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

ORDER MO-2004

Appeal MA-050149-1

City of North Bay

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NATURE OF THE APPEAL:

The City of North Bay (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to "the contamination or possible contamination of the property at [a specified address] and other properties in the immediate vicinity thereof". The request was submitted by a law firm representing the owner of some of those properties.

The requester stated that the owner of the property at the specified address had been conducting remediation efforts at the specified address, and as part of those remediation efforts, the owner had placed monitoring stations on two adjacent properties owned by the requester's client. The requester stated that:

> Our client is concerned that contamination of [the property being remediated] has also resulted in contamination of the properties [of the requester] at [two specified addresses].

The City identified eight records as responsive to the request. Under section 21(1) of the *Act*, the City notified individuals whose names appear in four of the records (subsequently numbered records 1 to 4 in an Index of Records provided by the City) and asked whether they consent to the disclosure of this information. The individuals named in records 1, 3, and 4 did not consent and the City was unable to contact the individual named in record 2.

Also under section 21(1), the City identified and notified a consultant whose interests it considered may be affected by disclosure of four other records (subsequently numbered records 5 to 8 in the Index of Records prepared by the City), and asked whether it consented to disclosure of those records. The consultant forwarded the City's request to its client, a corporation that owns (or owned at the time) the property being remediated (the affected person). The affected person objected to disclosure of those records.

The City then issued an access decision. It disclosed records 1 to 4, subject to the severance of information identifying the individuals who had been notified pursuant to section 14(1) of the *Act* (protection of personal privacy), as the individuals did not provide their consent to disclose this information. The affected person did not consent to disclosure of the other four records, and City denied access to them in full pursuant to section 10(1) of the *Act* (third party information).

The requester (now the appellant) appealed the City's decision to withhold this information.

This office appointed a mediator to assist the parties to resolve the issues. During the course of mediation, the City agreed to share with the appellant its Index of Records, which provided further information as to the general nature of the undisclosed records or portions of the records and indicated the exemptions claimed for each of them.

Also during the course of mediation, the City explained that it had severed the names of individuals from the records indexed as numbers 1, 3 and 4 because the named individuals had

not consented to the disclosure of this information. The City explained that it did not succeed in contacting the individual named in record 2, and therefore severed that individual's name.

In light of this, and the fact that he received records 5, 6, and 7 from the Ministry of the Environment, the appellant agreed to narrow the appeal to the City's refusal to disclose the record entitled "Summary of Activities – [named location]" (1 page), indexed as record number 8 in the City's Index of Records. This record is withheld under section 10(1). Section 14(1) is not claimed for this record and is therefore no longer at issue in this appeal.

No further mediation was possible. Therefore, the appeal entered the inquiry stage and I was assigned as Adjudicator. I initially sent a Notice of Inquiry to the City and invited it to provide representations. Representations were received from the City. I then sent a Notice of Inquiry to the affected person with the representations of the City in their entirety and invited it to provide representations. The representative of the affected person responded, "I reviewed the representations of the City and agree with them. [The affected person] has no additional representations."

I sent a Notice of Inquiry to the appellant with copies of the representations of the City and the affected person and invited the appellant to provide representations. The appellant did so.

DISCUSSION:

The record at issue is a chronological summary of a program of soil, groundwater, and air quality monitoring and testing procedures, as well as test results, in relation to testing carried out by a consulting firm on behalf of the affected person. The affected person is the past or present owner of a property where a gas station was formerly located at the address in the City of North Bay specified in the request for information. This testing has been conducted on the gas station property as well as on adjacent properties to determine whether contaminants have migrated beyond the gas station property.

The appellant states that some of this monitoring has been carried out on two of its properties, which it identifies by address. Although neither the City, the affected party, nor the record at issue clearly identify the properties monitored by the consultant, I am satisfied from a review of the records disclosed to the appellant, together with the request, decision and representations, that some of the off-site monitoring and testing took place on the two properties owned by the appellant and on property owned by the City.

THIRD PARTY INFORMATION

Do the mandatory exemptions at sections 10(1) (b) and (c) apply to the record?

In its decision, the City did not specify which subsections of section 10(1) it based its decision on. However, its decision states that:

> In this case the third party information is being denied access to on the grounds that it meets the three (3) tests, being:
>
> - Scientific and technical information plus information of monetary value (cost to test);
> - The information was supplied in confidence, implicitly or explicitly; and
> - The information applies to third party property owners and could result to undue loss or gain to a person; the disclosure may result in the third party no longer supplying this or similar information to the City.

The City's explanation of its decision raises the possible application of subsections (a), (b) and (c) of section 10(1) and the City provided representations on the application of these subsections. When contacted by the City to ask whether it would consent to disclosure, the affected person replied that the records contain "scientific and technical information plus information of monetary value (cost to test)". As noted earlier, the affected person did not elaborate by providing representations.

