Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4592

Appeal MA22-00459

City of St. Catharines

November 12, 2024

Summary: Under the *Municipal Freedom of Information and Protection of Privacy Act,* an individual asked the city for information relating to a phase I and phase II environmental site assessment. The city located and provided some records but withheld two environmental site assessments claiming that they contained third party information that is exempt from disclosure because of section 10(1) of the *Act*. The requester appealed the city's decision. At adjudication, one of the affected parties claimed that the city did not have custody or control of the assessments.

In this order, the adjudicator concludes that the assessments are within the custody or under the control of the city. He also finds that the records are not exempt from disclosure by section 10(1) and orders the city to provide the assessments to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c. M.56, sections 4(1) and 10(1).

Orders Considered: Orders MO-1263, MO-1503, MO-1974, MO-2922, P-239 and PO-2558.

Cases Considered: *City of Ottawa v. Ontario,* 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011).

OVERVIEW:

[1] The records at issue in this appeal are Phase I and Phase II Environmental Site Assessments for a specified property. The records were provided to the City of St.

Catharines (the city) by the current owner of the specified property in an application process regarding brownfield redevelopment. The previous owner of the property, the party that commissioned the reports, takes issue with providing the city with these assessments given a pre-existing non-disclosure agreement between the current and former owner to keep them confidential.

[2] Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the requester asked for all correspondence relating to an email regarding the specified property and the Phase I and Phase II Environmental Site Assessments concerning that property.

[3] The city identified records responsive to the request and notified affected parties under section 21(1) of the *Act* to obtain their views regarding disclosure of the records.

[4] Following third party notification, the city issued a decision to the requester granting full access to responsive email records. Access to two other records, Environmental Site Assessments, was denied pursuant to the mandatory exemption in section 10(1) (third party information) of the *Act.*

[5] The requester, now the appellant, appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[6] During mediation, the city confirmed its decision to deny access to the two Environmental Site Assessments (the ESAs). The appellant confirmed that he is pursuing access to the withheld records and asserted that the public interest override in section 16 of the *Act* should apply. As a result, section 16 of the *Act* was added as an issue in this appeal.

[7] Further mediation was not possible, and the appeal was moved to the adjudication stage of the appeals process. An IPC adjudicator commenced an inquiry by inviting the parties, including two third parties (the current and previous owners of the property), to provide representations on the issues under appeal.

[8] In the inquiry, the previous owner stated that the city did not have custody or control of the records, prompting the adjudicator to invite further submissions on this issue. Representations were received and shared in accordance with the IPC's *Code of Procedure*.

[9] Subsequently, I was assigned as the adjudicator in this appeal. After reviewing the materials in the file, I decided to invite representations from two additional parties, those that conducted the assessments and completed the ESAs.

[10] As noted, there are several parties in this appeal, all of whom were invited to provide representations. As confirmed by the city, the third party that provided the ESAs to it, is the current owner of the specified property (referenced in this order as "the current owner") and did not provide representations. The previous owner of the property

who commissioned the ESAs provided representations in this appeal (referenced in this order as "Company A"). I also invited representations from the two engineering companies that completed the ESAs. Only one engineering company provided representations (referenced in this order as "the engineering company").

[11] In this order, I find that the ESAs are in the custody or under the control of the city. I also find that section 10(1) does not apply to exempt the ESAs from disclosure and order the city to disclose them to the appellant.

RECORDS:

[12] A Phase I and a Phase II Environmental Site Assessment (the ESAs).

ISSUES:

A. Are the ESAs "in the custody" or "under the control" of the city pursuant to section 4(1)?

B. Does the mandatory exemption at section 10(1) for third party information apply to the ESAs?

DISCUSSION:

Issue A: Are the ESAs "in the custody" or "under the control" of the city pursuant to section 4(1)?

[13] Section 4(1) provides for a general right of access to records that are in the custody or under the control of an institution governed by the *Act*. It reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[14] Under section 4(1), the right of access applies to a record that is in the custody or under the control of an institution; the record need not be both.[1]

[15] If the record is not in the custody or under the control of the institution, none of the exclusions or exemptions needs to be considered since the general right of access in section 4(1) is not established.

