

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3267-I

Appeal MA14-363

City of Woodstock

December 2, 2015

Summary: The appellant made a request to the City of Woodstock under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records relating to the agreement between the city and Hydro One for the sale of shares in Woodstock Hydro. The city withheld the responsive records under the discretionary exemption in section 11 (economic and other interests). In this interim order, the adjudicator does not uphold the city's decision and grants access to some of the records. The adjudicator remains seized of the appeal in order to address issues relating to one of the records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 11.

OVERVIEW:

[1] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Woodstock (the city) for access to the following information:

Documents related to the Agreement by and between Hydro One Inc., [numbered company], and the Corporation of the City of Woodstock.

Letters from and to Woodstock Hydro Holdings or Woodstock Hydro Services received by or sent by the City of Woodstock regarding the Agreement; and

A copy of the confidentiality agreement between the parties; and The Agreement or contract between the City and [identified individual/name of law firm]

[2] After locating responsive records, the city notified a party that may have an interest in the records (the affected party) of the request and identified the records responsive to the request. The affected party advised that it did not object to the release of the information responsive to the request.

[3] The city then issued a decision to the appellant, advising him that it had located five letters from Woodstock Hydro to the city regarding the agreement. The city advised that it granted the appellant partial access to the letters and withheld portions of the letters pursuant to the discretionary exemption in sections 11(c), (d), (e), (f) and (g) (economic and other interests) of the *Act*. With regard to the appellant's request for the confidentiality agreement between the parties, the city advised the appellant that it released the agreement in a separate letter. Finally, with regard to the "agreement or contract between the City and [identified individual/name of law firm]", the city advised that no such record exists.

[4] The appellant appealed the city's decision.

[5] In mediation, the appellant confirmed that he wished to pursue access to all the withheld portions of the records, but he was not appealing the city's decision that certain records do not exist. The appellant also raised the issue of the possible application of the public interest override in section 16 of the *Act* to the records.

[6] During the inquiry into this appeal, the adjudicator sought and received representations from the appellant and the city. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The file was then assigned to me to dispose of the issues on appeal.

[7] In this order, I do not uphold the city's decision and order it to disclose Records 1 – 3. I remain seized of the appeal in order to deal with the issues relating to Record 4.

RECORDS:

[8] The records at issue consist of the following:

1. Appendix A (the White Paper) to Letter dated November 5, 2013
2. Letter dated February 10, 2014 re: Supplementary Correspondence and Appendix A – Addendum to the White Paper

3. Letter dated June 6, 2014 re: Issues Arising from Proposed Share Purchase Agreement
4. Letter dated June 6, 2014 re: Woodstock Hydro Holdings Inc. Board Meeting

DISCUSSION:

[9] The sole issue in this appeal is whether the records are exempt under section 11.

[10] In its representations, the city explains that the appeal arises from a proposed agreement between the city and Hydro One for the purchase of the city's shares in Woodstock Hydro Holdings Inc. ("Woodstock Hydro"). The agreement would see the city divest its electricity distribution interests and Hydro One take over operation of electricity distribution for the Woodstock area. The agreement was negotiated in 2013 and 2014, with the final agreement reached in 2014.

[11] At the time it submitted its representations, the city noted that the agreement between itself and Hydro One was conditional upon the review and approval by the Ontario Energy Board (the OEB). The review was commenced on July 15, 2014, and the OEB approved the sale on September 11, 2015.

[12] The city submits that as the records at issue arise from the confidential communications between the city and Woodstock Hydro in relation to the conditional agreement, and that portions of the records are exempt under sections 11(c), (d), (e), (f) and (g) of the *Act*.

[13] Section 11 states, in part:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[14] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹

[15] For sections 11(b), (c), (d) or (g) to apply, the institution must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²

[16] The failure to provide sufficient evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.³

Representations

[17] The city submits that disclosure of the withheld portions of the records would reveal significant and sensitive information about the city that would prejudice and harm its interests in the event that the agreement is not approved. The city argues that prior IPC orders have found that it is the "conditional" nature of the agreement which makes the city vulnerable to the harms in section 11.

