Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4185

Appeal MA20-00401

Toronto and Region Conservation Authority

March 31, 2022

Summary: The Toronto and Region Conservation Authority (the TRCA) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records that a certain association provided to the TRCA in relation to two files and a company that had been required to provide environmental impact assessments. The TRCA located a responsive record, and after consulting with the association in question, decided to disclose the record in full to the requester. The association appealed the TRCA's decision, relying on the mandatory exemption at section 10(1) of the *Act*. In this order, the adjudicator finds that the record does not meet the three-part test for section 10(1) and, as a result, upholds the TRCA's decision to disclose it, 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).

OVERVIEW:

[1] The City of Vaughan (the city) and the Toronto and Region Conservation Authority (the TRCA) decided to consider a certain environmental assessment of a specified area in the city. A company had been required to do an environmental impact assessment for that area, and did so, in 2018 and 2019. The city and the TRCA decided to consider the 2019 assessment. A certain association disagreed with the decision to do so, and raised funds to pay a consultant for an independent report comparing the 2018 and 2019 environmental assessments, setting out the differences between them. The association later communicated with the TRCA and/or the city by email, and sent these institutions the consultant's comparison document as an attachment to one of

these emails. The TRCA received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records that the association provided to the TRCA in relation to the company that had been required to provide environmental impact assessments and two specified files.

[2] In response to the request, the TRCA located a responsive record: an email chain, with an attachment to one email.

[3] The TRCA notified a party whose interests may be affected by disclosure (an affected party) to seek its views about the disclosure of the record at issue. The affected party objected to the disclosure of the records.

[4] The TRCA later issued an access decision to disclose the records in full. The TRCA did not release the records to the requester to allow the affected party to appeal the TRCA's decision.[1]

[5] The affected party (now the appellant) appealed the TRCA's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[6] The IPC appointed a mediator to explore resolution. During mediation, the mediator held discussions with the TRCA, the appellant and the requester. The requester confirmed that he is seeking access to the records in their entirety and the appellant confirmed their objection to the disclosure of any part of the records, relying on the mandatory exemption at section 10(1) (third party information) of the *Act*. Since no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry.

[7] The adjudicator initially assigned to this appeal decided to begin an inquiry under the *Act* by sending the appellant a Notice of Inquiry, setting out the facts and issue on appeal. The adjudicator asked the appellant for written representations in response. She also asked the appellant to consider whether he would consent to the disclosure of any portion(s) of the records, and if so, to advise the IPC as soon as possible.

[8] The appeal was then transferred to me in order to continue the inquiry.

[9] The appellant provided written representations to the IPC. These representations were then shared with the TRCA and the requester, to assist them in making written representations in response to the Notice of Inquiry. The TRCA provided written representations in response, but the requester did not. The appellant provided reply representations. After reviewing the appellant's reply representations, I determined that I could close the inquiry.

[10] For the reasons that follow, I uphold the TRCA's decision, and dismiss the appeal.

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[1] Under section 21(8) of the *Act.*

RECORD:

[11] The record at issue is a six-page email chain, including a 20-page attachment to one of the emails.

DISCUSSION:

[12] The only issue to be decided in this appeal is whether the mandatory exemption at section 10(1) for third party information applies to the record.

[13] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[2] where specific harms can reasonably be expected to result from its disclosure.[3]

[14] 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[.]

[15] For section 10(1) to apply, the party arguing against disclosure 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;

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[16] Since the appellant opposes disclosure of the record, the appellant had the onus of proving that the record meets each part of the three-part test. However, most of the appellant's representations address other matters, such as the appellant's substantive views about the TRCA's decision to proceed with the 2019 assessment (which falls outside the IPC's jurisdiction), which are not relevant to my determination of whether the three- part test is met. As a result, while I have reviewed the appellant's representations, I will only be referencing relevant aspects of them in this order.

[17] The TRCA's position is that the record does not meet any part of the three-part test, and as a result, should be disclosed.

Part 1 of the section 10(1) test: type of information

[18] If the type of information at issue does not reveal a trade secret, or scientific, technical, commercial, financial or labour relations information, it cannot be withheld under section 10(1) of the *Act*.

[19] The appellant does not identify which of these types of information would be revealed by disclosure of the email chain or the attachment. The appellant describes the attachment as a "third-party document" prepared by "a consultant," comparing the 2018 and 2019 environmental assessments.

[20] The TRCA submits that the records do not contain scientific or technical information.

