Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1452

Appeal MA-000346-1

City of Windsor

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NATURE OF THE APPEAL:

The City of Windsor (the "City") received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to environmental studies on a certain area of land. In his appeal letter, the appellant expressed concern that industrial waste and oil/chemical residue may be in the soil and that the property is in close proximity to schools.

The City located one responsive record, an environment site audit that was commissioned by the owner of the property and submitted to the City for review, as responsive to the request. It then notified the property owner and solicited its views on disclosure of the record. In turn, the property owner provided submissions to the City objecting to disclosure on the basis that the record is a technical audit that was submitted to the City in confidence, and that disclosure would result in competitive harm.

In its decision letter, the City confirmed that no environmental assessments were conducted on the property by any provincial or federal agency. It also referred to the environmental audit that was commissioned by the property owner. The City advised the appellant that it had decided not to disclose the record and relied on the exemption at section 10(1) (third party information) of the *Act*.

During mediation of this appeal, the City reiterated that it had searched for, but did not locate, environmental assessment reports by any provincial or federal agency. The appellant was not satisfied that a reasonable search was conducted and maintains that such records should exist.

I sent a Notice of Inquiry, setting out the issues and facts of this appeal, to the City and the property owner whose interests may also be affected by this appeal (the affected party). The City returned a response which was shared with the appellant. Representations were received from the affected party and the appellant.

RECORD:

The record at issue in this appeal is an environmental assessment audit ("audit") that was commissioned by the affected party and prepared by an independent consulting firm.

PRELIMINARY ISSUES:

Scope of the Request/Reasonableness of Search

Where a requester provides sufficient detail about the records which s/he is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The *Act* does not require the City to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the City must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in the institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The City explained that the appellant did not submit his request in writing and when requested to do so, he refused. It states that the Freedom of Information Coordinator (FOIC) attempted to clarify with him the nature of the information requested. For example, the FOIC indicated that she asked the appellant a series of questions, including the address of the property, who may have produced the audit, whether the information was produced by the City, and the date of the document. The appellant was only able to provide the street intersection of the property.

The City submits that it then:

> ... contacted [Engineer II] who provided the document in question. I (FOIC) requested the third party to provide comments. I then called [the appellant] again telling him that the City of Windsor did not have an "audit". I asked if he knew of any other agency that may have been involved in the clean up of the site. He said "No".
>
> In my effort, I thought there may be a difference between an assessment or an audit. Therefore, I recontacted [Engineer II] in our Public Works Department. He indicated that he was unaware of any E.P.A. being done on site. Furthermore, audits and assessments in environmental studies are interchangeable terminology. This was conveyed to the appellant.
>
> Unless the appellant could advise of any further details of environmental studies, I have no other way of doing a further search.

The appellant confirmed that he personally attended at the Public Works Department and "asked in the first instance if anything had been done" with respect to "any environment research". He acknowledged that City staff instructed him to forward his request to the FOIC, who he unsuccessfully attempted to see and subsequently contacted by telephone. The appellant indicates that he did not submit a written request because he was not advised that it was required.

Based on the above, I accept the City's position that the search for the government-conducted assessment reports was reasonable in the circumstances.

DISCUSSION:

Section 10(1) of the *Act* provides:

> 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;

Section 10(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. In Order PO-1805, Senior Adjudicator David Goodis discussed the purposes of the provincial equivalent to section 10(1). He stated that this provision was designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions".

While 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 information which, while in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace (see, for example, Order MO-1393).

In applying section 10(1), previous decisions have held that in order to support an exemption from disclosure under this section, institutions or affected parties must establish 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; **and**

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Part 1: Type of Information

The City and the affected party state that the audit contains scientific and/or technical information. The affected party also indicates that the information was used in the preparation of commercial lease documents. In its submissions, the affected party describes the consulting company as a "nationally recognized professional environmental consultant" that was retained to "assess the condition of the site." The consultant, among other things, carried out a site inspection, collected samples and measurements, analyzed and interpreted results, and prepared

the audit. The audit describes the excavations that were undertaken and sets out the results of analyzed samples.

The terms ". . . scientific, technical, commercial, . . . information" have been defined by this office as follows:

> *Scientific information*
>
> Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the *Act* [Order P-454].
>
> *Technical information*
>
> Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the *Act* [Order P-454].
>
> *Commercial information*
>
> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order P-493].

