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

ORDER MO-2260

Appeal MA-050358-1

The Corporation of the City of London

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NATURE OF THE APPEAL:

The Corporation of the City of London (the City) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> We hereby request … that the [City] produce the following records relating to the ongoing road sewer project at Pine Street and Oak Street, London (which includes tunneling under Canadian National Railway tracks for a storm sewer):
>
> 1. all plans, contracts, and schedules;
>
> 2. records relating to the borer that became stuck in the ground, which blocked Pine Street and Oak Street for approximately 20 months.

After locating records responsive to the request, the City informed the requester that disclosure of a number of the records may affect the interests of third parties, and that it was giving the third parties an opportunity to make representations concerning disclosure. The City notified seven third parties pursuant to section 21 of the *Act*.

Based on my review of the records at issue, it appears that the third parties include the engineering firm hired by the City to manage the storm sewer project (the contract administrator); the firm that was contracted to lead the work on the storm sewer project (the contractor); the firm that was subcontracted to build the tunnel for the storm sewer (the tunnel subcontractor); and other consultants and subcontractors.

The City sent each third party a letter, along with an index of records and a copy of the records relating to them. It referred them to the exemption in section 10(1) of the *Act* (third party information) and invited them to notify the City in writing of any concerns they may have with respect to disclosure of the records.

The City received the following response to its letters:

- Two third parties consented to the disclosure of the records relating to them;
- Two third parties did not respond to the letters;
- Three third parties objected to the disclosure of the records relating to them, including the contract administrator, the contractor and the tunnel subcontractor.

The City then issued a decision letter that granted the requester full access to 71 documents, partial access to eight documents, and no access to five documents. It further advised her that it had decided to disclose additional records relating to third parties but that these records would be withheld from disclosure for 30 days to give these parties an opportunity to appeal its decision to the Commissioner's office.

Subsequently, the City located an additional record (an amending agreement between the City, the contractor and the tunnel subcontractor) that was partly responsive to the request. It issued a

supplementary decision letter that provided the requester with access to those portions of the amending agreement that were responsive to her request.

Both the contractor and the tunnel subcontractor appealed the City's initial and supplementary decisions to this office. In particular, they appealed the City's decision to disclose the records relating to them to the requester. The contract administrator did not appeal the City's decision to disclose the records relating to it to the requester.

The appellant in this appeal is the tunnel subcontractor, which objects to the City's decisions to disclose the records relating to it to the requester. I also have a related appeal before me (MA-050363-1) that was filed by the contractor, which also objects to the City's decisions to disclose the records relating to it to the requester. The issues in the related appeal are being addressed in a separate order.

During the mediation stage of the appeal process, the requester agreed to disclose her identity to the appellant and to clarify that her law firm was representing a developer. This appeal was not settled in mediation and was moved to adjudication.

I began this adjudication by sending a Notice of Inquiry to both the appellant and the City, inviting them to submit representations on the issues in this appeal. In response, the City submitted representations to this office. The appellant did not submit any representations in response.

I then sent the same Notice of Inquiry to the requester, along with the complete representations of the City. In response, the requester submitted representations to this office.

RECORDS:

There are 20 records at issue in this appeal. They consist mainly of correspondence, particularly letters sent by the appellant to the contractor. In addition, the responsive portions of the amending agreement between the City, the contractor and the tunnel subcontractor are at issue. I have summarized these records in the following chart, which is based on the index of records submitted by the City:

Record number	Description of record	Number of pages	City's decision
22	Correspondence regarding tunneling methodology	6	Disclose in full
66	Correspondence regarding tunnel	3	Disclose in full

	standby		
69a	Correspondence regarding tunnel boring machine specifications	4	Disclose in full
69b	Correspondence regarding tunnel stoppage	2	Disclose in full
69c	Correspondence regarding tunnel progress	3	Disclose in full
75	Correspondence regarding status of CNR tunnel and tunnel plan	2	Disclose in full
83	Correspondence regarding tunneling	2	Disclose in full
85	Correspondence regarding ground loss at working shaft	5	Disclose in full
92	Correspondence regarding settlement of outstanding issues	4	Disclose in full
93	Correspondence and invoice for standby cost of subcontractor's tunnel boring machine	2	Disclose in full
124b	Correspondence regarding City's notice to proceed	3	Disclose in part
142	Correspondence regarding tunneling methodology submittal	2	Disclose in full

