Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3601

Appeal MA16-744

Niagara Peninsula Conservation Authority

April 27, 2018

Summary: The NPCA received a request for a specified project proposal and all electronic communications in regards to it. The affected party appealed the NPCA's decision to disclose four electronic communication records and the project proposal, claiming the application of section 10(1) (third party information). In this order, the adjudicator upholds the NPCA's decision to disclose the records. She finds that they are not exempt under section 10(1).

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

BACKGROUND:

[1] The Niagara Peninsula Conservation Authority (the NPCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> Report #54-15 dated May 20, 2015 with the subject matter "[named company], Project Proposal"
>
> I wish to have a copy of the contract that was made as a result of this report and a copy of all reports and plans that were submitted to the NPCA as a result of the engagement of [named company]. This will include the communication plan that was developed, contact targets, details and messages.

> I am also requesting Appendix 1 to report 54-15.
>
> Furthermore report 54-15 defines this as an unsolicited proposal and I wish to see all documents from [named company] in which they approached the NPCA and proposed this project.
>
> I also wish all forms of electronic communications in regards to the above mentioned.

[2] Following affected party notification, the NPCA issued a decision to the requester and the affected party granting access, in part.

[3] The requester appealed the NPCA's decision and appeal MA16-413 was opened to address that appeal.

[4] The affected party, now the appellant, also appealed and file MA16-744 was opened to address its appeal.

[5] During mediation, the NPCA reconsidered its decision and issued a revised decision, granting access to the project proposal and 66 records, which were previously withheld. Consequently, file MA16-413 was closed.

[6] Following further discussions, the appellant provided their written consent to disclose all of the records identified in the revised decision, except Records 13, 38, 53 and 54, in addition to the project proposal.

[7] As no further mediation was possible, the appeal was moved to the adjudication stage where an adjudicator conducts an inquiry under the *Act*.

[8] I commenced my inquiry by inviting the parties to provide representations. I received representations, reply representations and sur-reply representations from the appellant and the requester. The NPCA confirmed that it would not be providing any representations in this appeal. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the parties' representations were shared.

[9] In this order, I uphold the NPCA's decision to disclose the records as they are not exempt under section 10(1).

RECORDS:

[10] The records at issue are email chains (specifically Records #13, #38, #53, and #54), and the project proposal.

[11] I note that the last page of the project proposal contains the "Terms of Agreement" in which the appellant proposes a retainer relationship with the NPCA. I

also note that once the NPCA signed and returned this last page to the appellant, an agreement was reached between the two parties. As such, I find this document to be an agreement or contract as it governs the relationship between the parties.[1]

DISCUSSION:

[12] The only issue in this appeal is whether the mandatory exemption for third party information at section 10(1) of the *Act* applies to the records at issue.

[13] 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,
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> > (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.

[14] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

[15] For section 10(1) to apply, the appellant must satisfy each part of the following

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[1] I note that my copy of the project proposal is unsigned but, based on the representations and other material provided by the parties, I am satisfied that this record is the contract, which has been signed by both parties.

[2] *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.*).

[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

Part 1: type of information

[16] Past orders of this office has defined commercial information as follows:

> *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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]

[17] Adopting this definition, from my review of the records, I find that they relate to the sale of services by the affected party to the NPCA and thus contain information that qualifies as commercial information for the purposes of section 10(1) of the *Act*. I note that the appellant and the requester did not provide any representations on the type of information contained in the records at issue. Based on my review, I accept that the records contain commercial information, and thus the first part of the test for the application of section 10(1) has been met.

Part 2: supplied in confidence

[18] The appellant and requester did not submit any representations on whether the records at issue, the project proposal and the email chains, meet the "supplied" component of part 2.

Project Proposal

[19] I will first consider whether the information contained in the project proposal was supplied by the appellant to the NPCA. If so, I will then consider whether it was supplied in confidence.

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[4] Order PO-2010.
[5] Order P-1621.

