

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4301

Appeal MA21-00742

City of Ottawa

December 19, 2022

Summary: The appellant challenged the decision of the City of Ottawa (the city) to disclose certain information relating to its proposal submitted to the city to provide a specified Shared E-Scooter Pilot Project. The city had decided to grant a requester partial access to the proposal, relying on the exemptions in sections 14(1) (personal privacy) and 10(1) (third party information) to deny access to certain portions. The appellant argues that the city should have applied section 10(1), a mandatory exemption, to the entirety of the proposal. The requester did not appeal the city's application of either the sections 10(1) or 14(1) exemptions. In this order, the adjudicator upholds the city's decision to partially disclose the proposal and dismisses the appellant's claim that section 10(1) should apply to the entirety of the proposal.

Statute Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, section 10(1).

OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all applications pertaining to a specified solicitation submitted to the city as part of a specified Shared E-Scooter Pilot Project, as well as all scoring associated with each application, and all notes related to the assessment process.

[2] After notifying a number of affected parties who may be affected by disclosure and receiving objections from two of them to the disclosure of their proposals, the city

issued an access decision. In its decision, the city granted the requester partial access to the responsive records relying on the exemption for personal privacy at section 14(1) and the exemption for third party information at section 10(1).

[3] The two objecting affected parties appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC). The original requester did not appeal the city's access decision but they still pursue access to the information that the city decided to disclose.

[4] This appeal relates to the appeal filed by one of the two objecting affected parties (who I shall refer to as the appellant). The appeal filed by the other objecting affected party is addressed in a separate appeal.

[5] Because the original requester did not appeal the city's decision, the only information at issue in this appeal is the information that the city decided to disclose to the original requester. The other information withheld by the city on the basis of sections 10(1) and 14(1) is not at issue in this appeal.

[6] At mediation, the appellant objected to the city's decision to disclose information from its proposal, taking the position that it qualified for exemption under sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may decide to conduct an inquiry under the *Act*.

[8] I decided to conduct an inquiry and sought representations from the city on the facts and issues set out in a Notice of Inquiry. The city provided responding representations. I then sent a Notice of Inquiry to the appellant along with a copy of the city's representations. The appellant did not provide responding representations and referred me to a letter it provided to the IPC with its Appeal Form objecting to the disclosure of its information. The appellant's letter only provides submissions relating to section 10(1) of the *Act*. Accordingly, and based on the information at issue, I will only be addressing the possible application of section 10(1) in this appeal.

[9] In this order, I find that there is insufficient evidence to conclude that section 10(1) applies to the information that the city decided to disclose, I uphold the city's decision to partially disclose the proposal to the requester and I dismiss the appeal.

RECORDS:

[10] At issue in this appeal is the information that the city decided to disclose contained in the appellant's 2021 Shared E-Scooter Pilot Project Proposal.

DISCUSSION:

Does the mandatory exemption at section 10(1) for third party information apply to the information the city decided to disclose?

[11] The city submits that section 10(1) does not apply to the information that it decided to disclose. The appellant disagrees.

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

[13] 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;

(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.

[14] For section 10(1) to apply, the party resisting disclosure, in this case the appellant, must establish all parts 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

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

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.

[15] Assuming, without deciding, that the first two parts of the test of the section 10(1) test have been established, I will consider whether the appellant has established part three of the test.

[16] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace.³

[17] 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*.⁴

[18] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁵ 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.⁶

[19] In applying section 10(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).⁷

[20] The city explains that it decided to withhold only certain information on the basis of section 10(1), such as the description of specific technology features. The city states that it determined that disclosure of basic features of the technology that would be found in a typical e-scooter, would not result in the harms contemplated under section 10(1) of the *Act*. The city submits that:

This reflects a distinction between general information about the e-scooter business and technology, which would be publicly available or ascertainable with little effort as opposed to commercially valuable information whose disclosure may result in an undue loss to the Affected Third Party and/or a gain to their competitors. For example, the e-scooter

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

⁴ Order PO-2435.

⁵ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁶ *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.

⁷ Order PO-2435.

user agreements, privacy policy, and waivers at pages 55 through to 84 [of the record] would likely be publicly available.

[21] In summary, the city's position is that there is a significant amount of information in the proposal – and that it decided to disclose – that is either commonly known information in the industry or is publicly available.

[22] In its letter objecting to the release of its information to the requester, the appellant submitted that it could reasonably be expected to suffer competitive harm from disclosure. It wrote:

Competitive harm has even been found in cases where some of the information at issue is already publicly available. [The appellant] is in direct actual competition with other e-scooter providers in Canada. Municipal governments are establishing competitive RFP processes that awards permits to a company/companies with unique technologies and solutions. [The appellant] has developed industry-leading solutions to mitigate common challenges and this information is shared with the cities on a confidential basis. [The appellant] will suffer substantial competitive injury if these technologies and operational strategies are released.

For all the above reasons, [the appellant's] record is confidential and therefore exempt from disclosure.

[23] In my view, I have not been provided with sufficient evidence to establish that section 10(1) harms could reasonably be expected to result from disclosure of the information at issue. I have reached this conclusion on the basis of the information at issue and the brief submissions of the appellant on harms (the totality of which is stated above). I also agree with the city's characterization of the information that it decided to disclose.

[24] Simply stating that the appellant is in competition is not sufficient for me to conclude that disclosure could reasonably be expected to cause the harm in section 10(1)(a), or any of the harms set out in section 10(1). Nor does simply making statements unsupported by evidence, as the appellant has done here. More must be provided. As set out above, to meet the third part of the test, the appellant must provide "detailed evidence" about the risk of harm if the information is disclosed. Although it need not prove that disclosure will in fact result in such harm, it must demonstrate a risk of harm that is well beyond the merely possible or speculative. Here, the appellant's brief submissions are statements that are imprecise and do not explain or demonstrate how disclosure of the particular information at issue could cause the section 10(1) harms.

[25] Accordingly, I find that the third part of the test has not been met. As all three parts of the test must be met for the exemption to apply, section 10(1) of the *Act* has

no application in the current appeal and I uphold the city's disclosure decision.

ORDER:

1. The appeal is dismissed and I uphold the city's decision to disclose portions of the record to the original requester by sending them to him by **January 27, 2023** but not before **January 23, 2023**.
2. To verify compliance with order provision 1, I reserve the right to require the city to provide me with a copy of the record as disclosed to the original requester.

Original signed by: _____
Steven Faughnan
Adjudicator

December 19, 2022 _____