[18] The city made specific representations about the records and the application of section 11:

- Records 1, 2 and 2A4 represent internal analysis and negotiation strategy of the city and Woodstock Hydro in relation to the agreement. Included in these records are commentaries from Woodstock Hydro in relation to aspects of the agreement, plans and strategies for maximizing benefits to the city and practical matters relating to compensation for employees of Woodstock Hydro.

1 *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

2 *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

3 Order MO-2363.

4 The city refers to the appendix to Record 2 as Record 2A.

- Record 3 contains commentary from Woodstock Hydro on a preliminary version of the agreement. It includes confidential opinions and analyses that were used by the city to inform its negotiation strategy.
- Record 4 contains confidential information from a Woodstock Hydro Board of Directors meeting. These meetings were confidential and the minutes are not available to the public. The information relates to measures being taken by Woodstock Hydro to address human resource matters in light of the agreement.

[19] The city submits that sections 11(c) and (d) apply to the withheld information as disclosure of this information would expose the city's confidential negotiation strategies and thus would place the city at a "severe disadvantage" should the OEB not approve the agreement. The city would then be forced to re-negotiate with Hydro One or seek another purchaser for Woodstock Hydro with its strategies known to these other parties. The city submits this would render any eventual sale less economically and financially beneficial for the city.

[20] For the exemption at sections 11(e), (f) and (g), the city notes that the information withheld contains strategies, positions, plans, procedures, criteria and instructions relating to the negotiations between itself and Hydro One. The documents directly address issues that have arisen during negotiation, criteria for those negotiations, plans for the negotiations, recommendations for negotiating positions, personnel management issues and the ongoing administration of Woodstock Hydro. The city submits that until the agreement has been approved, the negotiations could be continued or repeated. The withheld information is strategic information and its disclosure would severely harm the city and its ability to conduct further negotiations as needed.

[21] As stated above, the OEB approved the sale on September 11, 2015. A representative from this office contacted the city in order to find out whether they wished to revise their decision following the approval. The city advised that they did not intend to revise their decision and wished to proceed with the appeal with the submissions already submitted.

[22] I find that the city's arguments and evidence submitted in support of the application of the section 11 exemption are predicated on the agreement between itself and Hydro One still requiring the OEB approval and the possibility that the negotiations between the parties is still open. I find that the OEB approval changes the circumstances in this appeal.

[23] Based on my review of the records and the city's representations, I find that it has not provided sufficient evidence to establish that disclosure of the records would result in any of the enunciated harms set out in section 11. The city has not demonstrated that disclosure of Records 1 – 4 would result in any of the harms claimed in section 11 that is beyond merely possible or speculative now that the agreement

between itself and Hydro One is final and approved. The information at issue relates to the negotiation of the agreement for the sale of Woodstock Hydro to Hydro One including the city's strategies and plans. Based on the city's representations and the information at issue, I am unable to find that disclosure of this information could reasonably be expected to either prejudice the city's economic interests or competitive position (subsection (c)) or, cause injury to the city's financial interests (subsection (d)). Furthermore, as the agreement between the city and Hydro One has been finalized and the city did not indicate that negotiations are ongoing, I find that the harms set out in sections 11(e), (f) and (g) are also not established. Accordingly, as the information is not exempt under section 11, I will order Records 1 – 3 disclosed.

[24] During my review of the records, I noted that certain information in Record 4, on its face, appears to be the personal information of identifiable individuals within the meaning of that term as defined by the *Act*. This information may qualify for exemption under the mandatory personal privacy exemption in section 14(1). As the individuals to whom this information relates have not been notified of this appeal, I will not order that this information be disclosed. To be clear, I find that Record 4 is not exempt under the discretionary exemption in section 11 but may be exempt under the mandatory exemption in section 14(1). I remain seized of this appeal in order to address issues relating to Record 4.

ORDER:

1. I order the city to disclose Records 1 – 3 to the appellant by providing him with a copy of them by **January 6, 2016**.
2. I remain seized of the issues in this appeal pending final determination of all outstanding issues.

Original Signed by: _____
Stephanie Haly
Adjudicator

December 2, 2015 _____