

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3991

Appeals MA18-00878 and MA18-00879

Region of Peel

December 21, 2020

Summary: The Region of Peel (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to contracts regarding cell towers, surveillance cameras, smart meters, and other technology located at a specified address, and records of any money paid to the region for the use of this technology. The region identified responsive records and issued an access decision, after notifying several affected parties whose interests might be affected by disclosure. The region provided full access to some responsive records, and partial access to other records, after deciding that portions of the records were exempt under the mandatory exemption at section 10(1) (third party information) of the *Act*. One of the affected parties and the original requester appealed the region's decision, resulting in Appeals MA18-00878 and MA18-00879. The adjudicator processed these appeals jointly. In this order, the adjudicator finds that the information at issue in both appeals is not exempt under section 10(1), orders it disclosed, and dismisses the appeals.

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

OVERVIEW:

[1] The Region of Peel (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

...all data that is being gathered and shared and amount of money that is being paid to Peel living and anyone else who is getting paid, regarding

cell towers, surveillance cameras, smart meters, FOBS etc.. This technology is located at [a specified address in Mississauga, Ontario]....

[2] The request was clarified to include the following:

Contracts for the above noted technology at that location; and

Records of any monies paid to the Peel Living or the Region of Peel for the use of the above noted technology at that location.

[3] After notifying third parties whose interests may be affected by disclosure (affected parties), the region issued a decision granting the requester full access to some responsive records, and partial access to others. The region relied on the mandatory exemptions at sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act* to withhold portions of the records. The region also produced an index of records for each of the four affected parties involved, containing a list of responsive records and the exemptions relied upon to withhold information.

[4] One of the affected parties, now the appellant in appeal file MA18-00878, appealed the region's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office). The other affected parties did not appeal the region's decision to disclose some information, and that information is not at issue.

[5] The requester, now the appellant in appeal file MA18-00879, appealed the region's decision to this office regarding the information that the region decided to withhold.

[6] For ease of reference, I will refer to the appellant in MA18-00879 as the requester and the appellant in file MA18-00878 as Affected Party 1. The requester's appeal involves records relating to Affected Party 1 and two other affected parties (Affected Parties 2 and 3).

[7] During the mediation of the appeal of Affected Party 1, although Affected Party 1 consented to some further disclosure, the parties could not reach a mediated resolution. Affected Party 1 advised the mediator that they would like to pursue the appeal at adjudication on the basis that all of the remaining information that the region was planning to disclose should be withheld pursuant to section 10(1)(a).

[8] During the mediation of the requester's appeal, the requester advised the mediator that she is not pursuing the information withheld under section 14(1); as a result, section 14(1) is no longer at issue. The requester advised the mediator that she would like to proceed to adjudication on the issue of access to the information withheld under section 10(1)(a).

[9] Following these attempts at mediation, appeal files MA18-00878 and MA18-

00879 moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*. These appeals were processed jointly at adjudication.

[10] As the adjudicator of these appeals, I began my joint inquiry under the *Act* by issuing a Joint Notice of Inquiry, setting out the facts and issues on appeal, to the region and Affected Party 1. I asked for written representations from these parties from the issues set out in the Notice of Inquiry. Affected Party 1 declined to provide written representations. The region advised this office in writing that it stood by its access decision, but did not provide further representations. I then asked the requester to provide written representations. Her response indicates that she continues to seek the information withheld under section 10(1)(a). Upon my further review of the file, I invited two other affected third parties (Affected Party 2 and Affected Party 3) to provide written representations on the issues set out in the Joint Notice of Inquiry, but they declined to do so.

[11] For the reasons that follow, I uphold the region's access decision, in part, and dismiss the appeals. I uphold the region's decision to disclose the information at issue in the appeal brought by Affected Party 1. However, I do not uphold the region's decision to withhold the information at issue in the requester's appeal, and as a result, I will order the region to disclose that information to the requester.

RECORDS:

[12] According to the index of records relating to the three relevant affected parties in the requester's appeal, the following pages of various records are at issue in this joint inquiry.

Affected party	Description of information withheld	Page numbers
Affected Party 1	Portions of a lease agreement between Affected Party 1 and the region	Page 2 (in part), and pages 3-6, and 13 (in full)
Affected Party 1	Roof sketch	Page 9
Affected Party 1	Pictures with sketches of location of antennas	Pages 10-12
Affected Party 2	Exhibit B (to a certain lease agreement between Affected Party 2 and the region) - Plan of leased premises	Page 9
Affected Party 2	Exhibit B (to another agreement) - Design drawings	Pages 17-27
Affected Party 2	Exhibit D - Inventory of equipment	Page 28

Affected Party 2	Exhibit B (to a third agreement) - Design drawings	Pages 32-43
Affected Party 2	Exhibit D - Inventory of equipment	Pages 44
Affected Party 3	Exhibit B (to a lease agreement between Affected Party 3 and the region) – Site layouts and drawings	Pages 9-12
Affected Party 3	Exhibit B (to a licence amending and extension agreement between Affected Party 3 and the region) - Installations	Pages 14-32
Affected Party 3	Exhibit C – Inventory of equipment	This exhibit does not appear in the index of records but was identified as having been withheld in the copy of records sent to the IPC (at pages 56 and 57 of 89 in the IPC copy of records.

DISCUSSION:

[13] The only issue to be decided in these appeal is whether the mandatory exemption at section 10(1) applies to the records. For the reasons that follow, I find that none of the information at issue is exempt under section 10(1).

[14] Affected Party 1 objects to disclosure of the information at issue in its appeal on the basis of section 10(1)(a). Likewise, the region has withheld the records at issue in the requester’s appeal under section 10(1)(a).

