Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4481

Appeal MA21-00082

The Corporation of the City of Cambridge

January 12, 2024

Summary: The Corporation of the City of Cambridge received a multi-part request under the *Act* for access to information relating to an investigation into a named company by the Cambridge Fire Department. While numerous records were disclosed, a letter was withheld under section 10(1) (third party information). In this order, the adjudicator finds that some of the information contained in the letter is exempt under section 10(1). She orders the city to disclose the non-exempt information to the appellant.

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 Corporation of the City of Cambridge (the city) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to an investigation into a named company by the Cambridge Fire Department.

[2] Prior to issuing a decision, the city notified a company because its interests may be affected by disclosure of the records (the affected party). The affected party objected to the disclosure of the records.

[3] The city issued a decision granting partial access to the records. It denied access to the remaining records based on several exemptions, including section 10(1) (third

party information) of the *Act*.[1]

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

[5] During mediation, the city issued several revised decisions where it disclosed some of the previously denied records to the appellant.

[6] After numerous discussions with the mediator, the appellant advised that he was pursuing access to certain records.

[7] The appellant also advised that he believes the city has additional records that have not been disclosed to him. Subsequently, the city conducted another search for responsive records. The city identified additional records and made an additional disclosure to the appellant.[2]

[8] As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where I decided to conduct a written inquiry under the *Act*. I invited and received representations from the city, the appellant and an affected party.[3]

[9] During the inquiry, the city issued a further revised decision and disclosed additional records. The only record remaining at issue is a letter.

[10] In this order, I find that some of the information contained in the letter is exempt under section 10(1). I order the city to disclose the non-exempt information to the appellant.

RECORDS:

[11] The record remaining at issue is a 7-page letter addressed to the Cambridge Fire Department from the affected party (referred to as Record 1 in the index of records).

DISCUSSION:

[12] The sole issue in this appeal is whether the exemption for third party information

[1] The other exemptions the city relied on were sections 8(1)(a) (law enforcement matter), 8(1)(b) (law enforcement investigation) and 12 (solicitor-client privilege). They are not at issue in this appeal.
[2] After reviewing the additional disclosure, the appellant advised the mediator that he continues to believe that there are additional responsive records that have not been disclosed, specifically pages missing from a verification report. As a result, the issue of whether the city conducted a reasonable search was added to the scope of the appeal. However, during the inquiry the appellant confirmed that he is no longer pursuing this issue.
[3] 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*.

in section 10(1) applies to the letter. For the reasons that follow, I find that it applies to some of the information contained in the letter.

[13] The affected party claims that the mandatory exemptions at section 10(1) applies to the letter and that it therefore should not be disclosed.[4]

[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,
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> > (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] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[16] For section 10(1) to apply, the party resisting disclosure – in this case, the affected party, 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

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[4] In its representations, the city stated that on further review it was no longer relying on section 10(1). As such, the city did not make any submissions on this exemption.
[5] *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.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[17] All three parts of the three-part test must be met to establish the exemption.

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

[18] The types of information listed in 10(1) have been discussed in prior IPC orders. Relevant to this appeal are the following:

> ***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:
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> (a) is, or may be used in a trade or business;
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> (b) is not generally known in that trade or business;
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> (c) has economic value from not being generally known; and
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> (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[7]
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> ***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.[8]

[19] The affected party claims that the letter contains trade secret or technical information.

[20] With respect to trade secret, the affected party submits that the letter reveals a trade secret, namely information pertaining to the creation of its system. It submits that this system constitutes a trade secret because it is (a) used in the fire services trade, (b) not generally known in that trade, (c) have economic value from not being generally known, and (d) is the subject of reasonable efforts to maintain secrecy. It submits that it invested in developing this system; the system secures it an advantage vis-à-vis its competitors. The affected party also submits that the system is internal to it and is not shared with such competitors.

[21] Despite its claim that the letter contains technical information, the affected party

[7] Order PO-2010.
[8] Order PO-2010.

did not make any detailed submissions to that effect.

[22] Although the appellant provided representations, his representations did not address the first part of the test except to describe the affected party's system, that is referred to in the letter, as a database software program.

[23] On my review of the letter, I find that it contains information that qualifies as technical information. It is clear that the information pertaining to the affected party's system was prepared by a professional in the field and it describes the operation or maintenance of a process or system.

[24] The appellant also argues that the letter reveals information that qualifies as a trade secret. However, in support of its position, it simply reiterates the four criteria that are required to be established in order for information to qualify as a trade secret without any additional explanation as to why the information meets those criteria. I find that there is insufficient evidence, based on the affected party's submissions and the letter, to find that the letter contains a trade secret.

[25] I have found that the information in the letter qualifies as technical information. As such, I find that the first part of the test for the application of section 10(1) has been met.

Part 2: supplied in confidence

[26] 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.[9] 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.[10]

[27] 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.[11]

[28] 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;

[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] Order PO-2020.