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,
>
> (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

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1)(a), (b) or (c) to apply, the institution and/or the third party 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; 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 paragraph (a), (b) and/or (c) of section 10(1) will occur.

Part 1: type of information

As stated above, the City alleges that the record contains scientific and technical information. The assertion of the affected person that records contain "information of monetary value (cost to test)" raises an issue of whether commercial or financial information is in the record.

The types of information listed in section 10(1) have been discussed in previous orders:

> *Scientific information* is information belonging to an organized field of knowledge in 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 a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of

> information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Representations, analysis and findings

The City states:

> The record reveals both scientific and technical information. The scientific information relates to the observation and testing of soil and groundwater and was undertaken by an expert in the field … . The technical information relating information belonging to an organized field of knowledge (in this regard, engineering) and involves information prepared by a professional in the field… .

The appellant states that "the record does not reveal either scientific or technical information, within the meaning of the aforementioned subsections", but offers no explanation of this assertion. The appellant then appears to concede that the information may be scientific or technical information, as he states that "the first two parts of the test may be satisfied".

I find that the explanations and descriptions of monitoring and testing procedures and test results are technical information.

Although the affected person has stated that the four records initially at issue contain "information of monetary value (cost to test)", this record contains no such information. Therefore, I find that it contains no commercial or financial information.

I find, therefore, that some of the information in the record is "technical information" and meets the first test for exemption under section 10(1). Other information in the record is neither scientific nor technical and therefore does not satisfy part 1 of the test for exemption. However, in light of my findings in relation to tests two and three, it is unnecessary to specify which information is technical and which is not.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043].

Finding

The appellant does not deny that the record was supplied to the City by the affected person, and in fact appears to concede that this may be the case. I find that is clear from the evidence that this is the case. The information satisfies this part of the second test for exemption.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The City states that the affected person supplied the information to it "based on past practice, which implied confidentiality". In response to a question from me, the City responded that:

> There are no municipal by-laws, resolutions, policies or guidelines that direct the City to keep the information confidential. It has been the past practice of the City to keep the information confidential.

The City states that the affected person supplied the information with a reasonable expectation of confidentiality "as this has been the City's practice".

Although the affected person submitted no representations, in its initial response to the City, it stated, "information was supplied in confidence, implicitly or explicitly", without any elaboration.

The appellant's representations do not address this issue, except to acknowledge the possibility that "of the three-part test…only the first two parts may be satisfied." However, in my view, a

submission made by the appellant in relation to the third part of the test is also relevant to the issue of expectation of confidentiality:

> If the property [of the affected person] was listed for sale…the vendor would be required to disclose the environmental condition of the property to any potential purchaser.

In my view, the City has not provided "detailed and convincing" evidence that the affected person had a reasonable expectation of confidentiality. The City has no by-laws, resolutions, policies or guidelines that direct the City to keep the information confidential. Stating that confidentiality is consistent with an unspecified "past practice" is not sufficient in these circumstances. The City does not provide any evidence as to whether this past practice relates only to this affected person in relation to this particular testing program, or whether it is a more widespread practice. If it is a more general practice, there is no explanation as to what kinds of communications and situations this practice encompasses. There is also no evidence of any communications between the City and the affected parties as to their expectations, either at the time the information was supplied to the City or before or since that time.

I must be careful not to give reasons for my finding that disclose the contents of the record. However, I can state that I have reviewed the related records that have been disclosed to the appellant for assistance in understanding the context in which this information was supplied to the City, and found them useful in determining whether parts 2 and 3 of the test for exemption are met.

In deciding whether there is sufficient evidence of a reasonable expectation of confidentiality, I have taken into account the circumstances in which this information was supplied to the City as revealed by the representations and the related records. The relevant circumstances include the nature of the problem addressed in the record at issue (contamination or potential contamination of soil, groundwater and structures); disclosure requirements imposed by authorities in this case (for example, see item 1 in the second paragraph of page 3 of record 7), and the fact that the Ministry of the Environment does not consider related information provided to it to be confidential, as indicated by the appellant's evidence that "the Ministry of the Environment released three of the four records, without claiming any exemption"; the number and nature of different authorities involved; the potential impacts on public health and safety and on the environment of such situations (as revealed by records 1 and 2, for example); the number of surrounding properties and public infrastructures potentially impacted by the situation (see for example test locations and results in records 5, 6, and 7); and the fact that the information relates in part to monitoring that was done on the properties in addition to those owned by the affected person and the City, such as the appellant.

Furthermore, while reporting provisions in statutes and regulations that potentially cover this kind of situation require disclosure to public authorities rather than disclosure to the public (except for section 11(2) of the *Health Protection and Promotion Act*, which requires a Medical Officer of Health to report publicly the results of investigations to complainants), such provisions also suggest that there is a diminished expectation of confidentiality in such circumstances [see,

for example, Section 32(2) of Ontario Regulation 217/01 under the *Technical Standards and Safety Act*; section 13(1) of the *Environmental Protection Act*; *Ontario Water Resources Act*, section 32; and *Health Protection and Promotion Act*, sections 11(1) and (2)].

