

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3460-F

Appeal MA15-17

Town of Newmarket

June 23, 2017

Summary: This final order considers whether a report that sets out the general terms of agreement between the Town of Whitby and a local soccer club regarding a proposed indoor soccer facility, should be disclosed to the appellant. In this order, the adjudicator finds that the mandatory exemption in section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act* does not apply to this record and orders the Town of Newmarket to disclose it to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 10(1).

Orders Considered: Interim Order MO-3395-I.

DISCUSSION:

[1] This final order determines whether one of the remaining records at issue in the above appeal should be disclosed to the appellant, who represents a local taxpayers' advocacy group in Newmarket. He appealed a decision by the Town of Newmarket to deny him access to some records and parts of records relating to a \$2.8 million loan that the town provided to the Newmarket Soccer Club.

[2] In Interim Order MO-3395-I, I upheld the town's decision to refuse disclosure of one record but ordered it to disclose a number of other records and parts of records to the appellant. However, I deferred consideration of whether one record and parts of

two records should be disclosed to him, because the third parties referred to in those records had not been notified and given an opportunity to make submissions as to whether the information relating to them should be disclosed. In particular, order provision 5 of that interim order stated the following:

If the appellant wishes to continue pursuing access to the following records and parts of records, he should notify me in writing on or before February 16, 2017.

- Annual amounts paid by three soccer clubs to NSC to rent space (p. 5 of record 3)
- Names of two guarantors who guaranteed loan from a private lender, amount of that guarantee and other information (appendix D to record 3 and record 47)
- 2008 report re agreement between another town and its local soccer club (attachment to record 49)

[3] The appellant sent me a letter stating that he was interested in continuing to pursue access to the last record. That record is a Town of Whitby recommendation report prepared for a meeting of council on June 9, 2008. It was prepared by the Town of Whitby's Community and Marketing Services division and sets out the general terms of agreement between the Town of Whitby and a local soccer club regarding a proposed indoor soccer facility.

[4] In its initial decision, the Town of Newmarket refused to provide the appellant with access to this record because it claimed that it was exempt from disclosure under the mandatory exemption in section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[5] Given that this record contains information about both the Town of Whitby and a local soccer club in Whitby, I sent letters to both of these parties asking whether they objected to the disclosure of this record and, if so, to explain why, with reference to the exemptions in the *Act* that they were relying upon. My letters noted that the entire contents of this report appear to be found in a larger report that is publicly available on the Town of Whitby's website. I also included a template for the section 10(1) exemption, which applies to third party information, in the letter that I sent to the local soccer club. Finally, I provided the Town of Newmarket with copies of these letters.

[6] In response, I received letters from both the Town of Whitby and the Town of Newmarket which stated that they do not object to the disclosure of this record. I did not receive any response from the local soccer club in Whitby.

[7] As noted above, the record at issue sets out the general terms of agreement between the Town of Whitby and the local soccer club regarding a proposed indoor

soccer facility. Although I did not receive any representations from the local soccer club, I will briefly consider whether section 10(1) applies to this record, because it is a mandatory exemption.

[8] Section 10(1) reads:

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.

[9] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ 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.²

[10] 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.³ 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.⁴ Neither the Town of Newmarket nor the Town of Whitby objects to the disclosure of this record. Consequently, the onus would be on the local soccer club, if it objects to disclosure, to show that the section 10(1) exemption applies to this record. As noted above, however, the local soccer club

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ Section 42 of the *Act*.

⁴ Order P-203.

did not provide any representations to me about the possible application of section 10(1).

[11] For section 10(1) to apply, the party resisting disclosure 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;
2. the information must have been supplied to the town 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.

[12] I have reviewed this record and find that it contains information about the local soccer club's financial situation, including its revenues and annual operating expenses. I am satisfied that such information qualifies as the local soccer club's "financial information," which means that the first part of the section 10(1) test is met.

[13] However, there is no evidence before me to suggest that the local soccer club supplied this financial information in confidence to the Town of Whitby, either implicitly or explicitly. Nor have I have been provided with any evidence to show that the prospect of disclosure of this record would 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. Consequently, parts 2 and 3 of the section 10(1) test have not been met.

[14] Given that all three parts of the section 10(1) test must be met for the exemption to apply, I find that this record is not exempt under section 10(1) and must be disclosed to the appellant.

ORDER:

I order the Town of Newmarket to disclose the Town of Whitby recommendation report (which is an attachment to record 49) to the appellant by **July 31, 2017** but not before **July 25, 2017**.

Original Signed by:

Colin Bhattacharjee
Adjudicator

June 23, 2017