Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3772

Appeal MA18-456

Middlesex-London Health Unit

May 27, 2019

Summary: This order addresses a third party's appeal of the Middlesex-London Health Unit's (the health unit) decision to disclose portions of an email and the entirety of a text exchange to the individual who requested access to the information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The third party appellant argues that the mandatory exemption for third party information at section 10(1) applies to the information. In this order, the adjudicator upholds the health unit's decision and orders it to disclose the information at issue to the requester.

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

OVERVIEW:

[1] The Middlesex-London Health Unit (the health unit) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*)for access to the following records:

> All correspondence, including emails, between Chief Medical Officer of Health [named individual] and [another named individual] and/or [another named individual] or his agent between March 19, 2018 – April 13, 2018 regarding [specified address] and/or supervised consumption site location, and
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> All correspondence between [named individual] and [another named individual], [specified business name] and/or his agent, between March

> 19, 2018 – April 13, 2018 regarding [specified address] and/or other supervised consumption site locations.

[2] Pursuant to section 21 of the *Act*, the health unit notified the third parties who might have an interest in the disclosure of the responsive information. Subsequently, the health unit issued a decision to the requester and the third parties, granting partial access to the responsive records. The health unit withheld portions of the responsive records pursuant to the mandatory exemption for third party information at section 10(1) of the *Act*.

[3] One of the third parties, now the appellant, appealed the health unit's decision to disclose portions of the records related to them.

[4] The requester also appealed the health unit's decision to deny access to some of the records. That appeal was resolved and closed during mediation.

[5] During mediation, the appellant advised that they continue to take the position that the information at issue should not be disclosed. The requester advised that they continue to seek access to the withheld portions of the records at issue. The requester also stated that they believe that there is a public interest in the disclosure of the records and the public interest override at section 16 was included as an issue in this appeal.

[6] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry by sending a Notice of Inquiry setting out the facts and issues on appeal to the appellant initially, seeking representations. The appellant chose not to submit representations.

[7] In this order, I find that the mandatory exemption for third party information at section 10(1) of the *Act* does not apply and I order the health unit to disclose the information at issue to the requester in accordance with its original decision.

RECORDS:

[8] There are two records at issue:

1. an email dated April 12, 2018, to which the health unit has granted access in part, and

2. a text message exchange, to which the health unit has granted access in full.

DISCUSSION:

Does the mandatory exemption at section 10(1) apply to the text message exchange and the portions of the email to which the health unit has granted access?

[9] The appellant submits that the mandatory exemption at section 10(1) of the *Act* applies to the information in the email and the text message exchange that the health unit is prepared to disclose to the requester.

[10] 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.

[11] 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]

[12] For section 10(1) to apply, the third party appellant must satisfy each part of the following three-part test:

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[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.

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

[13] To satisfy the first part of the section 10(1) test, the party resisting disclosure (in this case the appellant) must show that the records reveal information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

[14] These types of information have been defined 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
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[3]
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> *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.[4]
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> *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,

[3] Order PO-2010.
[4] Order PO-2010.

> 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.[5]
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> *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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]
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> *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.[8]
>
> *Labour relations* means relations and conditions of work, including collective bargaining, and is not restricted to employer/employee relationships.

[15] The appellant has not made any submissions on whether the information at issue qualifies as any of the types set out in section 10(1). However, considering the definitions taken from previous orders and the content of the email and the text exchange, I accept that they contain information that qualifies as commercial information as it relates to the buying, selling or exchange of merchandise or services.

Part 2: supplied in confidence

[16] 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.[9] 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.[10]

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

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[5] Order PO-2010.
[6] Order PO-2010.
[7] Order P-1621.
[8] Order PO-2010.
[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.

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

[18] The appellant has not made submissions on whether they supplied any of the information in the email or the text exchange to the health unit and, if so, whether it was supplied in confidence.

[19] I find that the email, which was sent to the appellant from the Chief Medical Officer of the health unit, was not supplied to the health unit as required by part 2 of the test. Additionally, from my review of the content of the email, it does not appear that the disclosure of any of the information that is contained within it would reveal or permit the drawing of accurate inferences with respect to information supplied to the health unit by the appellant.

[20] With respect to the text exchange, although it is clear that the appellant is a party to that exchange, it is not clear who the recipient is.[11] Given that the text exchange is now in the custody or control of the health unit, I am prepared to accept that portions of the exchange were supplied to the health unit by the third party appellant. However, there is no evidence before me that there was a reasonable expectation of confidentiality with respect to this information. I also have no evidence before me to conclude that the other portions of the text exchange were supplied to the health unit and, even if they were, that they were supplied with a reasonable expectation of confidentiality.

[21] I find, therefore, that part 2 of the test has not been met for either of the records at issue.

Part 3: harms

[22] Although the third party's section 10(1) claim fails as a result of my finding that part 2 of the test has not been met, I will consider part 3 of the test for the sake of completion.

[23] To satisfy the third part of the test, the appellant must provide evidence about the potential for harm resulting from disclosure. They 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]

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[11] Based on the wording of the request it can be assumed, but not confirmed, that the recipient is the Chief Medical Officer of Health of the health unit.

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

[24] The failure of a party resisting disclosure to provide such evidence will not necessarily defeat the claim for exemption where harm can be inferred 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]

[25] As the appellant has not provided representations, they have not provided any evidence that the disclosure of the email or the portions of the text exchange that are at issue could give rise to a reasonable expectation of harm of any of the types identified in paragraphs (a) to (d) of section 10(1). The complete lack of evidence in this respect does not meet the sort of detailed evidence that is generally required to establish a reasonable expectation of harm. Additionally, from my review of the records and the information at issue, I do not accept that any such harms are inferable on their face. Accordingly, I find that the appellant has not established that any of the harms set out in paragraphs (a) to (d) of section 10(1) could reasonably be expected to result from the disclosure of the portions of the email or the text exchange that the health unit is prepared to disclose.

[26] I find, therefore, that part 3 of the test has not been met for either of the records at issue.

Finding

[27] As all parts of the three-part test must be met for section 10(1) to apply and I have found that neither part 2 nor part 3 have been met, I find that the portions of the email and the text exchange that are at issue are not exempt from disclosure under section 10(1). I will order the health unit to disclose this information to the requester.

[28] Given that I have found that section 10(1) does not apply, it is not necessary for me to make a determination on whether the public interest override in section 16 applies to the information at issue.

ORDER:

1. I order the health unit to disclose the information at issue to the requester, in accordance with its decision with respect to the disclosure of that information, by **July 2, 2019** but not before **June 26, 2019**.

2. With respect to provision 1, I reserve the right to require the health unit to provide me with a copy of the records disclosed to the requester.

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[13] Order PO-2435.

Original Signed by: May 27, 2019

Catherine Corban
Adjudicator