

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4190

Appeal MA21-00075

The Regional Municipality of York

April 19, 2022

Summary: The Regional Municipality of York (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the top five COVID-19 workplace outbreaks in the municipality from March to November 2020, ranked by number of cases. The municipality produced a record with the requested information and following notification of the employers listed in the record, issued a decision granting access to the record. One of the listed employers appealed the municipality's decision, claiming that its information in the record was not responsive to the request and was in any event exempt from disclosure under section 10(1) (third party information) of the *Act*. In this order, the adjudicator finds that the appellant's information is responsive to the request and that section 10(1) does not apply to it. She upholds the municipality's decision and orders it to disclose the record to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 10(1) and 17.

Cases Considered: Order MO-4166-I.

OVERVIEW:

[1] Local public health units in Ontario provide support to businesses and organizations to prevent COVID-19 and to help manage workplace COVID-19 outbreaks and exposures.¹ In November 2020, the Regional Municipality of York (the municipality)

¹ See: [COVID-19 Workplace Resources | Public Health Ontario](#); [Preventing COVID-19 in the Workplace | York Region](#)

received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

A list of the top five workplace outbreaks of Covid-19 by employer's name and location in York Region, ranked by number of cases. The time frame is March 11 to the current date. I'm looking for a ranking outside of health care and long-term care settings, (i. e. non-health care sectors), by specific employer name and case counts.

[2] After consultations with the affected employers, the municipality issued a decision granting full access to a record generated by the municipality, listing the top five COVID-19 outbreak employers' names, addresses and confirmed number of cases linked to each outbreak.

[3] One of the employers, now the appellant, appealed the municipality's decision to the Information and Privacy Commissioner of Ontario (IPC), on the basis that its information is exempt from disclosure under the exemption for third party information at section 10(1) of the *Act*.

[4] During mediation, the municipality released to the requester all the information in the record except for that pertaining to the appellant. The requester, in response, advised the mediator that they were still interested in obtaining access to the full record, including the appellant's information. The requester also raised the possible application of the public interest override at section 16 of the *Act*. The appellant maintained its objection to disclosure of the information.

[5] The appeal moved to the adjudication stage, where I decided to conduct an inquiry. I first sought representations from the appellant, as the party resisting disclosure. The appellant did not provide representations. I did not find it necessary to seek representations from the municipality or the requester.

[6] For the reasons that follow, I find that the information at issue is responsive to the request and is not exempt from disclosure under section 10(1). As a result, I uphold the municipality's access decision and order the appellant's information in the record disclosed. It is not necessary in the circumstances to decide whether the public interest override applies to the information.

RECORD:

[7] The record at issue is a one-page document listing of the top five non-healthcare related workplace outbreaks for COVID-19 in the municipality, as of November 28, 2020. Alongside each employer's name are three columns noting the employer's address in the municipality's working file, its address in the business directory, and the number of confirmed cases linked to the outbreak.

[8] The record has been released to the requester, with the exception of the

information relating to the appellant. That is the information remaining at issue in this appeal.

ISSUES:

- A. What is the scope of the request? Is the information at issue responsive to the request?
- B. Does the mandatory exemption at section 10(1) for third party information apply to the information at issue?

DISCUSSION:

Issue A: What is the scope of the request? Is the information at issue responsive to the request?

[9] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

1. A person seeking access to a record shall,
 - a. make a request in writing to the institution that the person believes has custody or control of the record;
 - b. provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record[.]²
2. If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[10] To be considered responsive to the request, a record must “reasonably relate” to the request.³ Institutions should interpret requests liberally, in order to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in the request, this should be resolved in the requester’s favour.⁴

[11] Although the appellant raised responsiveness as an issue at mediation, it provided no representations at the adjudication stage. Based on the information before me, I am satisfied that the information relating to the appellant, being an employer in the municipality with one of the top five COVID-19 outbreaks outside of health care and long- term care settings during the specified time period, is reasonably related to the

² Section 17(1)(c) refers to the payment of the applicable fee.

³ Orders P-880 and PO-2661.

⁴ Orders P-134 and P-880.

request. This information is therefore responsive to the request, and I will next consider whether it is exempt from disclosure under section 10(1).

Issue B: Does the mandatory exemption at section 10(1) for third party information apply to the information at issue?

[12] Section 10(1) of the *Act* 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,

- (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.

[13] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁵ 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.⁶

[14] For section 10(1) to apply, the appellant, as the party resisting disclosure of the record, 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

⁵ *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.*).

⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

[15] The IPC has described the types of information protected under section 10(1) as follows:

Trade secret includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (a) is, or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁷

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.⁸

Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.⁹

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.¹⁰ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.¹¹

⁷ Order PO-2010.

⁸ Order PO-2010.

⁹ Order PO-2010.

¹⁰ Order PO-2010.

¹¹ Order P-1621.

Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.¹²

Labour relations means relations and conditions of work, including collective bargaining. It is not restricted to employer/employee relationships. The IPC has found that "labour relations information" includes:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute;¹³ and
- information compiled in the course of the negotiation of pay equity plans (for example, exchanges between a hospital and the bargaining agents representing its employees).¹⁴

[16] The IPC has found, however, that "labour relations information" does **not** include:

- names, duties and qualifications of individual employees;¹⁵
- an analysis of the performance of two employees on a project;¹⁶
- count of an alleged incident at a child care centre;¹⁷ or
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation.¹⁸

[17] As no representations were submitted by the appellant, my analysis is based on the record before me, and the surrounding circumstances. The information at issue consists of the name of the appellant, its address in the municipality's working file, its address in the business directory, and the number of the cases linked to the outbreak. It is not clear what type of information protected by section 10(1) the appellant is claiming the record contains. In any event, even if the record were to contain the type of information protected by section 10(1), all three parts of the test must be met in order for the exemption to apply. I find below that none of the harms listed in section 10(1) could reasonably be expected to result from disclosure.

¹² Order PO-2010.

¹³ Order P-1540.

¹⁴ Order P-653.

¹⁵ Order MO-2164.

¹⁶ Order MO-1215.

¹⁷ Order P-121.

¹⁸ Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

Part 2: supplied in confidence

[18] 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.¹⁹

[19] 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.²⁰

[20] Based on my review of the record before me, and the nature of the access request, it is evident that the appellant supplied the key information in the record – the number of cases associated with the outbreak – to the municipality. I have doubts, however, that the appellant had a reasonable expectation of confidentiality when it provided this information to the municipality.

[21] In Order MO-4166-I, the adjudicator noted that in the context of the COVID-19 pandemic, the IPC has urged public health units and government organizations to provide as much information as is necessary to protect public health, without naming individuals. The adjudicator noted that in the Commissioner’s Message from the IPC’s 2020 Annual Report, Commissioner Patricia Kosseim offered these instructive words:

It is essential to inform citizens about the public health risks of COVID-19 as the evidence evolves, and to establish confidence in the government decisions and actions affecting them and their loved ones. Our office received many media and public enquiries about the level of information public institutions could or should release to keep Ontarians safe during the pandemic. The direction from my office on this matter has been consistent — Ontario privacy laws do not prevent health authorities from sharing as much non-personal information as is necessary to protect public health, without identifying individuals. Public health units and government organizations should provide as much non-identifying information as possible to explain the risk profile of community spread and protect public health. Depending on the context, this information could include numbers of affected individuals, demographic data about infected or deceased individuals, and in some cases, even names and locations of organizations experiencing outbreaks.

[22] While this message postdates the timing of the record at issue, it is, in my view, reflective of the realities facing employers and public health during the COVID-19 public health crisis as it stood in 2020. Public health authorities were, and are, responsible for keeping the public informed about risks relating to COVID-19, including those present at workplaces. In this context, it is doubtful that the appellant could reasonably have expected that the information at issue – which does not identify any individuals – would

¹⁹ Order MO-1706.

²⁰ Orders PO-2020 and PO-2043.

be kept in confidence by the municipality.

[23] However, it is not necessary that I decide whether the information at issue was supplied in confidence, because I find below that its disclosure could not reasonably be expected to result in any of the harms listed in section 10(1).

Part 3: harms

[24] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.²¹

[25] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.²² However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.²³

[26] As no representations were submitted by the appellant, my analysis is based on the record before me and the surrounding circumstances. The record at issue reveals that the appellant, as an employer, experienced a COVID-19 outbreak between March and November 2020, and sets out the number of cases associated with that outbreak.

[27] While one can speculate that releasing this information could result in some reputational harm to the appellant, speculation is not enough to establish the section 10(1) exemption. Without any representations or evidence from the appellant on the impact that the release of this information could have, I am not satisfied that there is a reasonable expectation of any of the harms listed in section 10(1) materializing if the information at issue is disclosed.

[28] I also note that even if there were a reasonable expectation of some prejudice to the appellant's competitive position, or loss to the appellant, section 10(1)(a) requires that any prejudice to competitive position be *significant*, and section 10(1)(c) requires that loss be *undue*. With respect to the latter, one could argue that any loss is not "undue" if it results from bringing public scrutiny to bear on a workplace that suffered a COVID-19 outbreak during the pandemic. Indeed, such scrutiny may be necessary to prevent future outbreaks from occurring.

[29] In any case, as the burden of proof for showing that harm under section 10(1)

²¹ Orders MO-2363 and PO-2435.

²² *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

²³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

could reasonably be expected to result from the disclosure of the record falls on the appellant, and no representations or evidence of harm were provided by the appellant, I find that the appellant has not established that disclosure of the record could reasonably be expected to result in any of the harms specified in paragraphs (a), (b), (c) and/or (d).

[30] All three parts of the test must be met in order for section 10(1) to apply to the record. As I have found that part three of the test has not been met, I find that the section 10(1) exemption does not apply to the information at issue.

[31] Given my finding, I do not need to decide whether the public interest override at section 16 applies to the information.

ORDER:

I uphold the municipality's access decision and dismiss the appeal. I order the municipality to disclose the remaining information in the record to the requester by **May 24, 2022** but not before **May 19, 2022**.

Original Signed by: _____
Gillian Shaw
Senior Adjudicator

_____ April 19, 2022