[21] The IPC has described the scientific and technical information protected under section 10(1) as follows:

> ***Scientific information*** is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.[4]
>
> ***Technical information*** is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.[5]

[4] Order PO-2010.
[5] Order PO-2010.

[22] I will discuss the email chain and the attachment separately because I find them to be different enough in nature to warrant separate consideration.

The email chain

[23] With respect to the email chain, based on my review of its contents, and of the parties' representations, I find that the emails within it cannot be reasonably characterized as a trade secret, or scientific, technical, commercial, financial or labour relations information within the meaning of section 10(1) of the *Act*.

[24] Although the context of the email correspondence is a disagreement between the appellant and the TRCA (and the City of Vaughan) regarding an environmental issue, in my view, the emails cannot reasonably be characterized as either scientific information or technical information, as those terms have been defined. The emails do not "relate to the observation and testing of a specific hypothesis or conclusion by an expert" in an organized field of knowledge, so they are not scientific information within the meaning of section 10(1).

[25] Similarly, based on the evidence before me, I have insufficient evidence to conclude that any views expressed in the emails about the environmental issue were either "prepared by a professional" in the relevant field, or "[describe] the construction, operation or maintenance of a structure, process, equipment of thing," such that the emails can qualify as technical information. Therefore, the email chain does not meet part one of the test. Since a record (or part of a record) must meet all three parts of the test to be exempt under section 10(1), and the email chain does not meet part one, and no other exemptions were claimed over these emails, I uphold the TRCA's decision to disclose them, but without personal information belonging to the representative of the association.[6]

The attachment (the consultant's comparison document)

[26] As mentioned, an attachment to one email is a document prepared by a consultant, comparing the 2018 and 2019 environmental impact assessments. It consists of some narrative summarizing the table that forms the bulk of this portion of the responsive record. The table and summary found compare two environmental assessment reports, which may themselves have qualified as scientific information. However, those assessments are not before me. The consultant's comparison that *is* before me points out that the 2018 environmental assessment addressed certain issues, and how the 2019 assessment compares to it (for example, by omitting references to certain subjects). It also highlights differences that are considered particularly significant.

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[6] The IPC confirmed with the original requester that he is not seeking personal information. To be clear, the TRCA is to redact information in the email chain revealing the non-association email addresses (both professional and personal) of the association's representative, as well as information appearing in many of their email "signatures" which reveals their professional position, address, and phone number because the emails were sent in the individual's capacity as a representative of the association that is named in the request, and not in the individual's professional capacity.

[27] Based on my review of the comparison document and the representations of the parties, I have insufficient evidence to accept that the comparisons set out in the document prepared by the consultant "relate to the observation and testing of a specific hypothesis or conclusion by an expert" in an organized field of knowledge to constitute scientific information. It does not appear to me from the evidence that the consultant himself observed or tested a specific hypothesis or conclusion in producing this document.

[28] However, I am prepared to accept that this portion of the record contains information that qualifies as technical information. As noted, technical information belongs to an organized field of knowledge in the applied sciences or mechanical arts. It *usually* involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.

[29] Here, the subject matter of this portion of the record is a comparison of two environmental impact assessments, so I am prepared to accept that the information at issue belongs to an organized field of knowledge in the applied sciences.

[30] The appellant describes the author of this comparison document as "a consultant." In describing the environmental assessments, the appellant also refers to ecologists, and states that they are not regulated in Ontario in the same way that, for example, engineers are. It is not clear to me from this if the appellant is asserting that the consultant is an ecologist. However, from my review of the record, I find that the consultant offers professional consulting services in the subject matter of the environment. Accordingly, given the subject matter and the field of practice of the author, I am willing to accept that this record meets part one of the test for section 10(1), as a record containing technical information.

Part 2: supplied in confidence

[31] The appellant asserts that the consultant's comparison document was supplied in confidence to the TRCA. However, the TRCA states that it was not.

Supplied

[32] The requirement that the information have been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[7]

[33] 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]

[34] Based on my review of the appellant's representations and the email attaching the consultant's comparison document itself, I find that the consultant's comparison

[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.

document was supplied by the appellant to the TRCA.

In confidence

[35] The party arguing against disclosure must show that *both* the individual supplying the information *and* the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an *objective* basis.[9]

[36] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.[10]

[37] As mentioned, the appellant asserts that it provided the consultant's comparison document to the TRCA on a confidential basis. From my review of the appellant's representations, and the email attaching the consultant's comparison document itself, I find that the appellant provided the consultant's document to the TRCA on the basis that it was confidential.

