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

FINAL ORDER MO-2032-F

Appeal MA-050139-1

Regional Municipality of York

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NATURE OF THE APPEAL:

This is my final order disposing of the outstanding issues in this appeal.

This appeal arose from a decision of the Regional Municipality of York (the Municipality) in response to a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for certain draft reports and other records regarding a hydrogeological investigation that had been prepared by a [named company] for the Municipality.

The Municipality granted access to some records and denied access to others, citing the mandatory exemptions at sections 10(1)(a), (b) and (c) of the *Act* (third party information). The requester (now the appellant) appealed the Municipality's decision. This appeal was opened and, after successful mediation on one of the issues, the file was transferred to the adjudication stage of the appeal process.

As the adjudicator assigned to this appeal, I conducted an inquiry. After receiving representations from the institution, the two affected parties and the appellant, I issued Interim Order MO-1996-I, in which I addressed some, but not all, of the issues regarding access to the records.

In Order MO-1996-I, I described the records as:

Record A

- Draft for Discussion - Geology and Hydrogeology, September 2004 (37 pages)
- Draft Appendix A - Conceptual Geologic Model and Draft Appendix B - Groundwater Flow for York region (169 pages)

and

Record B

- Correspondence, dated December 24, 2004 (2 pages)
- Emails with attachments (16 pages).

I ordered the Municipality to disclose a copy of Record A. I made no findings regarding Record B, because as I stated in the interim order:

> …one of the affected parties provided a review of the draft report. That affected party is an employee of the Government of Canada. The review and related e-mail correspondence comprises Record B. This raises the possibility that the mandatory exemption at section 9(1) of the *Act* might apply to Record B. This section states, in part:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> Because section 9 might apply and because the parties have not had an opportunity to address this issue, I have decided to defer my review of issues regarding access to Record B. I will therefore deal only with Record A in this interim order.

I then sent a supplementary Notice of Inquiry to the Municipality and the affected party, inviting representations on whether the mandatory exemption at section 9(1) of the *Act* might apply to Record B. Both the Municipality and the affected party declined to provide written representations. Therefore, I decided it was not necessary to seek representations from the appellant before issuing this final order.

In this order I will consider whether the mandatory exemptions in sections 9(1) and 10(1) of the *Act* apply to Record B. With respect to section 10(1), I will rely on the representations provided in response to the first Notice of Inquiry.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

Section 9(1)(a) states:

> A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada…

Section 9(2) states:

> A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912].

For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result as described above. To meet this test, the

institution 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.)].

If disclosure of a record would permit the drawing of accurate inferences with respect to information received from another government, it may be said to "reveal" the information received [Order P-1552].

In the Notice of Inquiry, I notified the Municipality that, under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. The Municipality declined to make representations and the record itself does not provide a basis for upholding the application of section 9(1)(a).

As noted previously, section 9(2) permits disclosure where consent is provided by the applicable party. Because the affected party did not reply to the supplementary Notice of Inquiry, at my instruction, an Adjudication Review Officer (the ARO) called the affected party by telephone. The affected party advised the ARO orally that there was no "federal concern or interest" which would prevent the release of the record, and he did "not see any other reason not to release those documents". However, in my view, this stops short of being an actual "consent". Nevertheless, this statement does not support the application of section 9(1)(a) and in fact tends to suggest that confidentiality is not an issue from the affected party's perspective.

I find that section 9(1)(a) does not apply to Record B.

THIRD PARTY INFORMATION

Sections 10(1)(a), (b) and (c) 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;
>
> (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) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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) 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), (c) and/or (d) of section 10(1) will occur.

Record B consists of 2 pages of correspondence, dated December 24, 2004, and 16 pages of emails with attachments. The December 24, 2004 letter was written by the affected party, and provided review comments about Record A. The emails and attachments all relate to the review of Record A. There is some duplication within Record B of the type of information in Record A, which I previously found was not exempt under section 10(1).

As noted above, all three parts of the section 10(1) test must be met in order for the exemption to apply. In this case, for the reasons outlined below, I am not satisfied that the "harms" component in part 3 of the test is met, and it is therefore not necessary for me to consider parts 1 and 2.

Part 3: harms

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].

Record B, as noted, consists of a peer review of Record A and related e-mails. The information in Record B consists of questions and comments relating to the material in Record A. The Municipality and the affected party provided representations regarding Records A and B in response to the initial Notice of Inquiry. I have reviewed both the representations and Record B. There is no new, or materially different, information in Record B itself, or in the representations, that leads me to find that the harms test has been met. The representations I quoted, and the reasons provided in Order MO-1996-I regarding Record A also apply to Record B. The following extract from that order sets out the pertinent representations, as well as my reasons, which I adopt for the purposes of this appeal.

