

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4465

Appeal MA21-00493

North Bay Hydro Distribution Limited

November 28, 2023

Summary: North Bay Hydro Distribution Limited (NBHDL) received a request under the *Act* for details and results of any calculations showing financial benefits resulting from NBHDL's purchase of Espanola Hydro. NBHDL located a responsive record and after seeking the views of an affected third party, it denied access to the record pursuant to section 10(1) (third party information) and 11 (economic and other interests). The requester appealed NBHDL's decision. In this order, the adjudicator upholds NBHDL's decision and finds that section 10(1) applies to exempt the record from disclosure.

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

Orders and Investigation Reports Considered: Orders MO-2986, P-1537, PO-1818, PO-1957, PO-2461 and PO-3507.

OVERVIEW:

[1] North Bay Hydro Distribution Limited (NBHDL) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)*, for access to information concerning NBHDL's purchase of Espanola Hydro. The requester sought:

The details and results of any calculations showing the financial benefits accruing to NBHDL resulting from the purchase of Espanola Hydro including those calculations made by or provided to NBHDL.

[2] Prior to issuing a decision, NBHDL notified an affected third party of the request under section 21(1) of the *Act* seeking its views on disclosure of the responsive record (a spreadsheet) and notified the requester of this step. After the affected third party objected to disclosure, NBHDL issued a decision to the requester denying access under section 10(1) (third party information), and section 11 (economic or other interests) of the *Act*.

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

[4] The mediator communicated with both the appellant and NBHDL about the appeal. NBHDL clarified that in addition to relying on section 10(1)(a) and (c) to deny access to the responsive record, it was also relying on subsections 11(a), (c), (d), and (e). NBHDL maintained its position to withhold the record in its entirety.

[5] The appeal was moved to the adjudication stage where an adjudicator may conduct an inquiry. The original adjudicator assigned to this appeal decided to conduct an inquiry and sought representations from NBHDL which were shared with the affected third party (the affected party) who provided its own representations. At this point, I was assigned as the adjudicator to continue the inquiry. I shared the non-confidential portions of these representations with the appellant who provided his own representations. The parties were invited to submit reply and sur-reply representations, all of which were shared in accordance with the IPC's *Code of Procedure*.

[6] In this order, I uphold NBHDL's decision and find that the exemption at section 10(1) applies to exempt the record at issue.

RECORDS:

[7] The record at issue is an electronic spreadsheet that NBHDL describes as a dynamic electronic spreadsheet that involves three components:

- the spreadsheet application or template and the underlying formulas, developed by and proprietary to the affected party, which automate calculations of content input into the spreadsheet in accordance with a financial model for mergers and acquisitions developed by the affected party (collectively, the "model")
- the data developed by and proprietary to NBHDL (the "data") that was used by the affected party to produce a financial model specific to the assessment of the purchase of Espanola Hydro

- the “NBHDL model” is an asset of NBHDL’s in which the affected party also has an interest because of the information about the affected party’s model that can be derived from the NBHDL model.

[8] The appellant confirmed during mediation that he seeks access to an electronic copy of the spreadsheet(s) at issue and during adjudication he made clear that he was not seeking a hard copy.

DISCUSSION:

[9] I will start by examining if the mandatory exemption at section 10(1) for third party information applies to the record.

[10] 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

[11] The relevant parts of section 10(1) 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;

...

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[12] 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

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 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.

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

[13] The IPC has described the types of information protected under section 10(1) as follows:

Trade secret includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (a) is, or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.³

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.⁴ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁵

Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁶

[14] As described by the affected party and confirmed in my review, the record is comprised of a worksheet (the model) utilizing data obtained from NBHDL with respect to the acquisition of the Espanola Hydro. The NBHDL and the affected party submit that the record contains information that contains trade secrets, financial and commercial information.

[15] The appellant argues that the record does not contain the kinds of information claimed by the NBHDL and the affected party. He submits that the affected party's model has not been shown to be a trade secret which is generally not known in the trade or

³ Order PO-2010.

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order PO-2010.

business. The appellant suggests that other organizations who may be competitors to the affected party have by necessity developed similar processes using identical software in order to provide the same results as the model. He submits that the use of formulas in the software in a different order or for a unique purpose which provides the same results is not representative of a trade secret.

[16] I have reviewed the record and agree that it contains information that satisfies part 1 of the three-part test. The record includes trade secret information because it consists of a formula, pattern, compilation, method, technique that is used in trade or business that would not be generally known in the trade or business. Despite the appellant's suggestion that competitors of the affected party have their own information to develop similar processes, I accept the affected party, and NBHDL's submissions that having advised on significant utility transactions,⁷ including financings, valuations and regulatory matters, it is a prominent advisor in what is a niche industry. The record at issue contains information relating specifically to the affected party's proprietary methodologies for utility mergers and acquisitions. Despite the appellant's suggestion that the affected party's competitors have their own similar processes, in my view, the evidence supports that the affected party's formula, method and technique is not generally known. I also consider the non-disclosure agreement (discussed below) required of the NBHDL prior to the affected party providing its services, a factor in deciding that the formula and method set out in the records is trade secret because of the apparent efforts the affected party takes to ensure that its method does not become generally known.

