

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4407

Appeal MA22-00333

Port Hope Police Services Board

July 7, 2023

Summary: The Port Hope Police Services Board (the police) received a freedom of information request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a contract between the police and a certain individual. The police denied access to the contract on the basis that it is exempt from disclosure under the mandatory exemption at section 10(1) (third party information) of the *Act*. The requester appealed the police's decision, and seeks access to the contract, without information relating to payment. In this order, the adjudicator allows the appeal, finding that the contract was not "supplied" to the police (as required by part two of the three-part test that must be satisfied for section 10(1) to apply). Therefore, she orders the police to disclose the portions of the contract that the appellant seeks.

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 Port Hope Police Services Board (the police) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a contract between the police and a certain individual. They denied access to the record on the basis of the mandatory exemption at section 10(1) (third party

information) of the *Act* to do so.¹ This order explains why I do not uphold their decision to do so.

[2] The requester, now the appellant, appealed the police's decision to the Information and Privacy Commissioner of Ontario (the IPC). The IPC appointed a mediator to explore resolution. The police issued a supplementary access decision during mediation, in which they claimed sections 10(1)(a) and 10(1)(b) of the *Act*.² During mediation, the appellant narrowed the scope of the appeal to the portions of the contract that do not include details about payment.³ No further mediation could take place, so the file moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[3] I began a written inquiry under the *Act* by asking the police and a party whose interests may be affected by disclosure (the affected party) for written representations on the issue of the exemption at section 10(1). The police provided written representations in response, and the affected party provided written confirmation that he agrees with the police's position and has nothing to add to it. On my review of these representations and the contract itself, I decided that I did not need to hear from the appellant.

[4] For the reasons that follow, I allow the appeal. I find that the contract is not exempt under section 10(1), and as a result, I order the police to disclose it to the appellant, without the details of remuneration that the appellant removed from the scope of the request.

RECORD:

[5] The record at issue is a consulting contract. The appellant is not seeking portions of the contract containing the details of payment.

DISCUSSION:

[6] The only issue to be decided in this appeal is whether the mandatory exemption at section 10(1) for third party information applies to the consulting contract at issue. For the reasons that follow, I find that it does not.

[7] The purpose of section 10(1) is to protect certain confidential information that

¹ The police's letter indicated that the record was withheld under the "third party exemption" without specifically citing section 10(1) of the *Act*. At mediation, they later confirmed that this is the exemption they were relying on.

² The police did not cite these sections, but wording from them.

³ The appellant indicated that he is "not concerned with either how much [the identified individual] was paid on an hourly or daily basis or the total amount of the contract."

businesses or other organizations provide to government institutions,⁴ where specific harms can reasonably be expected to result from its disclosure.⁵

[8] For section 10(1) to apply, the party arguing against disclosure (the police and the affected party, in this case) 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.⁶

[9] Since all three parts of the test must be met for section 10(1) to apply, and because I find, below, that part two does not apply, I do not need to discuss the other parts of the test.

Part 2: supplied in confidence

Supplied

[10] 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.⁷

[11] 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

⁴ *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.*).

⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁶ Here, the police and the affected party specifically rely on the harms set out in paragraphs (a) and (c). Although I do not discuss harms in this order because of my finding that part two of the three-part test does not apply, for reference, sections 10(1)(a) and 10(1)(c) say:

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;

...

(c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

[12] The police and the affected party acknowledge, and I find, that the record at issue is a contract.

[13] This characterization of the record is important because of the long-standing treatment of contracts requested under the *Act*: the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.⁹

[14] There are two exceptions to this general rule: the "inferred disclosure" exception and the "immutability" exception.¹⁰

[15] The police argue that contracts will not always be considered "supplied," and that the information at issue "is reasonably considered to have been 'supplied' either in the direct sense of that term or through the 'inferred disclosure' exception."

[16] In my view, the police appear to be taking a contradictory stance: on the one hand, they submit disclosure would provide "direct access (i.e. not simply allowing an inference) to non-negotiated information supplied by the third party," while on the other hand, they are claiming that the "inferred disclosure" exception applies (which requires accurate inferences to be made).

[17] I do not accept either of these positions.

[18] Regarding the police's submission that the information at issue was directly supplied, I find that this position is not supported by the evidence. Based on my review of the contract, I find that it contains terms reflecting an agreement between two parties. From the police's brief representations and the contract itself, I am unable to conclude what parts of the contract, if any, could reasonably be seen as "directly" supplied by the affected party and would constitute his "informational assets." Furthermore, as noted, even if little or no negotiation came before a contract, a contract will be treated as mutually generated, rather than "supplied" under section 10(1), unless one of only two exceptions apply.

[19] With respect to the exception claimed by the police, the "inferred disclosure," their argument is similarly unpersuasive and unsupported by the evidence. They argue: "Given the relatively brief nature of the contract and its contents, the inferred disclosure

⁹ 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*).

¹⁰ The "immutability" exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs (see *Miller Transit*, cited above at para. 34).

test is satisfied.” However, this statement does not say anything about the nature of the information in the contract itself. The “inferred disclosure” exception applies if disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.¹¹ The police have not specified which information in the contract is “underlying non-negotiated confidential information.” Based on my review of the contract, I am unable to conclude that there is any such information. Rather, as discussed, I find that the contract reflects the agreed upon terms between the contracting parties, the police and the affected party.

[20] For these reasons, based on my review of the representations of the police and the affected party, and of the contract itself, I find that there is insufficient evidence that the information at issue was “supplied,” within the meaning of section 10(1). As a result, it is not necessary for me to consider the other element of part two of the test (“in confidence”), or parts one and three of the test for section 10(1).

[21] Since the contract does not meet part two of the test, it is not exempt from disclosure under section 10(1) of the *Act*, and I will order the police to disclose it to the appellant.

ORDER:

1. I allow the appeal.
2. I order the police to disclose to the appellant the parts of the record that remain at issue (the whole contract, without the portions regarding remuneration) by **August 14, 2023** but not before **August 8, 2023**.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require the police to provide me with a copy of the record disclosed to the appellant.

Original Signed by: _____
Marian Sami
Adjudicator

_____ July 7, 2023

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