In the circumstances of this case, I have not been given sufficient evidence to support a finding that a person in the position of the affected party would have a reasonable expectation that information such as this supplied to a public authority in the position of the City would be confidential. I find therefore that the second part of the test for exemption is not satisfied with respect to the information at issue in this appeal. I will, nevertheless, also canvass part 3 of the test.

Part 3: harms

General principles

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(b): similar information no longer supplied

In its letter to the City objecting to disclosure, the affected person stated, "The disclosure may result in [the affected person] no longer supplying this or similar information to the City", without elaboration.

In its representations, the City addresses this in the following manner:

> Disclosure of the record could result in similar information no longer being supplied to the institution. The property owner has confirmed that disclosure of this record may result in them no longer supplying this or similar information to the City.
>
> The City has a specific interest, as the abutting property owner, in this regard. The City would not want the future disclosure of similar information to them to be withheld or refused on the basis that the information may be further disclosed without consent.

> There are no benefits or advantages to the property occupant or owner of supplying information of the type found in the record to the City. The benefit is to the City for being provided with the information as the abutting owner of road allowances and other municipal property.
>
> There are no municipal by-laws, resolutions, policies, or guidelines that require or encourage property owners or occupants to supply this or similar information to the City. It has been the past practice of the City to request this or similar information from an abutting property owner when the permission is requested to access City property for the purposes of completing soil and groundwater testing.

Analysis and findings

Although the City identifies its interest as a property owner, rather than any broader public interest, in the continued supply of similar information, I am satisfied that such a broader public interest exists to the supply of such information. The seriousness of the potential impacts of similar situations on human life, human health, the safety of buildings and public infrastructure and the natural environment are widely known and well documented. It is important that the owners and occupants of adjacent lands and public infrastructure and public authorities responsible for public health and safety and environmental protection, which include the City in this case, be supplied with information of the type found in the record at issue.

However, the City has not provided "detailed and convincing evidence" that disclosure of this record could reasonably be expected to result in similar information not being supplied in future.

I accept that there are no municipal by-laws, resolutions, policies or guidelines that require the affected person to supply similar information to the City in future. However, it does not follow from this that there is no legal requirement to supply the information or that "there are no benefits or advantages to the property occupant or owner of supplying information of the type found in the record to the City".

While I will avoid discussion that may reveal the contents of the records, in my view, this is a type of situation in which, even in the absence of any legislated requirement to supply this kind of information, the nature of the hazard, the need for permission to construct monitoring and testing installations on public and private property, and the requirements to report to several other authorities diminish the possibility of refusing to supply such information to the City.

There are strong advantages to supplying this kind of information to owners of adjacent land and to the owners and operators of adjacent public infrastructure (in this case, the City). Conversely, there are potentially serious consequences, including negative public relations, potential civil liability, and potential inability to redevelop property that can flow from failure to supply this kind of information to a municipal government. These potential consequences create pressure to supply such information. One of the pressures to continue to supply such information to the City arises from the fact that, as the City acknowledges, the affected person requires the City's permission to use property owned by the City for conducting soil and groundwater testing.

In addition, even though there may be no municipal by-laws or policies requiring the affected person to supply this or similar information to the City, I do not find that supplying it was voluntary in light of the information on page 3 of record 7 about certain obligations imposed by a government authority. I find that the City has not established that disclosure could reasonably be expected to result in similar information no longer being supplied to it.

Sections 10(1)(a) and (c): prejudice to competitive position/undue loss or gain

In its letter to the City objecting to disclosure, the affected person stated, "Information applies to third party property owners and could result to undue loss or gain to a person", without elaboration. This statement was in reference to the four records withheld at that time, and not specifically directed at the record still at issue.

In its representations, the City stated, "The property owner has advised that, in their opinion, disclosure of the record could result in undue loss or gain to a person", without elaboration. Thus, although the City is making the claim under section 10(1), it appears that it offers no evidence on this issue and simply accepts the unsubstantiated claim of the affected person.

It is not apparent to me from reading the representations or the record at issue, together with the records disclosed to the appellant, how the disclosure of this record could reasonably be expected to result in any prejudice to the any person's competitive position, interference with contractual or other negotiations, or undue loss or gain.

I find that that the City has not established that disclosure could reasonably be expected to result in any prejudice to the affected person's competitive position, interference with contractual or other negotiations, or undue loss or gain to any person.

I find that parts 2 and 3 of the test have not been satisfied. Accordingly, I find that the record is not exempt under section 10(1).

ORDER:

1. I order the City to disclose the record to the appellant by sending a copy to him no later than **January 17, 2006**, but no earlier than **January 12, 2006**.

2. To verify compliance with this order, I reserve the right to require the Ministry to provide to me a copy of the record disclosed to the appellant.

Original Signed by: December 9, 2005
John Swaigen
Adjudicator