- 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 disclosure[12]

[29] The affected party submits that the letter was "supplied" because it sent the letter directly to the Cambridge Fire Department. It also submits that the Cambridge Fire Department had no hand in generating the information contained in the letter.

[30] With respect to the "in confidence" component, the affected party submits that it supplied the letter with the expectation that the information contained in the letter would be treated confidentially. The affected party also submits that the letter is marked "CONFIDENTIAL".

[31] In response, the appellant submits that the letter was not treated confidentially by the city. He explains that he received a copy of the email in which the letter was attached. The appellant points out that the email was not marked "confidential" or "private".

[32] Having reviewed the letter and the parties' representations, I find that the letter was supplied to the city in confidence by the affected party. It is clear the affected party sent the letter to the city. I accept that the letter was supplied "in confidence" to the city with the expectation that it would be treated confidentially. Although the city disclosed the email (in which the letter was attached) to the appellant, it did not disclose the letter itself (the attachment). As such, I find that the letter has been treated consistently by the city in a manner that indicates a concern for confidentiality. I conclude that the second part of the test has been satisfied.

Part 3: harms

[33] To meet part 3 of the test, 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.[13]

[34] 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.[14] The failure of a party resisting disclosure to provide detailed evidence

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[12] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.
[13] *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.
[14] *Ontario* (*Community Safety and Correctional Services*) v. *Ontario* (*Information and Privacy Commissioner*), cited above.

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.*[15]

Representations of the parties

[35] The affected party submits that there is a reasonable expectation of harm to its competitive position if the letter is disclosed. It explains that the letter contains its system. The affected party submits that its system allows for significant efficiencies that keep it at a competitive advantage in the fire services industry. It submits that if this information is disclosed into the public domain its competitors could replicate or otherwise copy it to compete with it in bids and tenders for service contracts.

[36] The affected party also submits that disclosure could result in an undue loss for it and undue gain to its competitors. It explains that it made a substantial financial investment into creating its system. The affected party submits that "if other fire services businesses are given access to this information they will find themselves at significant advantage: they could use [its] template to form their own remote access web-based system" bypassing fundamental steps in the system creation process.

[37] In response, the appellant submits that there is no reasonable expectation of harm to the affected party's competitive position if the letter is disclosed. He submits that the system is not utilized for tender or bids and, as such, does not provide a competitive edge to the affected party. The appellant also submits that the particular system used by the affected party did not allow for significant efficiencies in fire alarm inspections, servicing, verifications or installations.[16] He submits that the affected party's system was not up to modern technology standards, was not efficient nor time saving.

[38] With respect to undue loss, the appellant submits that the system can only be utilized with an internet connection, which puts it at a distinct disadvantage within the fire alarm industry. He explains that several of the affected party's competitors, who he referenced by name, do everything electronically, and, as such the affected party's system is a backwards step for these companies. Considering this, the appellant submits that there is no undue gain to the affected parties' competitors by disclosing the letter.

[39] In response, the affected party submits that the appellant's argument that its system is ineffective and dated is not relevant as it is the system that it uses to maintain its advantage in the market in which it competes.

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[15] Order PO-2435.

[16] He provided a detailed example of the inefficiencies with the affected party's operating system in his representations.

Analysis and findings

[40] 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 record at issue, the circumstances of this appeal, and/or the representations made by the parties.

[41] In this appeal, the record at issue is a 7-page letter addressed to the Cambridge Fire Department from the affected party.

[42] Based on my review of the letter and the representations of the affected party and the appellant, I find that disclosing the first two and a quarter pages and the last page of the letter could not reasonably be expected to result in any of the harms in section 10(1). The information contained in these pages of the letter do not contain information about the affected party's system.

[43] However, I find that the remaining pages contain information about the affected party's system. I accept the affected party's submission that it made a substantial financial investment into creating this system which is an important aspect of its day-to-day operations. Although the appellant is of the view that the affected party's system may not be effective, efficient and is dated, I accept the affected party's submission that it is the system that it uses to maintain its advantage in the market in which it competes. I also accept that the affected party's competitors could use the information about the system as a template to form their own system to compete against the affected party. In my view, disclosure of the information could reasonably be expected to prejudice significantly the affected party's competitive position and result in an undue loss to the affected party and undue gain to its competitor. As such, I find that the majority of the remaining pages, if disclosed, could reasonably be expected to result in harms enumerated in sections 10(1)(a) or (c).

[44] As all parts of the three-part test have been met for some of the information contained in the letter, the mandatory exemption at section 10(1) applies to exempt that information from disclosure.

[45] I will order the city to disclose the information that I have found not to be exempt to the appellant. For the sake of clarity, with this order I will provide the city with a copy of the letter in which I have highlighted the information that should not be disclosed.

ORDER:

1. I uphold the city's decision to disclose the letter to the appellant, in part.
2. I order the city to disclose the non-highlighted information of the letter by **February 19, 2024** but not before **February 12, 2024.** To be clear, the highlighted information should not be disclosed.

3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the letter disclosed to the appellant upon request.

Original Signed by: January 12, 2024

Lan An
Adjudicator