[16] The courts and the IPC have applied a broad and liberal approach to the custody

[1] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

or control question.[2] In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*. [3]

[17] In this appeal, the city has physical possession of the assessments. The issue is whether the assessments are in its custody or under its control. The IPC considers a non-exhaustive list of factors when deciding if a record is in the custody or under the control of an institution.[4] Factors that are relevant to the circumstances of this appeal include:

- Does the content of the record relate to the institution's mandate and functions?[5]
- Does the institution have physical possession of the record because its creator provided it voluntarily or pursuant to a statutory or employment requirement?[6]
- If the institution does have possession of the record, is it more than "bare possession"? In other words, does the institution have the right to deal with the record in some way and does it have some responsibility for its care and protection?[7]
- Does the institution have a right to possession of the record?[8]
- Does the institution have the authority to regulate the record's content, use and disposal?[9]
- Are there any limits on the ways the institution may use the record? If so, what are those limits, and why do they apply to the record? [10]
- To what extent has the institution relied on the record?[11]
- How closely is the record integrated with other records held by the institution?[12]

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[2] *Ontario Criminal Code Review Board v. Hale*, 1999 CanLII 3805 (ON CA); *Canada Post Corp. v. Canada* (*Minister of Public Works*), 1995 CanLII 3574 (FCA), [1995] 2 FC 110; and Order MO-1251.
[3] *City of Ottawa v. Ontario,* 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).
[4] Orders 120, MO-1251, PO-2306 and PO-2683.
[5] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, cited above, and Orders 120 and P-239.
[6] Orders 120 and P-239.
[7] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[8] Orders 120 and P-239.
[9] Orders 120 and P-239.
[10] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[11] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above, and Orders 120 and P-239.
[12] Orders 120 and P-239.

- What is the usual practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature?[13]

Representations

[18] In its initial representations, Company A (the third party who commissioned the assessments), submitted that the city did not have custody or control over the ESAs as they were provided to the city by the current owner of the property in contravention of a non-disclosure agreement between them.

[19] Company A provided confidential representations in this appeal, which were summarized by the adjudicator and provided to the appellant. I will only refer to the summary of the representations in this order, although, I have reviewed and considered all of Company A's submissions.

[20] Company A submits that the current owner, who provided the ESAs to the city, was contractually bound to keep the assessments confidential. Company A provided a redacted copy of a non-disclosure agreement it entered with the current owner in support of this submission. Company A submits that the IPC should not be seen to condone a party's breach of a contractual obligation by further exacerbating that breach by allowing continued disclosure of confidential information.

[21] The city provided representations concerning whether it has custody or control of the ESAs. It submits that it has consistently acted as though it has custody of these assessments being submitted to it as part of an application for the Community Improvement Plan program (the CIP program), which offers incentives for developers to remediate brownfield land for the sake of development. The city notes that although it was aware that the ESAs were not paid for by the CIP applicant (the current owner), it was not aware of any agreement to keep them confidential.

[22] The city explains the following ways that it dealt with the records. It explains that the assessments were submitted by it to the Ministry of the Environment, Conservation and Parks (the MECP) in 2020. The city also explains that it submitted them to external legal counsel for examination by a legal expert in 2020. The city states that in another request for information under the *Act*, it considered these same ESAs responsive records, and they were withheld pursuant to section 10(1). The city explains that in the present appeal it recognized that it should notify the current and previous owners of the request. The city submits that its actions show that it consistently acted as though it did not have control. (The city says that it was "ordered" to provide the ESAs to MECP, but it has not provided any context to substantiate that claim.)

[23] The city submits that if a non-disclosure agreement exists between Company A and the current owner to keep the ESAs confidential, then an argument can be made that its possession of the assessments is "bare possession," otherwise, it considered the

[13] Order MO-1251.

assessments to be in its custody but not under its control.

[24] The appellant submits that the statutory power for municipalities to grant financial incentives to property owners that are redeveloping brownfield lands comes from section 28 of the *Planning Act*. Therefore, he argues that the ESAs came into the city's possession through the course of its legislated duties. The appellant states that the city relied on the ESAs to facilitate decision making involving millions of dollars and the city has a right to deal with them in the process of granting this support to landowners.