[17] It is also clear from the representations that the affected party's model has economic value from not being generally known. I accept that the affected party has honed its proprietary methodologies that analyze comparisons of strategic alternatives in utility mergers with each client engagement and this methodology would not be generally known.

[18] Further, despite the appellant's suggestion that the software utilized by the affected party is not proprietary to the affected party, it is clear when reviewing the record that the formula and pattern in the record was created by the affected party and would likely not be known by a competitor, in the format presented, unless disclosed by the affected party.

[19] Therefore, I find that the first part of the test is met.

Part two of the section 10(1) test: supplied in confidence

[20] NBHDL states that the affected party, utilizing the data NBDHL provided, created the NBHDL model and directly supplied it. It notes that the affected party created the record under the terms of a non-disclosure agreement that the affected party required

⁷ In its representations, NBHDL referenced five mergers where the affected party was the lead financial advisor.

the NBDHL to execute before it would provide its services. The NBHDL submits that the non-disclosure agreement and the protection afforded to commercially sensitive proprietary information under the *Act* are the basis for the affected party's expectation that it was providing the model to NBHDL in confidence.

[21] The affected party submits that it directly supplied the model to NBHDL under the terms of a non-disclosure agreement that both parties executed. It suggests that as a result there is an objective expectation of confidentiality in respect to the model. The affected party submits that this expectation was reasonable given the commercially sensitive information.

[22] The appellant does not address the part two test.

[23] I find that the record was supplied to NBHDL by the affected party, in confidence. Despite the NBHDL providing the initial data to the affected party, the record illustrates the method that was developed by the affected party and provided to NBHDL.

[24] Even though the model created by the affected party contains the data of the NBHDL, it is clear when reviewing the record that the data is not severable. Being intertwined with the affected party's formula/pattern/method, severance would result in disconnected snippets. Further, the appellant insists that he requires an electronic version of the model and is not seeking a hard copy. As set out by the affected party, severances to the electronic copy by way of change or adjustment of any of the calculations or inputs is likely to materially change the output of the model, compromising its integrity and rendering the result of little to no use.

Part three of the section 10(1) test: harms

[25] 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*.⁸

[26] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.⁹ 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

⁸ Orders MO-2363 and PO-2435.

⁹ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

information.¹⁰

[27] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace.¹¹

Representations

[28] NBHDL submits that the harms in section 10(1)(a) and (c) are met. It submits that it specifically chose the affected party to assist in assessing the purchase because of its industry-specific expertise. NBHDL notes that disclosure of the NBHDL model would disclose the affected party's model. It notes its understanding that the affected party model is a key asset of the affected party, equivalent to the code of proprietary software.

[29] NBHDL indicates that it was advised by the affected party, and it accepts that:

- the model was developed by a team of the affected party's professionals with deep utility industry experience
- the affected party's team built and perfected the model (utility mergers and acquisitions spreadsheet template) utilizing team member experience enhanced over time with each client engagement and transaction
- the model is comprised of complex methodologies that analyze comparisons of strategic alternatives in utility mergers
- the model is a highly interactive and sensitive tool - it performs complex calculations based upon inputs
- the inputs are based upon information and underlying analysis and estimates provided by the client (in this case, NBHDL)
- a change or adjustment of any of the calculations or inputs could materially change the output of the model
- the model allows the affected party to provide a unique offering – a highly customized analysis to clients (in this case, the NBHDL model).

[30] As such, NBHDL submits that the model is central to the advisory services that the affected party offers to its current and prospective clients and a key component in numerous advisory engagements, including for NBHDL. It suggests that if the model were to be publicly disclosed, the affected party would experience a significant loss of

¹⁰ *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.

¹¹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

competitive position in the market for future engagements, as any individual could utilize the model for their own gain.

[31] NBHDL states that it would be very difficult without a significant investment in time and resources, for a third party to build the model from scratch. It submits that obtaining the model through the *Act* would permit third parties to acquire a significant asset at no cost to the detriment of the owner and inventor of the asset. NBHDL notes that the IPC has held that section 10(1)(a) and (c) "seek to protect information that could be exploited in the marketplace," and submits that the NBHDL model derived from the application of the model to the data consist of information that could be exploited in the marketplace and accordingly, is precisely the type of information that section 10(1) of the *Act* is meant to protect. The NBHDL submits that the model could be used by anyone familiar with financial modeling to derive the model or components of it.