[38] However, there is insufficient evidence before me to establish that the TRCA expected the information to be treated confidentially. I do not have, for example, a response email to the appellant offering an assurance of confidentiality. Rather, what I have is a statement in the TRCA's representations stating that its staff determined that the record was not supplied to it in confidence.

[39] With this evidence of conflicting expectations of confidentiality between the supplier and recipient of the consultant's comparison document, I find that the consultant's comparison document does not meet part two of the test. Since all three parts of the test for section 10(1) must be met in order for a record (or part of a record) to be exempt from disclosure, and part two is not met, the consultant's comparison document is not exempt under section 10(1) of the *Act*. As no other exemptions were claimed over this part of the record, I uphold the TRCA's decision to disclose it.

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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).

[40] However, for the sake of completion, I will also explain why the consultant's comparison document does not meet part three of the test, either.

Part 3: harms

Could reasonably be expected to

[41] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the *Act.*[11]

[42] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[12] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[13]

[43] The Notice of Inquiry sent to the appellant explained that there are four specific types of harm that are set out in section 10(1):

- sections 10(1)(a) and (c) (prejudice to competitive position / undue loss or gain) – these sections seek to protect information that could be exploited in the marketplace;[14]
- section 10(1)(b) (similar information no longer supplied); and
- section 10(1)(d) (information supplied in a labour relations dispute).

[44] The appellant did not specifically cite any of these sections in their representations.

[45] However, I have reviewed the appellant's representations to see if there is any reference to any of the types of harms that section 10(1) protects against. I have also considered this part of the record itself (the attachment) to determine whether disclosure of the record would result in any of the harms listed in section 10(1) may be discerned from the record in the circumstances, as section 10(1) is a mandatory exemption.

[46] In considering the appellant's representations for evidence regarding types of

[11] Orders MO-2363 and PO-2435.
[12] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[13] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.
[14] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

harms claimed, I note two points: a passing reference to possible litigation, and the appellant's comment that it would "think twice about the public good" before providing such a document to the TRCA. These may be considered references to the harms contemplated by sections 10(1)(a)/10(1)(c), and 10(1)(b), respectively.

[47] If, by raising the possibility of litigation, the appellant means to signal a concern about the consultant's comparative document being used against it, it is worth noting that past IPC orders have held this type of concern relating to possible litigation is not the type of harm covered by sections 10(1)(a) or 10(1)(c).[15] In any event, I find insufficient evidence before me to establish that either of these types of harms may reasonably be expected as a result of disclosure of the consultant's comparison document.

[48] With respect to the appellant's statement about future hesitancy to share similar records with the TRCA, I find it to be speculative. As mentioned, a party resisting disclosure must show that the risk of harm is real and not just a possibility. The appellant's representations did not sufficiently assist me in understanding why the appellant would be reluctant to withhold information relating to genuine environmental concerns for the public good in the future, if the records at issue in this appeal were disclosed. In any event, I find that the appellant's brief reference to thinking twice about sharing similar information with the TRCA in the future is not sufficient evidence that the harms contemplated by section 10(1)(b) are reasonably expected to occur.

[49] From my own review of the consultant's comparison document and consideration of the circumstances, I cannot conclude that disclosure of this portion of the responsive record could reasonably be expected to prejudice significantly the competitive position of and/or result in undue loss or gain to, a person, group of persons or organization (including the appellant), under sections 10(1)(a) and/or 10(1)(c) of the *Act*.

[50] Likewise, I am unable to conclude from the evidence before me, including the consultant's comparison document itself, that disclosure of this portion of the responsive record could reasonably be expected to result in similar information no longer being supplied to the TRCA, under section 10(1)(b).

[51] For these reasons, while I accept that the consultant's comparison document meets part one of the test, I find that it does not meet parts two and three of the test. As a result, is not exempt from disclosure under section 10(1) of the *Act*, and I uphold the TRCA's decision to disclose it to the requester, in full.

ORDER:

1. I uphold the TRCA's decision to disclose the record to the requester (without personal information relating to the appellant's representative), and dismiss the appeal.

[15] See, for example, Order PO-3141.

2. I order the TRCA to disclose the record to the requester by **May 9, 2022** but not before **May 2, 2022**.

3. In order to verify compliance with this order, I reserve the right to require the TRCA to provide me with a copy of the record sent to the requester, under paragraph 2 of this order.

Original Signed by: March 31, 2022

Marian Sami
Adjudicator