Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3248-I

Appeal MA12-508

City of Markham

September 30, 2015

Summary: This second Interim Order follows Interim Order MO-3176-I. The appellant sought access to specified reports relating to the proposal for the construction of an arena in the city. The city located four records that were responsive to the request and issued a decision denying access to them in their entirety. The city relied on a number of discretionary exemptions and the mandatory exemption in section 10(1)(a) (third party information) of the *Freedom of Information and Protection of Privacy Act* (the *Act*) to deny access. The appellant appealed the city's decision to this office and raised the possible application of the public interest override in section 16 of the *Act.*

Interim Order MO-3176-I found that while records 1 and 2 qualify for exemption under the discretionary exemption in section 12 (solicitor-client privilege), the city has to reconsider its discretionary exemption claims and re-exercise its discretion in accordance with certain relevant factors. Interim Order MO-3176-I also deferred the determination of the possible application of section 10(1)(a) to the records. The city reconsidered its exercise of discretion and maintained its position that records 1 and 2 are exempt under the discretionary exemption in section 12.

This Interim Order finds that none of the records at issue is exempt under section 10(1)(a) and orders records 3 and 4 disclosed. It also finds that the city failed to consider certain relevant factors in its re-exercise of discretion and orders the city to re-exercise its discretion taking into account the relevant factors.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1)(a) and 12.

Orders and Investigation Reports Considered: Interim Order MO-3176-I.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] This is the second interim order being issued in respect of Appeal MA12-508, following Interim Order MO-3176-I. The appellant, a representative of a local ratepayers association, submitted a request to the City of Markham (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain reports relating to the Markham Sports Entertainment and Cultural Centre (GTA Centre). The city located four records that were responsive to the request and issued a decision denying access to them in their entirety relying on the discretionary exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11 (a), (c), (d) and (e) (economic and other interests) and 12 (solicitor-client privilege), and the mandatory exemption at section 10(1)(a) (third party information) of the *Act*. The appellant appealed the city's decision to this office and raised the possible application of the public interest override in section 16 as an issue in the appeal.

[2] In Interim Order MO-3176-I, I found that the statutory solicitor-client privilege exemption in section 12 applied to records 1 and 2, but I ordered the city to re-exercise its discretion to withhold the four records bearing in mind the following developments which I found had significant bearing on the appeal:

- The city decided not to proceed with the GTA Centre proposal.
- Information relating to the city's plan for the GTA Centre has been published in the media; this is in addition to the information previously disclosed by the city about the proposal.
- Information relating to this appeal and to related Appeal MA13-261 has been published in the media.
- The city informed this office that a motion before City Council (Council) to have all of the records at issue in this appeal and in related Appeal MA13-261 disclosed to the public was defeated on the basis that the *Act* prohibits disclosure.

[3] I also deferred my determination of the possible application of the mandatory exemption in section 10(1)(a).

[4] After issuing Interim Order MO-3176-I, I invited the city's representations on its re-exercise of discretion. In response, the city submitted a letter advising it required additional time to comply with my Interim Order MO-3176-I due to the voluminous nature of the records, the complexity of the issues and the numerous discretionary exemptions at issue. In its letter, the city requested a stay, variation and/or reconsideration of provisions 1 and 2 of Interim Order MO-3176-I. Before responding to the city's stay request, I sought the appellant's position on it. She expressed disappointment and disagreement with the request and argued that it was simply a delay tactic on the part of the city.

[5] After considering the submissions of both parties, I granted the city a temporary stay of provisions 1 and 2 of Interim Order MO-3176-I. At the conclusion of the stay, the city submitted representations withdrawing its reliance on the discretionary exemptions in sections 6(1)(b), 7(1) and 11(a), (c), (d) and (e). The city also decided to disclose records 3 and 4, subject to my determination of whether section 10(1)(a) applied to them. The city maintained its decision to withhold records 1 and 2 under the discretionary exemption in section 12. I shared the city's representations and revised decision with the appellant, and invited her representations in response. The appellant continued to object to any of the records being withheld. I also invited the representations of the two third party firms that authored the records at issue on the possible application of section 10(1)(a); neither firm provided representations.