144	Correspondence regarding tunneling methodology (revised)	3	Disclose in full
145	Correspondence regarding tunneling methodology	3	Disclose in full
147	Correspondence regarding contract administrator's position regarding completion of tunnel	3	Disclose in full
166b	Correspondence regarding tunnel shaft	4	Disclose in full
184	Correspondence regarding removal of dewatering system	3	Disclose in full
191	Correspondence regarding tentative schedule of work to be completed	2	Disclose in full
211	Correspondence regarding soil report	4	Disclose in full
217	Amending agreement between City, appellant and tunnel subcontractor	6	Disclose in part

DISCUSSION:

THIRD PARTY INFORMATION

The appellant, who objects to the City's decision to disclose the records at issue, claims that the mandatory exemption in section 10(1) of the *Act* applies to these records.

Section 10(1) states:

> 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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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].

Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

In the circumstances of this appeal, the City has decided to disclose the records at issue, but the third party (the appellant) has appealed that decision. Consequently, the onus is on the appellant to prove that the section 10(1) exemption applies to the records at issue.

For section 10(1) to apply, the appellant 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 paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

In order to satisfy Part 1 of the test, the appellant must prove that each record contains one or more of the types of information listed in section 10(1).

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

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> *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].

Although the onus is on the appellant to prove that each record contains one or more of the types of information listed in section 10(1), the appellant did not submit any representations in this appeal.

The City states that it agrees that Records 22, 69a, 75, 83, 85, 142, 144, 145, 166b and possibly 211 contain "technical information," and that Record 93 contains financial information. However, it asserts that Records 66, 92, 124b and 147 do not contain any trade secrets or scientific, technical, commercial, financial or labour relations information, and that the appellant has not presented any persuasive arguments to the contrary.

The requester simply asserts that the records do not reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

I have reviewed the records at issue and find that Records 22, 66, 69a, 69b, 69c, 75, 83, 85, 92, 124b, 142, 144, 145, 147, 166b, 184, 191, and 211 reveal "technical information" about the tunnel project. In particular, these records reveal information prepared by engineers or professionals in other technical fields relating to the construction of the tunnel.

With respect to the remaining records, I find that Records 93 and 217 reveal "financial information" relating to the costs involved in constructing the tunnel.

Given that I have found that all of the records reveal "technical information" or "financial information," Part 1 of the three-part section 10(1) test is satisfied with respect to those records.

Part 2: supplied in confidence

For section 10(1) to apply, the appellant must also satisfy Part 2 of the three-part test, which is that the information must have been supplied to the institution in confidence, either implicitly or explicitly.

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].

Although the onus is on the appellant to prove that the information in the records at issue was supplied to the City in confidence, either implicitly or explicitly, the appellant did not submit any representations in this appeal.

Based on my review of the records at issue, it appears that the contractor sent correspondence that it received from the appellant to the contract administrator, who then provided these records to the City. The City submits that it was appropriate for the engineering firm acting as the contract administrator to provide the records at issue to the City. It asserts that the contract administrator had a contractual obligation to report back to the City with respect to how the tunnel project was progressing.

In my view, the contract administrator hired to oversee the project was acting as the City's agent. I accept the City's submission that the contract administrator had an obligation to report back to the City on the progress of the project, which included providing the City with relevant documentation submitted by the appellant and other parties involved in the construction of the tunnel.

Given that the contract administrator was acting as the City's agent, I find that any information in the records at issue that was provided to the contract administrator was, procedurally speaking, directly "supplied" to the City, for the purposes of section 10(1) of the *Act*. In particular, I find that the information in Records 22, 66, 69a, 69b, 69c, 75, 83, 85, 92, 93, 124b, 142, 144, 145, 147, 166b, 184, 191, and 211 was "supplied" to the City, although it must still be determined whether this information was supplied "in confidence."

With respect to Record 217 (the amending agreement) I find that the information in the responsive portions of this record was not "supplied" to the City. The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

In Order PO-2435, Assistant Commissioner Brian Beamish adopted this approach with respect to per diem rates paid to consultants in accordance with contracts between the Ontario Family Health Network and these consultants. He observed that the government had the option of accepting or rejecting a consultant's bid, which is "a form of negotiation":

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management

> Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation.