Analysis and finding

[25] As established by the Divisional Court in *City of Ottawa v. Ontario*, I must consider the factors that are relevant to determine custody or control contextually in light of the purpose of the *Act*. In my view, when examining the factors "from the perspective of scrutinizing government action and making government documents available to citizens so that they can participate more fully in democracy," the factors weigh in favor of a finding that the city has custody and control over the ESAs.[14]

[26] At the outset, I note that the city admits that it has custody of the ESAs but claims to not have control over them. It also submits that if a non-disclosure agreement exists concerning the ESAs, then it may only have bare possession. After considering the various representations in this appeal, it is my view that the city has both custody and control over the records, although, it is only necessary for the purposes of section 4(1) of the *Act* that the city has one or the other.

[27] Company A argues that the ESAs were provided to the city by the current owner in contravention of a non-disclosure agreement, suggesting that the city does not have the right to possess them. However, despite any preceding agreement between the current and prior owners, it is undisputed that the assessments were provided to the city as part of a CIP program application administered by the city that offers incentives to developers to remediate brownfield land for the sake of development. The third party that submitted the ESAs to the city was the owner of the specified property at the time. It is also apparent that the CIP program guidelines require phase I and II environmental site assessments and that was the purpose for which the city received them.

[28] I have considered the city's suggestion that it has only "bare possession" of the assessments. In Order P-239, former Commissioner Tom Wright discussed the concept of bare possession. The former Commissioner explained that when an institution has some right to deal with the records and some responsibility for their care and protection, this cannot be said to be bare possession.

[29] I agree and adopt Order P-239 for my analysis. In my view, the city's possession of these records does not amount to bare possession only. The city acquired the right to deal with the records and the responsibility for their care and protection when it received

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[14] *City of Ottawa v. Ontario*, cited above.

them from the third party as part of an application for brownfield redevelopment. While the city did not create the records, it relied on them when it provided them to the MECP when requested, and also provided them to external counsel for "examination." The city also considered these same records to be responsive in another access request where the city relied on section 10(1) to withhold the information.[15] In my view, the city integrated these assessments with other records it held and dealt with them in the same way it would have dealt with other ESAs in its possession. As a result, considering the context in which they were received, I find that the city has a right to possess these assessments. Further, I find that the records relate to the city's mandate and function which includes regulating land use and development in the municipality.

[30] In *City of Ottawa*, the Divisional Court found that the city did not have custody over an employee's personal emails sent from the city's account because its possession of the emails on its server amounted to bare possession only. The Court also noted that the purposes of the *Act* must be borne in mind in determining questions of custody, and that disclosure of an employee's personal emails would not further the purpose of shedding light on the activities of the government. In my view, the present circumstances are distinguishable from those in *City of Ottawa*. As noted above, the city's possession is not bare possession because it has dealt with the ESAs, albeit in a limited way. Further, the ESAs were provided to the MECP who released its own, more current information concerning the specified property. In my view, the ESAs therefore have some connection to public scrutiny of the activities of the city, an institution under the *Act*.

[31] Regarding Company A's concerns about the confidentiality of the information and the authority for the current owner to provide the assessments to the city, it is often the case that an institution will obtain information on the basis that it is confidential, including environmental site assessments (as the city did in this appeal as part of an application). The appropriate place to address these concerns is the exemption for third party information, which will be discussed at Issue B.

[32] Any dispute between Company A and the current owner about the current owner's potential contravention of a confidentiality agreement is a matter of dispute between these parties and does not detract from the fact that the city was provided these ESAs as part of its fulfillment of its statutory duties to deal with them as part of the CIP program and other development activities.

[33] In summary, most of the relevant factors for which I have received evidence weigh in favour of a finding that the ESAs at issue are in the custody or under the control of the city. In the circumstances of this appeal, I note:

[15] The city notes that in 2020 it received a request for soil conditions relating to the specified site and it considered the ESAs in this appeal to be responsive. The city notes that despite not contacting the third party about the 2020 request, it withheld the ESAs under section 10(1) and the information was not disclosed.