> As I understand the representations of the Municipality and the affected parties, they believe part 3 of the test is met because:
>
> - The release of the record may be injurious to the reputations of the affected parties, thereby resulting in a loss of competitive position, and/or undue loss (sections 10(1)(a) and (c)).
>
> - Unrestricted disclosure of this information has the potential to undermine the business interest of the affected parties (section 10(1)(a)).
>
> - It is feared that the differences between the draft report and the final report could cast doubt on the abilities and/or integrity of the affected parties (10(1)(a) and (c)).
>
> - The Municipality also suggests that disclosure of the information may result in similar information no longer being supplied to it (section 10(1)(b)). In this regard, I noted previously that the Municipality states that "…Company B has accepted that the collaboration of professionals as part of a peer review is an important means of validating the report before its final release, but has participated only on the understanding that its professional reputation would be protected (i.e. *the draft report and any resulting peer critique would be kept confidential*). The Region believes there is substantial public benefit in maintaining a process such as this and fears that a decision requiring the release of preliminary versions of reports prepared by its scientific consultants will cause Company B and other consultants to no longer provide opportunity for peer review of their work product prior to final report issuance" (emphasis in original). Company B comments that disclosure could lead it "… to seriously consider whether its draft reports would be permitted to be submitted for peer review by institutions covered by access and privacy legislation."
>
> - The Municipality and Company B assert that disclosure of the draft report could "confuse" the public.

In my view, these arguments are extremely general and do not point to any objective or factual basis for believing that the disclosure of the particular record at issue here could reasonably be expected to result in the harms mentioned at sections 10(1)(a), (b) or (c). As regards sections 10(1)(a) and (c), for example, it is not clear how the disclosure of the information in the record could result in prejudice to competitive or negotiating provision, or produce undue loss or gain.

Nor is there any credible explanation of why, in the circumstances of this case, any deviation in the final report from the contents of the record at issue, which is clearly marked as a "draft" report, could reasonably be expected to result in harms of that kind. Also, because the record is clearly marked "draft", I do not accept arguments of Company B that withholding it would prevent "confusion". For this same reason, I am not satisfied that, even if any such confusion should occur, this could reasonably be expected to constitute or result in the type of "harm" envisaged by sections 10(1)(a) and (c).

Previous orders of this office have addressed similar situations where the party with the onus failed to provide the kind of detailed and convincing evidence required to establish a reasonable expectation of alleged harms under sections 10(1)(a) and (c) (see, for example, Orders MO-1319, PO-1791 and M0-1914.) Adjudicator John Swaigen's comments on this issue in Order PO-1914 and his comments are, in my view, similarly applicable:

> The harms described by the Town are potential general impacts from disclosure of drafts containing errors or omissions. They do not address the impacts of the disclosure of the particular information at issue in this appeal. The harms described by the consultant are speculative and lack substance.
>
> I want to comment specifically on two aspects of the contemplated harm.
>
> The first aspect is the concern that the public, if permitted to see the information in the draft, will be confused and believe it is the final opinion of the consultant. In my view, the possibility of such a misunderstanding is minimal, for three reasons. First, the fact that the draft does not contain the seal or stamp of the Professional Engineer who prepared it indicates clearly that it is not to be relied upon as the professional opinion of the consultant. The Town, the consultant and the appellant all acknowledge this. Second, the copy of the record provided to this office has the word "draft" written on the cover page, indicating clearly that it is not the final version. Third, the final version of the study is available for comparison.

With respect to the representations regarding the potential harms to Company B and the other affected parties, Adjudicator Swaigen also comments on similar arguments put before him in Order PO-1914:

> The second aspect is the concern that may be summarized as harm to the consultant's reputation. I accept that it is possible for disclosure of a record to result in harm to the reputation of a person who supplied information in the record, and that this loss of reputation in turn can have the potential to result in a harm listed in section 10(1), such as undue gain to competitor. Whether disclosure of information could reasonably be expected to harm the supplier's reputation depends on factors such as the nature of the particular information and the nature of any errors or omissions. Having reviewed the draft report and the representations on this issue, I see nothing in this information or in the circumstances of this case that could reasonably be expected to result in this kind of harm.
>
> Similarly, in the circumstances of this appeal, I have not been provided with "detailed and convincing" evidence to establish a "reasonable expectation" of the identified harms in sections 10(1)(a) and (c). Having reviewed the draft report and the representations, including the nature of any errors or omissions, I am not persuaded that disclosure could reasonably be expected to result in these harms and I find that sections 10(1)(a) and (c) do not apply.
>
> With respect to section 10(1)(b), the Municipality submits that continued peer review is in the public interest, and that this "may" not continue to occur if the report is disclosed. Company B says that it would have to "seriously consider" whether to continue with peer review by the Municipality. In my view, neither of these statements on their face is sufficient to establish a reasonable expectation of the cessation of the peer review process (i.e. the continued supply of this type of information to the Municipality). Moreover, while I accept that such a peer review would clearly be in the public interest where the Municipality is the client of Company B, I am not persuaded that the cessation of this practice is a reasonable expectation in the context of any future negotiated contract between the Municipality and Company B (or any other consultant) to produce a report of this nature. I find that section 10(1)(b) does not apply.

> In summary, I find that the disclosure of the record cannot reasonably be expected to result in the harms identified in sections 10 (1)(a), (b) or (c). As all three parts of the test under section 10(1) must be met, Record A does not qualify for exemption under section 10(1). As no other exemption has been claimed for it, I will order it disclosed.

Based on my finding that neither section 9 nor sections 10(1)(a), (b) or (c) apply, I will order Record B disclosed.

ORDER:

1. I order the Municipality to disclose a copy of Record B by **April 22, 2006** but no earlier than **April 17, 2005**.

2. To verify compliance with this order, I reserve the right to require the Municipality to provide to me a copy of the record disclosed to the appellant pursuant to provision 1.

Original signed by: March 16, 2006
Beverley Caddigan
Adjudicator