I agree with Assistant Commissioner Beamish's reasoning and will apply it in the circumstances of the appeal before me. In my view, the responsive portions of the amending agreement between the City, the contractor and the tunnel subcontractor (the appellant) were subject to negotiation and mutually generated by the parties. I find that these contractual provisions were not "supplied" to the City by either of the third parties. Consequently, the appellant has not satisfied Part 2 of the three-part section 10(1) test with respect to Record 217 (the amending agreement), and the responsive portions of this record must be disclosed to the requester.

In confidence

I have found that the information in Records 22, 66, 69a, 69b, 69c, 75, 83, 85, 92, 93, 124b, 142, 144, 145, 147, 166b, 184, 191, and 211 was "supplied" to the City. However, to satisfy Part 2 of the section 10(1) test, the information in these records must have been supplied "in confidence" to the City.

In order to satisfy the "in confidence" component of Part 2 of the section 10(1) test, the party 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].

The City submits that the appellant has not demonstrated that the information in the records at issue was supplied to the City "in confidence." In particular, it asserts that regular progress meetings were held at the office of the contract administrator to discuss the "technical details" of the project, and that numerous parties involved in the project attended these meetings. In addition, minutes of these meetings were distributed to all of these parties as well as several private companies and public bodies who had an interest in the project.

Moreover, the City states that the appellant had a contractual obligation to submit information relating to the storm sewer project to both the contract administrator and the City, including information relating to the tunnel boring machine, associated equipment and construction methodology, and construction schedules. It submits that there is no suggestion in the contract that the information was to be supplied "in confidence."

In her brief representations, the requester submits that the appellant did not supply the information in the records at issue to the City "in confidence."

The onus is on the appellant to prove that it supplied the information in the records at issue to the City "in confidence," either implicitly or explicitly. However, the appellant did not submit any representations in this appeal. In the absence of such evidence, I am not prepared to find that the information in the records at issue was supplied to the City "in confidence," either explicitly or implicitly.

In short, for the purpose of the "in confidence" component of Part 2 of the three-part section 10(1) test, I find that none of the information in Records 22, 66, 69a, 69b, 69c, 75, 83, 85, 92, 93, 124b, 142, 144, 145, 147, 166b, 184, 191, and 211 was supplied to the City "in confidence." Consequently, the appellant has failed to satisfy Part 2 of the three-part test, which means that the information in these records does not qualify for exemption under section 10(1) of the *Act*.

Part 3: harms

For section 10(1) to apply, the party resisting disclosure must also satisfy the last part of the three-part test, which is that the prospect of disclosure of a record must give rise to a reasonable expectation that one or more of the harms specified in paragraphs (a), (b), (c) or (d) of section 10(1) will occur.

I have already found that the appellant has failed to satisfy Part 2 of the three-part test with respect to the records at issue. This means that the information in these records does not qualify for exemption under section 10(1) of the *Act*, and it is not necessary for me to consider whether Part 3 of the three-part test has been satisfied. However, in the interest of completeness, I will consider whether one or more of the harms specified in paragraphs (a), (b), (c) or (d) of section 10(1) could reasonably be expected to occur if the information in the records at issue is disclosed.

To meet this part of the test, the party resisting disclosure 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.)].

In appeals involving the section 10(1) exemption, the third party is usually in the best position to provide evidence as to whether any of the harms specified in paragraphs (a) to (d) (e.g., significant prejudice to its competitive position) could reasonably be expected to occur if the information in a record is disclosed. However, the appellant chose not to provide any representations in this appeal. In short, I have not been provided with detailed and convincing evidence from the appellant that would satisfy Part 3 of the three-part section 10(1) test.

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].

I have reviewed the records at issue. In my view, there are no other circumstances in this appeal, exceptional or otherwise, that would lead to an inference that any of the harms specified in paragraphs (a) to (d) of section 10(1) could reasonably be expected to occur if these records are disclosed to the requester.

Consequently, even if I had found that Part 2 of the three-part test was satisfied in the circumstances of this appeal, the appellant's failure to satisfy Part 3 of the test means that the information in the records at issue would still fail to qualify for exemption under section 10(1) of the *Act*.

ORDER:

1. I uphold the City's decision to disclose the records at issue to the requester.

2. I order the City to disclose the records at issue to the requester by **February 4, 2008** but not before **January 29, 2008**.

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 records that it discloses to the requester.

Original Signed By: December 28, 2007
Colin Bhattacharjee
Adjudicator