1. The records were provided to the city as part of a CIP program application
2. The city currently has a copy of the records in its record holdings
3. A copy of the records has been in the city's custody for several years
4. The records relate to the city's mandate and function
5. The city is responsible for the care and protection of its copy of the records
6. The city provided the records to the MECP, and
7. The city responded to the request (and an earlier access request) and participated in mediation, suggesting that it had the right to deal with the records.

[34] Accordingly, these assessments can be accessed by the appellant through the *Act*, and I will now consider the city's section 10(1) exemption claim to withhold this information.

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

[35] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[16] where specific harms can reasonably be expected to result from its disclosure.[17] Although not specifically stated, after reviewing the city and Company A's representations it is apparent that the city is relying on section 10(1)(a) and 10(1)(c) to withhold the ESAs.

[36] The relevant parts of section 10(1) state:

> 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] *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.*).
[17] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[37] 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

[38] The IPC has described the types of information protected under section 10(1), including:

> ***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.[18]
>
> ***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.[19]

[39] The city submits that the withheld ESAs contain scientific and/or technical information. Company A submits that the information by its very nature is both technical and scientific. The engineering company, that completed the phase II ESA, submits that the records reveal only technical information regarding environmental conditions. The appellant does not address this first part of the test.

[40] After reviewing the withheld information, I do not agree that it includes scientific information as defined under the *Act*. As stated above, for information to be considered "scientific" it must relate to the observation and testing of a specific hypothesis or

[18] Order PO-2010.
[19] Order PO-2010.

conclusion by an expert in the field.[20] The city and Company A did not refer me to specific information in the records that would be considered scientific.

[41] After reviewing the records and considering the representation of the engineering company, I find that the withheld information contains only technical information. The information was prepared by an engineer and consists of technical information regarding the environmental condition of the specified property.

[42] Therefore, the first part of the test is met.

Part two of the section 10(1) test: "supplied in confidence"

[43] 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.[21]

[44] 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.[22]

[45] The city notes the unusual circumstances in this appeal because the ESAs were not submitted by Company A who commissioned the assessments. Company A also confirms that it did not provide the reports to the city. It also repeats that the ESAs were submitted to the city by the current owner in breach of its obligation to keep them confidential. (As explained above, the assessments were submitted to the city in aid of an application to a CIP program.)

[46] The party arguing against disclosure must show that the party supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[23]

[47] 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,

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[20] Order PO-2010.
[21] Order MO-1706.
[22] Orders PO-2020 and PO-2043.
[23] Order PO-2020.

- 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.[24]

[48] The city refers to Company A's claim that the current owners were contractually bound not to disclose certain information provided to it, including the ESAs. The city notes that the ESAs state on their respective first pages that they are "privileged and confidential, prepared at the request of Counsel."

[49] The city notes that the current owners were contacted as the third party that provided the information, but they did not respond. It submits that applications for the CIP program, and supporting documentation, are not routinely disclosed by the city and there is no language in the application documents to warn the applicants that submitted documentation will be released to the public, as there is in an RFP documentation.

[50] The city submits that it would have been assumed implicitly that these documents would be considered confidential by any third party. It refers to a previous access request where the city considered that these ESAs have been supplied in confidence and it claimed section 10(1) to withhold them.

[51] Company A indicates that had it provided the ESAs to the city, its usual and customary practices is to only provide such information strictly in confidence.

[52] The engineering company notes that it provided the information to Company A on a privileged and confidential basis and the report is marked as such.

[53] As noted, the current owner, who supplied the ESAs to the city, although invited, did not provide representations in this appeal.

[54] The appellant did not address this part of the test.

Finding

[55] Based on my review of the information at issue and the representations of the parties, I find that the current owner, when providing the ESAs to the city, did not supply the information "in confidence."

[56] Although the ESAs are marked, on each page, as being "privileged and confidential," and after considering the representations, it is apparent that these notations pertain to the time when they were provided to Company A, not the time the current owner provided them to the city. It is also apparent that when Company A provided the ESAs to the current owner, it was on the basis that they be kept confidential according

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

to a non-disclosure agreement and the limitations section in the ESAs. However, there is no evidence that when the current owner provided the ESAs to the city, it did so with an expectation that the information was confidential and that it would be kept confidential or that it communicated to the city that the ESAs were to be kept confidential. As noted by the city, although applications to the CIP program are not routinely disclosed by it, there is no language in the application that discusses the confidentiality of the information that is submitted as part of the application.

