

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4451

Appeal MA22-00482

City of Guelph

October 18, 2023

**Summary:** The City of Guelph received a request under the *Act* for access to information relating to the sale of the District Energy system. The city denied access to the information at issue under section 10(1) (third party information). In this order, the adjudicator finds that the information at issue is not exempt under section 10(1) and orders it disclosed.

**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 Guelph (the city) received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following:

1. How much did the city receive (as the sole shareholder of GMHI<sup>1</sup>) for the sale of the District Energy system.
2. What, if any, other forms of compensation did the city receive from [named company]

[2] The city issued a decision denying access in full to the requested information.

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<sup>1</sup> Guelph Municipal Holdings Inc.

[3] The requester, now the appellant, appealed the decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the city advised that the information at issue in this appeal is third party information and relies on section 10(1) (third party information) of the *Act*.

[5] The mediator notified an affected party but was unable to obtain the consent of the affected party.

[6] The appellant then raised the possible application of section 16 (public interest override), which was added to the scope of this appeal.<sup>2</sup>

[7] As further mediation was not possible, this appeal was transferred to the adjudication stage of the appeals process, where I decided to conduct an inquiry under the *Act*. I invited and received representations from the city and the appellant.<sup>3</sup> The affected party declined to make representations.

[8] For the reasons that follow, I find that the information at issue is not exempt under section 10(1) and order it disclosed to the appellant

## **RECORDS:**

[9] The information at issue are the answers to the questions raised by the appellant in his access request. It is contained in a Word document.

## **DISCUSSION:**

[10] The sole issue in this appeal is whether the third party information exemption in section 10(1) applies to the information at issue.

[11] The affected party claims that the mandatory exemptions at section 10(1) applies to the information at issue and that it therefore should not be disclosed.

[12] 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,

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<sup>2</sup> Due to my findings that section 10(1) did not apply, I did not consider the possible application of the public interest override at section 16.

<sup>3</sup> The parties' representations were shared in accordance with the confidentiality criteria in the IPC's *Practice Direction 7* and section 7.07 of the IPC's *Code of Procedure*.

(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;

[13] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>4</sup> 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.<sup>5</sup>

[14] For section 10(1) to apply, the party resisting disclosure – in this case, the third party appellant – must satisfy each part of the following three-part test:

- a. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- b. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
- c. 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] All three parts of the three-part test must be met to establish the exemption. Because I find below that the affected party has not established part 3 of the three-part test, it is not necessary for me to consider parts 1 and 2 of the test.

[16] 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.<sup>6</sup>

[17] 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

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<sup>4</sup> *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.*).

<sup>5</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>6</sup> *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.

of the consequences.<sup>7</sup> 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*.<sup>8</sup>

### **Representations of the parties**

[18] The city submits that the affected party believes section 10(1) applies but it will follow any orders issued by the IPC regarding whether or not this exemption applies.

[19] As stated above, the affected party did not provide representations.

[20] The appellant submits that a municipality should not be able to enter into an agreement where the purchase price of a municipality-owned (public) asset is withheld from the community. He submits that disclosure does not jeopardize the sale nor does it jeopardize future transactions as this is a one-of-a-kind sale. The appellant submits that the city has shown a willingness, if not eagerness, in the past to share the dollar amount of the sales of city-owned assets, such as 627 acres in Hanlon Creek Business Park.<sup>9</sup>

### **Analysis and findings**

[21] To find that any of the section 10(1) harms could reasonably be expected to result from disclosure, I must be satisfied that there is a reasonable expectation of the specified harm. I can reach this conclusion either based on my review of the information at issue, the circumstances of this appeal, and/or the representations made by the parties.

[22] Based on my review of the information at issue and the representations of the city and the appellant, I find that the affected party has not established that disclosure of the information at issue could reasonably be expected to result in the harms enumerated in sections 10(1)(a), (b), or (c) of the *Act*.

[23] As stated above, the affected party declined to submit representations. As such, without any evidence from the affected party with respect to harms, I then reviewed the information itself to determine whether it is evident that disclosure could reasonably be expected to result or cause any of the stated harms. From my review of the information at issue and the circumstances of this appeal, I am unable to conclude that disclosure of the information could reasonably be expected to cause or result in any of

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<sup>7</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>8</sup> Order PO-2435.

<sup>9</sup> Another example provided by the appellant was the sale of 325-plus acres of land in the east end of Guelph to Fusion Homes.

the stated harms in section 10(1). The information at issue relates to the amount the city received from the sale of the District Energy system and what, if any, other forms of compensation did the city receive from the affected party.

[24] In sum, in the absence of any detailed evidence from the affected party and based on my review of the information at issue, I am unable to conclude that the disclosure of the information at issue could be reasonably expected to result in the harms set out in sections 10(1)(a), (b), or (c) of the *Act*.

[25] All parts of the three-part test must be met for the mandatory exemption at section 10(1) to apply. Since the affected party has not established part 3 of the section 10(1) test, I find that section 10(1) does not apply to exempt the information at issue in this appeal from disclosure

**ORDER:**

1. I order the city to disclose the information at issue to the appellant by **November 23, 2023** but not before **November 17, 2023**.
2. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the information disclosed to the appellant upon request.

Original Signed By: \_\_\_\_\_  
Lan An  
Adjudicator

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October 18, 2023