[15] Section 10(1)(a) says:

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[.]

[16] 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

[17] For section 10(1) to apply, the institution and/or the third party 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[18] For the following reasons, I find that the records meet part one of the test.

[19] Reviewing the information at issue in the appeal brought by Affected Party 1, I find that it is contained in a lease agreement between it and the region. Based on my review of this information, I find that it consists of contractual terms, including some information relating to money. Therefore, I find that it qualifies as commercial and/or financial information, as defined in past orders and set out below:

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.³ The fact that a record

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 Order PO-2010.

might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁴

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.⁵

[20] Turning to the requester's appeal, the region withheld drawings, photographs, lists of equipment, and some records with the stamp of a professional engineer. In its access decision, the region described this information as "technical information." Past orders have defined "technical information" as follows:

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.⁶

[21] Based on my review of the drawings, inventory lists and other information withheld, I accept that the information withheld qualifies as technical information, as that term is defined, above. From my review of the records and the index of records corresponding to each affected party, I note that all of the information withheld by the region in the requester's appeal consists of, or appears to consist of, exhibits to lease agreements between the region (as owner of the building in question) and each affected party (as a tenant seeking to install equipment on the roof of the building).

[22] Since the records reveal technical, commercial and/or financial information, they meet part one of the test.

Part 2: supplied in confidence

[23] As I will explain below, the information at issue in the appeal brought by Affected Party 1 does not meet part two of the test, but I am prepared to accept that the information at issue in the requester's appeal does.

[24] The requirement that the information was "supplied" to the institution reflects

⁴ Order PO-1621.

⁵ Order PO-2010.

⁶ Order PO-2010.

the purpose in section 10(1) of protecting the informational assets of third parties.⁷ 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.⁸

[25] 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 expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁹

[26] As noted, the information at issue in these appeals is found in lease agreements between the respective affected parties and the region. These lease agreements are contracts between the region (as owner and landlord of the building in question) and each affected party (as a tenant using the building to install the equipment, cabling, and other objects described in the lease agreements).

[27] 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.¹⁰

[28] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.¹¹ The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.¹²

Information at issue in the appeal of Affected Party 1

[29] Affected Party 1 objects to the region’s decision to disclose certain parts of a

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

¹⁰ This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

¹¹ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹² *Miller Transit*, above at para. 34.

lease agreement between itself and the region. However, Affected Party 1 did not provide representations to explain why the contents of that agreement should be considered "supplied," and not negotiated, despite the longstanding principle that 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). Therefore, Affected Party 1 has not met its onus to prove that part two of the test applies to the information that it resists disclosure to.

[30] Based on my review of the information at issue in the appeal brought by Affected Party 1, I find that it reflects the contractual terms between the region and Affected Party 1. It is not clear to me how this information would qualify under either the inferred disclosure exception or the immutability exception.

[31] In these circumstances, I find that the information at issue does not meet part two of the test. It is, therefore, unnecessary for me to examine whether it meets the "in confidence" element of part two of the test, or the harms requirement in part three. Accordingly, I find that section 10(1) does not apply to the information at issue in the appeal brought by Affected Party 1, and I uphold the region's decision to disclose it.

Information at issue in the requester's appeal

[32] The affected parties in the requester's appeal were each invited to provide their views about disclosure. Since they did not do so, I am in the position of having no submissions from these parties about whether they "supplied" the information at issue to the region, and if so, whether that supply was made with an implicit or explicit expectation of confidence.

[33] For its part, the region simply indicated that it stands by its access decision. That decision was that the records at issue in the requester's appeal are exempt under section 10(1). Since all three parts of the test must be met to be exempt, it follows that the region's position is that the records in the requester's appeal meet part two of the test.

[34] Despite the lack of representations from these parties, I am prepared to accept that the parts of the records at issue in the requester's appeal were "supplied" to the region on the basis of my review of the contents of the records and the fact that they are in the region's record-holdings.

[35] However, there is insufficient evidence before me to find that this supply of the records to the region was made "in confidence," to satisfy part two of the test.

[36] 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 expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹³

[37] 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.¹⁴

[38] Without representations from any of the affected parties (or from the region, beyond its assertion that it stands by its decision), I find that these parties did not meet their onus to prove that the information at issue was supplied to the region with a reasonable expectation of confidentiality, either explicitly or implicitly.

[39] On my review of the records themselves, it is not clear to me that they were supplied "in confidence" to the region. More specifically, it is not clear whether the information supplied to the region was supplied on the basis that it was to be kept confidential, or that it was treated by the respective affected parties in a way that indicates a concern for confidentiality, or that it was prepared for a purpose that would not entail disclosure.

[40] For these reasons, while I accept that the information at issue in the requester's appeal was supplied to the region, there is insufficient evidence to conclude that this supply was made "in confidence." In light of this finding, the parts of the records at issue in the requester's appeal do not meet part two of the test, and it is, therefore, unnecessary to determine whether the harms requirement under part three of the test is met.

[41] In conclusion, the information at issue in both appeals does not meet part two of the test. Since all three parts of the test must be met for the exemption at section 10(1) to apply, none of the information at issue in these appeals is exempt under section

¹³ Order PO-2020.

¹⁴ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

10(1) and all of it will be ordered disclosed to the requester.

ORDER:

1. I order the region to disclose the records to the appellant, in full, no later than **January 27, 2021**, but no earlier than **January 22, 2021**.
2. In order to verify compliance with this order, I reserve the right to require the region to provide me with a copy of the records disclosed pursuant to order provision 1.
3. The timeline noted in order provision 1 may be extended if the region is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting time extension request.

Original Signed by: _____
Marian Sami
Adjudicator

_____ December 21, 2020