[57] Further, when the city provided the ESAs to the MECP, it did not indicate if it contacted any third party for approval or to inform any third party that it was providing the information to the ministry. In my view, this is an indication that the city did not believe that the ESAs provided to it as part of a CIP program application were supplied in confidence.

[58] Therefore, I find that part 2 of the test under section 10(1) has not been met.

[59] Because I have found that part 2 of the test has not been established, the ESAs cannot be exempt under section 10(1). However, in the circumstances of this appeal, I will consider whether part 3, the harms component of the test under section 10(1), has been met.

Part three of the section 10(1) test: harms

[60] 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.*[25]

[61] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[26] 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.[27]

[62] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace.[28]

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[25] Orders MO-2363 and PO-2435.
[26] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[27] *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.
[28] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Representations

[63] The city notes that most adjudicators have found that the release of phase I and II ESA documents does not meet the harms test within their given contexts. It refers to Orders MO-1503 and MO-2922 noting that although the harms test was not met in each of these it was because the third party failed to provide detailed representations. It notes that often the harms expected in the release of ESAs is in relation to affecting the value of the land, or the difficulty in selling properties after the land has been developed. The city submits that in this appeal, Company A's claims are broader including:

- the ESAs include historic information concerning a specified issue and may be quoted out of context for the sake of creating controversy
- the property has been vacant since a sale in 2014, and release of the ESAs could damage efforts in redevelopment
- Company A's corporate reputation could be affected by quoting the reports out of context prejudicing its competitive position in the marketplace.

[64] The city submits that controversy concerning the environmental impact of Company A's tenure on these properties – whether out of context or justified – could damage Company A's corporate reputation in this area. It suggests that it would be difficult for the lay reader to use this sort of data in context, as most non-experts would need to rely on web searches extensively to try to understand acronyms, test results, regulations, and safe exposure levels. The city notes that it shared these documents with the MECP when requested. It suggests that the MECP has released much more current data and has made public presentations concerning the issue to City Council. On this point, it refers to a 2020, presentation by MECP setting out the results from the ministry's surface water and air monitoring surveys conducted to assess for any off-site impacts from the specified site and a 2020 Surface Water Quality Study technical memorandum.

[65] The city notes that Company A continues to operate in St. Catharines and is a significant partner and employer in the city's business community. It suggests that the continued public concern surrounding these properties means that the potential harm is more than hypothetical.

[66] Company A provided confidential representations concerning alleged potential harms under section 10(1). It submits that the ESAs include confidential sensitive information relating to the specified property that it previously owned, which ceased operations in 2010. It says the assessments include historic information related to a specified environmental concern. Company A suggests that the assessments may be quoted out of context and that this could harm its reputation and affect the future development of the specified property. It also suggests that there is information in the assessments that could cause unnecessary confusion and result in harm to it.

[67] As noted, the engineering company who completed the phase II ESA at issue

provided representations in this appeal. The engineering company submits that the technical nature of this report was intended for a technically knowledgeable audience who can interpret the results in the context of applicable regulations. The engineering company suggests that the results may be used inappropriately and taken out of context and in the absence of a full understanding of what has occurred onsite since 2011, when the investigation was conducted. The engineering company suggests that the use of data that does not reflect current site conditions may misrepresent soil and groundwater concentrations and potential associated risks. It states that release of this technical data which does not reflect current site conditions, could result in harm to the reputation of its client and itself, and could reasonably be expected to interfere or impact ongoing environmental and development work at the site (which the engineering company states that it has no knowledge of).

Analysis and finding

[68] As noted by the city, the IPC has held in the past, including in Orders MO-1503 and MO-2922, that disclosure of ESAs does not meet the harm test under section 10(1).

