' Association no longer exists. As a result, I notified only the Midland Police Services Board, referred to as the "third party" in this order. The Midland Police Services Board did not provide representations.

[7] For the reasons that follow, I find that the remaining record at issue is not exempt from disclosure under section 10(1), and I order the town to disclose it to the

appellant in its entirety.

RECORD:

[8] The record at issue is a three-page Memorandum of Agreement between the Midland Police Services Board (the board) and the Midland Police Senior Officers' Association (the association). The record appears to set out amendments to a collective agreement between the board and the association.

DISCUSSION:

[9] The sole issue in this final order is whether the Memorandum of Agreement is exempt from disclosure under the mandatory exemption in section 10(1). As previously stated, the third party did not provide representations to this office.

[10] The town is relying on sections 10(1)(a) and 10(1)(d) to deny access to the record. These sections state:

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;

...

(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.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

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.*).

parties that could be exploited by a competitor in the marketplace.²

[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 paragraph (a), and/or (d) of section 10(1) will occur.

Representations

Section 10(1)(a)

[13] The town advises that the appellant is engaged in ongoing arbitration with the board³ through the Ontario Police Arbitration Commission, and that this Commission is the proper venue for the appellant to seek the record. The town then goes on to quote the text of section 10(1)(a) and submits that given the ongoing litigation, the disclosure of the requested information will prejudice significantly the bargaining position of the institution.

[14] The appellant submits that the board demonstrated no concern with monetary losses when negotiating with the association to complete the collective agreement, and negotiated so long after the collective agreements were due that the association was able to view historical collective agreements from almost every police service in the province. The appellant further submits that the board failed to negotiate with the association when the association requested in late 2014, delaying discussions until late 2017 into 2018.

Section 10(1)(d)

[15] In its representations, the town quotes the text of section 10(1)(d) and then submits that a mediator was appointed to resolve a labour relations dispute between the board and the association. The mediator's subsequent award, the town argues, contained an express provision to maintain confidentiality. As a result, the town submits, disclosure of the requested information will reveal information that was

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ The town refers to this process as "ongoing litigation."

expressly desired to be kept confidential.

[16] The appellant submits that the *Police Services Act* requires collective agreements be promptly filed with the Police Arbitration Commission where they are made public and available upon request. The appellant further submits that the fact that other processes are in place, does not negate the board's responsibility to disclose the collective agreement, as required.

[17] Lastly, the appellant submits that the board has disclosed the association's collective agreement in the past when a freedom of information request was made.

Analysis and findings

[18] As previously stated, in order for a record to be exempt from disclosure under section 10(1), the party claiming the exemption must satisfy the three-part test, which I will now consider.

Part 1: type of information

[19] The types of information listed in section 10(1) have been discussed in prior orders and are as follows, in part:

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employer/employee relationships.

[20] The town refers to a labour relations dispute in its representations, while the appellant refers to some of the processes involving collective agreements. Based on the representations of the parties, as well as my review of the record, I am satisfied that the type of information in the record relates to collective bargaining and thus, qualifies as containing labour relations information for the purposes of section 10(1). As a result, part one of the test in section 10(1) is met.

Part 2: supplied in confidence

[21] 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.⁴

[22] 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

⁴ Order MO-1706.

inferences with respect to information supplied by a third party.⁵

[23] 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). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the 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

[24] 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.⁷

[25] 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; and
- prepared for a purpose that would not entail disclosure⁸

[26] The town’s position is that the information in the record is confidential because a mediator was appointed to resolve a labour dispute between the board and the association and the mediator’s award contained an express provision to maintain confidentiality. The town’s representations do not address whether or not the record was “supplied.” The appellant’s representations refer to this record as being negotiated.

[27] On my review of the record, it is clear that this was a negotiated contract between the board and the association, and that there is nothing on the face of the

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 PO-2020.

⁸ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

record that refers to it as being confidential. What is not clear, based on the evidence before me, is whether this record, after being negotiated between the board and the association, was then “supplied in confidence” to the town from the board and the association. Because the town has not discharged its onus to establish that the record was “supplied in confidence” to it, within the meaning of section 10(1), I am unable to make a finding that part two of the test has been met. However, even if I were to find that the record was “supplied in confidence” to the town, I find that the town has not established that part three of the three-part test in section 10(1) has been met, which I consider below.

Part 3: harms

[28] 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.⁹

[29] 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.¹⁰ 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 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹¹

[30] In applying section 10(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).¹²

[31] With respect to section 10(1)(a), the town’s position is that, given the ongoing litigation, the disclosure of the information will prejudice significantly the bargaining position of the institution. I find that the town has not provided detailed evidence to demonstrate the harm in section 10(1)(a). For example, the town does not provide any evidence as to how the disclosure of this record could reasonably be expected to prejudice significantly the bargaining position of any person, group of persons or organization or interfere significantly with the contractual or other negotiations of a person, group of persons or organization. As a result, I find that section 10(1)(a) does

⁹ *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.

¹⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹¹ Order PO-2435.

¹² Order PO-2435.

not apply.

[32] Turning to section 10(1)(d), the town submits that a mediator was appointed to resolve a labour relations dispute between the board and the association, and that the mediator's award contained an express provision to maintain confidentiality. The town further submits that disclosure of the information at issue will reveal information that was expressly desired to be kept confidential. In order to establish the harm in section 10(1)(d), the party claiming it must provide detailed evidence that disclosure of the information could reasonably be expected to 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. I find that the town has not provided detailed evidence of the nexus between the record at issue and any information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute. In other words, the town has not identified what information in the record at issue would reveal the information that was in the mediator's award. As a result, I find that section 10(1)(d) does not apply.

[33] For all of these reasons, I find that the town has not met its evidentiary burden that the three-part test in section 10(1) has been established, and having no evidence from the third party, I find that the record is not exempt under section 10(1).

ORDER:

1. I order the town to disclose the Memorandum of Understanding between the board and the association to the appellant by **June 2, 2021**, but not before **May 28, 2021**.
2. I reserve the right to require the town to provide this office with a copy of the record it discloses to the requester.
3. The timelines noted in order provision 1 may be extended if the town is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ April 28, 2021