I adopt these definitions for the purpose of this appeal.

From my review of the submissions of the City and the affected party, and of the record, I find that the audit contains scientific and /or technical information and, therefore, meets the first requirement for exemption under this section (Orders P-974, P-1235 and PO-1732).

Part 2: Supplied in Confidence

The second part of the three-part test set out above encompasses two components: it must be shown that the information was "supplied" to the institution, and that the supply of the information was in "confidence".

In order to establish that the record was supplied either explicitly or implicitly in confidence, the City and the affected party must demonstrate that an expectation of confidentiality existed at the time the audit was submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to the City on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the City.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

In support of the position that the record was supplied by the affected party with an implicit expectation of confidentiality, the City submits:

> The information was supplied to our Public Works Department during a process of redevelopment of the land in question in accordance with the City of Windsor official plan. It was provided to [named Engineer] for his review. It was to provided to [named Engineer] in implicit confidence. Subsequently, City plan procedures have been changed to indicate to future applicants that such documents <u>are a requirement</u> and as such may be released as a general document depending on the content.

The affected party asserts that the information was never intended to be provided to third parties because environmental site audits are "normally confidential documents prepared for decision making purposes by those having them undertaken and certain designated agencies such as financial institutions." It further states that the audit was provided to the City in confidence, for the purpose of evaluation, in accordance with subsection 5.4.8 of the Official Plan for the City of Windsor.

I accept that the affected party submitted the audit to the City with a reasonably-held and objective belief that it would be treated confidentially, and that this expectation was communicated implicitly through customary practice prior to the New Official Plan of the City of Windsor coming into effect in September 2000. I also accept that the audit was originally prepared for a purpose that would not entail disclosure (see Order P-561).

For these reasons, I find that the criteria outlined in Order P-561 are present and the second requirement for the section 10(1) exemption claim has been established.

Part 3: Harms

To discharge the burden of proof under the third part of the test, the City and/or the party resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed (Order P-373).

The words "could reasonably be expected to" appear in the preamble of section 10(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 10(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" (see Order P-373, two court decisions on judicial review of that order in Ontario (*Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), as well as Orders PO-1745 and PO-1747).

As the submissions of the City and the affected party on the application of sections 10(1)(a) and (c) are closely interrelated, I will consider them together.

Section 10(1)(a) and (c)

The City submits:

> The greatest concern I (FOIC) have is with the wording of the document and the lack of provincial standards to explain what are acceptable levels of contamination. The executive summary indicates that the property met "accepted" provincial standards. However, the audit references contamination of different points of the property of various substances. Without detailing what the provincial standards [are] or why the levels are considered safe, it appears that an opinion of an engineer is being given without standards. As such, this would prejudice the subject lands ability to redevelop.
>
> It must be noted that the lands have been developed into a retail area of food and restaurants. These lands sat vacant for over five (5) years up until recent development.

The affected party states that "in our opinion, nothing can be gained by providing our site audit information to the requester". It further submits:

> ... disclosure of the information could reasonably be expected to prejudice our site in the highly competitive commercial real estate market. Furthermore, disclosure of the information could result in undue loss to our business.

I do not accept the city's submissions on harm. The fact that the record may contain information which could be misleading does not alone fit within the harms described in section 10(1)(a) or

(c). In any event, the City is free to counter this effect by including with any disclosure of the record an explanation as to why the information could be misleading.

In addition, the affected party's submissions on harm are not convincing. The fact that nothing can be gained by providing access is not sufficient to establish harm under paragraph (a) or (c) of section 10(1), nor is the bare assertion that disclosure could reasonably be expected to cause competitive harm or undue loss, without detailed and convincing evidence in support. The affected party has failed to provide a sufficient connection between disclosure of the specific information in the record and the harm described in section 10(1)(a) and/or (c). The affected party's concerns are, at best, speculative (Orders M-10 and P-373).

Finally, neither the City nor the affected party provided submissions on the application of section 10(b) and, in the circumstances, I conclude that it does not apply.

For these reasons, I find that the audit does not qualify for exemption under section 10(1) of the *Act* and should be disclosed.

ORDER:

1. I order the City to disclose the record by sending a copy to the requester by **August 10, 2001**, but not before **August 6, 2001**.

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 record which is disclosed to the requester.

Original signed by: July 6, 2001
Dora Nipp
Adjudicator