[69] The adjudicator in Order MO-2922 found that the ESAs could not reasonably be expected to significantly prejudice the negotiating or competitive position of the third party as contemplated by section 10(1)(a) or result in undue gain or undue loss as contemplated by section 10(1)(c). She noted that in particular reference to the type of record at issue, consisting of scientific and technical information, this conclusion is consistent with past orders, (Orders MO-1263, MO-1503, MO-1974 and PO-2558), where section 10(1) was not upheld where it was claimed for ESAs.

[70] In Order MO-1263, the Assistant Commissioner addressed the denial of access to an ESA under section 10(1)(a) and 10(1)(c). He did not accept the city's (City of Toronto) position that disclosure of the record could reasonably be expected to prejudice the third party's competitive position in the marketplace or result in undue loss because the "need for remediation efforts to deal with potential environmental contamination on the property … is a known fact."

[71] I accept and apply this line of reasoning for this appeal. Company A and the engineering company suggest that disclosure of the ESAs could affect the future development of the property. However, environmental concerns surrounding this property are known which is reflected in the MECP presentation (mentioned above) and other information. This argument does not explain how the harms contemplated by sections 10(1)(a) or (c) could reasonably be expected to occur through disclosure.

[72] The city suggests that the circumstances in this appeal can be differentiated from the other appeals because the harms to Company A are more apparent. However, after considering the parties' representations and reviewing the ESAs at issue, I find that disclosure of the information contained in the assessments could not reasonably be expected to significantly prejudice the negotiating or competitive position of Company A

as contemplated by section 10(1)(a). I am also not persuaded that disclosure of the ESAs could reasonably be expected to result in undue gain or undue loss to Company A as contemplated by section 10(1)(c).

[73] As noted by the city, Company A and the engineering company, the information in the ESAs consists of historical information from an assessment conducted on the site in 2010 and 2011. They refer to sensitive information in the ESAs, including historic information about a specified environmental concern. The city and Company A point to more current information concerning the specified environmental concern and suggest that disclosure of the withheld information can lead to confusion and/or be quoted out of context.

[74] After reviewing the more current information (attached to the city's representations), I note that the 2020 presentation by MECP is a presentation setting out the results from the ministry's surface water and air monitoring surveys conducted to assess for any off-site impacts from the specified site. This presentation was made to city council, and is posted to the city's website, and addresses the specific environmental concern raised by Company A, discussing the current impact. This issue is also discussed in the 2020 "technical memorandum" prepared by the MECP, provided by the city with its representations and publicly available. Despite the MECP final conclusions, it is apparent that the specific environmental concern was discussed.

[75] Considering the amount of information already in the public domain about the issues discussed in the ESAs, including the specified environmental concern, it is hard to see how historical information that relates to a known concern mentioned by the MECP in 2020 would lead to the harms contemplated by section 10(1) to Company A, or the engineering company that completed the ESAs. Company A does not explain what harm transpired when the MECP released information addressing this specified environmental concern and I find that its submissions concerning harm if the ESAs are released are speculative and do not contain the necessary detail that would show how disclosure of this information would result in harming Company A's reputation and thereby lead to the harm at section 10(1)(c). In my view, release of the disclosed information that further particularized the specified environmental concern would not prejudice significantly Company A's competitive position or result in undue loss or gain given that general information about this concern is already publicly known.

[76] Further, regarding the parties' arguments about the risk of future development of the specified property, this risk of harm would logically fall upon the current owner. The current owner has taken no such position. I am therefore not persuaded by this argument.

[77] In summary, I find that part 3 of the section 10(1) test has not been established. In these circumstances, even if I had found that the ESAs were supplied in confidence (part 2), I would find that the section 10(1) exemption does not apply.

[78] I do not uphold the city's claim that section 10(1) applies, and I will order it to

disclose the ESAs to the appellant.

ORDER:

1. I find that the environmental site assessments (phase I and phase II) are in the custody or under the control of the city.

2. I do not uphold the city's decision that the environmental site assessments are exempt under section 10(1). Accordingly, I order the city to disclose the environmental site assessments to the appellant by **December 17, 2024**, but not before **December 13, 2024**.

3. In order to ensure compliance with paragraph 2, I reserve the right to require the city to send me a copy of the environmental assessments that it discloses to the appellant.

Original Signed by: November 12, 2024

Alec Fadel
Adjudicator