

Information and Privacy Commissioner,  
Ontario, Canada



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

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## INTERIM ORDER MO-4169-I

Appeal MA17-107

City of Greater Sudbury

February 24, 2022

**Summary:** This order arises out of an access request made to the City of Greater Sudbury for records relating to a specified organization. The city decided to grant full access to the records at issue and the organization appealed the decision on the basis that section 10(1) of the *Act* applied to the records at issue. In Interim Order MO-3646-I, the adjudicator found that section 10(1) did not apply to most of the records but deferred a ruling on two records for which notice had not been given to certain affected parties. In this order, the adjudicator finds that section 10(1) does not apply to one of the remaining records and orders the city to disclose it to the requester.

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

### OVERVIEW:

[1] A request was made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Greater Sudbury (the city) for access to general records related to a named organization of which the city is a member. In particular, the request was for the named organization's meeting agendas and minutes circulated to members between a specified time period.

[2] The requester also sought the following related information from the city:

General records related to the named organization,

All records related to items described as a "Forestry Project" and "Forestry Strategy" in the named organization's financial reports for a specified number of years, and

All records regarding revenue, expenditures, consulting fees, other supplies and expenses, donations, accounts receivable, other revenue and accounts receivable-other for a specified number of years.

[3] In response, the city located records responsive to the request and notified the named organization who might have an interest in the records. The organization wrote to the city, objecting to the disclosure of most of the records at issue, claiming the application of the exemption for third party information in section 10(1). The city then issued a decision to the requester and the organization, granting the requester full access to the responsive records.

[4] The organization, now the appellant, appealed the city's access decision to this office, claiming the application of the mandatory exemption in section 10(1) (third party information) of the *Act* to most of the records.

[5] During mediation of the appeal, the requester confirmed that they continue to seek access to all the responsive records, as per the city's decision to grant full access to the records.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducted an inquiry. During the inquiry, the appellant raised the issue of whether the records were in the custody or control of the city. The appellant and the city were given an opportunity to provide representations but these parties did not provide representations in response to any of the notices sent by the adjudicator.

[7] Following the inquiry, the adjudicator issued Interim Order MO-3646-I. In her decision, the adjudicator found that the records were in the custody and control of the city. On the issue of the third party exemption at section 10(1), she also found that with the exception of two records (for which she did not make a section 10(1) determination), the records were not exempt under section 10(1). Paragraph 33 of the order states the following:

I note that two records were prepared by other third parties. The first is a 26-page research study and the second is a six-page contract proposal. I defer my findings regarding whether section 10(1) applies to these records, pending notification of the two third parties who authored these records.

[8] The appeal was then assigned to me to continue the inquiry. I sought representations from two affected parties on the application of section 10(1) to their records which remained at issue. One of the affected parties requested a reconsideration of Order MO-3646-I. I rendered my decisions on that request in

Reconsideration Orders MO-4024-R and MO-4094-R, following which the adjudication of the section 10(1) issue continued.

[9] I again sought representations on the application of section 10(1) from both affected parties but did not receive submissions from either party. One of the affected parties brought an application judicial review in respect of the orders in relation to that affected party's record. An interim stay is in effect with respect to the adjudication of that affected party's record. Accordingly, this order only deals with access to one of the two remaining records at issue.

[10] In this decision, I find that section 10(1) does not apply to the record at issue and order the city to disclose the record to the requester.

### **RECORD:**

[11] The record remaining at issue is a 6-page contract proposal.

### **DISCUSSION:**

[12] The sole issue in this order is whether the record is exempt under the mandatory third party information exemption in section 10(1) of the *Act*. As stated above, the city's decision was to disclose the record. The third party appellant raised the issue of the possible application of section 10(1) to the records at issue and was given the opportunity to make representations on the application of section 10(1). As stated above, the third party appellant did not provide representations.<sup>1</sup> I note however that the third party appellant is not the party whose record is at issue. The affected party whose record is at issue is did not provide representations on the application of section 10(1) despite being provided with an opportunity to do so. However, as section 10(1) is a mandatory exemption, I will proceed to consider whether the record at issue is exempt from disclosure without representations from the parties.

[13] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions, where specific harms can reasonably be expected to result from its disclosure.

[14] Section 10(1) states, in part:

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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<sup>1</sup> As the city's decision was to disclose the records at issue, the adjudicator did not find it necessary to hear from the city on the application of section 10(1).

(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.

[15] For section 10(1) to apply, the party arguing against 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 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 of the section 10(1) test: type of information**

[16] The IPC has described commercial information protected under section 10(1) as follows:

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small. The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.

[17] Based on my review of the records, I am prepared to find that the contract proposal relates to the possible provision of a service by the affected party to the city and as such contains commercial information. I find that the record contains information that relates to the purchase and sale of a service between the city and the affected party. I find that part 1 of the test for section 10(1) is met.

## **Part 2: supplied in confidence**

[18] Part 2 of the test for the application of section 10(1) requires that the party resisting disclosure demonstrate that the information was “supplied” “in confidence” to the institution.

[19] The requirement that the information have been “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.

[20] 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.

[21] Next, the party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.

[22] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.

### ***Analysis and finding***

[23] Based on the circumstances and the fact that the record at issue was in the city’s record holdings, I accept that it was supplied by the affected party to the city for the purposes of section 10(1). The city had this record in its record holdings and it is evident that the record must have come in to the city’s record holdings in some way. Given the context, the likely scenario is that the affected party provided it to the city. Accordingly, I find that the record was supplied to the city by the affected party.

[24] However, based on my review of the record, there is nothing to indicate that the record was supplied in confidence. I note that there is a confidentiality provision in the proposal but based on my reading, that provision relates to any of the affected party’s other confidential information and not the contents of the proposal itself. As I do not

have evidence that the affected party supplied the record to the city in confidence, I find that part 2 of the test for the application of section 10(1) has not been met. Therefore, the section 10(1) exemption does not apply.

[25] As I have found that section 10(1) does not apply to the record, I dismiss the appeal from the city's decision to disclose the record and will order the city to disclose the record to the requester.

**ORDER:**

1. I find that section 10(1) does not apply to the record and order the city to provide a copy of the record to the requester by **March 31, 2022** but not before **March 25, 2022**.
2. In order to verify compliance with order provision 1, I reserve the right to require the city to provide me with a copy of the record disclosed to the requester.

Original Signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ February 24, 2022