[20] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[6]

[21] 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.[7]

[22] In Order PO-3670, Adjudicator Stella Ball states the following:

> The IPC has repeatedly found that the contents of a contract between an institution and a third party will not qualify as having been "supplied" for the purpose of section 17(1) [the provincial equivalent of section 10(1)] because contracts are presumed to be mutually generated, while proposals submitted by third parties to institutions are presumed to be "supplied."[8] The IPC has applied this general rule even in situations where the contracts are preceded by little or no negotiation. The Divisional Court has repeatedly upheld the IPC's general rule that contracts are mutually generated.[9] While there are two exemptions to this general rule – the "inferred disclosure" and "immutability" exceptions – the third party does not argue that these exceptions apply in this appeal.

[23] I adopt the reasoning in the above-noted order for this appeal. Applying the reasoning in the above-noted order, I find that the project proposal consists of a service agreement entered between the appellant and the NPCA. I therefore find that it is not "supplied" for the purpose of the *Act.* As all three parts of the test must be met, I will order that the project proposal be disclosed.

Email chains

[24] With respect to the email chains, they are communications between the affected party's employees and the representatives of the NPCA. Based on my review of the information contained in these email chains, I find that they were either supplied directly by the appellant to the NPCA or that disclosure would reveal information supplied by the appellant to the NPCA.

[25] I will now consider whether the information contained in these email chains have been supplied to the NPCA in confidence.

[26] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable

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[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8] See Order MO-3058-F for discussion of this general rule.
[9] See *Miller Transit* paras 26 and on, and more recently, *Accenture Inc. v Ontario (IPC)* 2016 ONSC 1616 at paras 40-42 and 50.

expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[10]

[27] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure[11]

[28] The appellant submits that the "in confidence" component has been met for record #13. It submits that the emails contained in this email chain was sent to a personal email address. As such, the appellant submits that the sender of the email had a reasonable expectation of confidentiality when the emails were sent.

[29] Based on my review of the emails and the circumstances surrounding their transmission, I accept that the appellant's expectation of confidentiality was reasonable. Accordingly, I find that all the email chains have met the "in confidence" component. As the second part of the test for the application of section 10(1) has been met, I will now turn to discuss whether the appellant would suffer any of the harms under section 10(1) from the disclosure of the email chains.

Part 3: harms

[30] In order to satisfy the third part of the test, the party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It 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.[12]

[31] 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

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[10] Order PO-2020.

[11] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[13]

[32] The appellant submits that it would suffer harms if the email chains (specifically Records #38, #53 and #54) were disclosed. The appellant identifies concerns about the nature of the communications and identifies its position that disclosure may result in undue loss to it. It also submits that it could prejudice its competitive position within the industry if competitors procured the electronic records in question and disclosed their contents to its existing and future clients, public office holders, and stakeholders. It states that this would result in loss of business and future business, and potentially damage working relationships with decision makers holding public office.

[33] The appellant's representations do not provide any further details or evidence in support of its arguments. I find that its representations fall short of the sort of detailed and convincing evidence that is required to establish part three of the test. Instead, its representations amount to speculation of possible harms. From my independent review of the email chains, I find that the harm is not inferable from the face of the records. I acknowledged that the nature of the language contained in one email may embarrass the appellant; however, this is not sufficient to establish the harms under section 10(1). Further, there is nothing precluding the affected party from addressing the embarrassing content of the email in any future negotiations or discussions with potential clients or public office holders. Accordingly, I find there is no evidence to establish any of the harms that may occur due to disclosure, and will order the email chains disclosed.

ORDER:

I uphold the NPCA's decision to disclose the project proposal and the email chains at issue to the requester and order the NPCA to send a copy of these records to him. This disclosure is to take place by **June 4, 2018** but not before **May 28, 2018**.

Original Signed by: April 27, 2018

Lan An
Adjudicator

[13] Order PO-2435.