[32] NBHDL submits that it was advised by the affected party and it accepts that:

- the NBHDL model includes all the components of the model that has been developed by the affected party over thirty to forty years to provide valuation services to its clients, and
- the affected party continues to use the model or key aspects of it as a significant tool for its advisory engagements.

[33] After reviewing NBHDL's representations concerning section 10(1), the affected party provided further submissions on this issue. It submits that the model is based on a highly customizable template that is used in the analysis of acquisitions in the local distribution company marketplace. The affected party states that it employs this template as a unique value-add to its client services. It submits that disclosure of the model would allow third parties (whether professional services firms/consultants or potential clients) to benefit from its proprietary methodology for their own analyses of utility mergers and acquisitions, thereby compromising the affected party's competitive position in the industry. Specifically, it states that third-party firms or consultants could use this model to advise on their own client transactions which would constitute irreparable prejudice and harm to its commercial interests.

[34] The appellant submits that disclosure of the record to himself cannot reasonably be expected to prejudice the competitive position of the affected party because:

- he is not a competitor of the affected party,
- he has no current business relationship with the affected party's competitors, and
- he is not in the business of advising clients on mergers and acquisitions of any kind.

[35] The appellant suggests that regardless of the status of the affected party in the global professional community and its ability or the time and effort expended in development of the NBHDL model, it could be inferior to other models developed by its competitors and rejected as sub-standard to their own or so similar as to be of no benefit to them.

[36] The appellant submits that the opinion that the model is valuable in a way that it is unique in the industry is subjective, being expressed to suggest a competitive advantage to prospective customers. He suggests that the information contained in the NBHDL model has not been shown to be unique in any material way or that its disclosure to him would result in actual harm.

[37] The appellant submits that NBHDL will retain control of the original NBHDL model and concerns regarding changes or adjustments affecting the output of the NBHDL model by the appellant are not relevant.

Analysis and finding

[38] After reviewing the record and the submissions of the parties, I find that part three of the three-part test is met because disclosure of the NBHDL model would result in the harms set out in section 10(1)(a).

[39] In my view, NBHDL and the affected party have provided me sufficiently detailed evidence to demonstrate that the disclosure of the record at issue could reasonably be expected to result in significant prejudice to the affected party's competitive position. If this information were to be disclosed, a competitor could reasonably be expected to imitate the pattern/formula observed in the record, as well as the substance, of the affected party's methodologies for utility mergers and acquisitions.

[40] When reviewing the record, it is apparent that competitors could make use of the methodologies set out in the NBHDL model and tailor their own model to imitate that of the affected party. I find that this information may be used by competitors to gain a significant competitive advantage by utilizing the affected party's model that was developed over several decades resulting in significant prejudice to the competitive position of the affected party in a niche industry.

[41] The information in the record illustrates the affected party's model that it employs as a service to its customer base. In my view, this information represents a significant investment of time, money and resources, as well as the accumulated experience of the company.¹² I agree that disclosure of this information would allow third parties to acquire a significant asset at no cost, to the detriment of the affected party. Section 10(1)(a) seeks to protect information that could be exploited in the marketplace, and I find that the NBHDL model, derived from the application of the model to the data, consist of information that could be exploited in the marketplace and

¹² Orders PO-1818 and PO-1957.

accordingly, is precisely the type of information that section 10(1) of the *Act* is meant to protect. I agree that the NBHDL model could be used by anyone familiar with financial modeling to derive the model or components of the it.

[42] The appellant suggests that the model could be inferior to other models created by the affected party's competitors. However, I find the existence of the NDA agreement prior to the affected party providing its services, shows that the affected party takes measures to protect its method to ensure that competitors do not have access to it. This supports the suggestion that the model contains information that the affected party intends to protect. Further, NBHDL submits that the model was an impetus for it seeking the services of the affected party, which supports that disclosure of this information could result in a competitive loss to the affected party. While the affected party's competitors may have (or could) developed their own model(s), this does not diminish the importance of the information for the affected party or suggest that its information, if disclosed would not be exploited in the marketplace.

[43] I also find the appellant's assurance that he is not a competitor of the affected party is not a factor to be considered under section 10(1). The IPC has consistently held that who the requester may be is not relevant to a determination concerning disclosure of the record as disclosure of a record is considered disclosure to the world.¹³

[44] I agree with and adopt the analysis in Orders PO-3507, MO-2986, P-1537 and PO-2461 and find that the identity of the appellant is not a consideration in this appeal.

[45] As I have found that all three parts of the test under section 10(1) have been satisfied with respect to the affected party's model, I find that section 10(1)(a) applies to exempt the information from disclosure.

ORDER:

I uphold the NBHDL's decision and dismiss the appeal.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ November 28, 2023

¹³ Orders PO-3507, MO-2986, P-1537 and PO_2461.