[6] In this Interim Order, I find that section 10(1)(a) does not apply to the records, and I order the city to disclose records 3 and 4. I also find that the city failed to re-exercise its discretion in accordance with Interim Order MO-3176-I and I order it to again re-exercise its discretion in respect of records 1 and 2 bearing in mind the relevant factors set out in this Interim Order and Interim Order MO-3176-I.

RECORDS:

[7] The four records at issue in this appeal are:

1. Report - Summary dated January 2011 prepared by Firm 1 (27 pages)
   (this is a draft version of record 2, and is contained in its entirety within record 2)

2. Report dated January 2011 prepared by Firm 1 (42 pages)

3. Opinion Letter and Report dated February 27, 2012, prepared by Firm 2 (4 pages)

4. Report Presentation dated April 12, 2012, prepared by Firm 2 (2 pages)

ISSUES:

A. Does the mandatory exemption at section 10(1)(a) apply to the records?

B. Did the city properly re-exercise its discretion under section 12 in accordance with provisions 1 and 2 of Interim Order MO-3176-I?

DISCUSSION:

A. Does the mandatory exemption at section 10(1)(a) apply to the records?

[8] The city claims that section 10(1)(a) applies to the records. This section 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;

[9] Section 10(1) is a mandatory exemption designed to protect the confidential "informational assets" of third party businesses that provide information to government institutions[1] and it serves to limit disclosure of confidential information belonging to these third parties that could be exploited by a competitor in the marketplace.[2]

[10] For section 10(1)(a) to apply, the city and/or the third party firms in this appeal, 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 city in confidence, either implicitly or explicitly; and

---

[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.).
[2] 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 the harms specified in section 10(1)(a) will occur.

[11] As noted above, the city is the only party resisting disclosure on the basis of section 10(1)(a) and it is the only party that has provided representations on the application of this section. Because the third party firms chose not to provide representations in this appeal, I will look to the city's representations to satisfy the three part test for the application of section 10(1)(a).

Part 1: type of information

[12] The types of information listed in section 10(1) that are relevant in this appeal have been discussed in prior orders.

> *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 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]

[13] I adopt these definitions for the purpose of this appeal.

Part 2: supplied in confidence

[14] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[6] 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.[7]

---

[3] Order PO-2010.
[4] Order P-1621.
[5] Order PO-2010.
[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.

[15] In order to satisfy the "in confidence" component of part two, the city must establish that the third party firms had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[8] 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 city 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.[9]

Part 3: harms

[16] To satisy part 3 of the test, the city must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[10] This office has found that parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[11]

Representations

[17] In respect of part 1 of the test, the city submits that records 1 and 2 contain financial and commercial information supplied in confidence by a number of private equity investors to Firm 1 in order to allow Firm 1 to perform "due diligence and pro forma financial analysis." Regarding part 2 of the test, the city submits that the information in the reports was prepared exclusively by Firms 1 and 2, and was explicitly supplied with a reasonable expectation of confidentiality. The city states that records 3 and 4 were also provided with a reasonable expectation of confidentiality and the

---

[8] Order PO-2020.

[9] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[10] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[11] Order PO-2435.

confidentiality is implicit. The city adds that out of concern for protecting the confidentiality of the information contained in the records, it put special systems and processes in place to control access to these records.

[18] The city's representations on part 3 of the test consist of an assertion that disclosure of the records could significantly prejudice the competitive position of the firms that authored the reports. The city states that the firms provide financial advisory services and it adds that the financial services industry is highly competitive with many firms providing similar services. The city argues that the financial models and analysis tools in the records are proprietary to the firms and their disclosure would give the firms' suppliers a competitive advantage over other firms practising in the same field. The city states that the proprietary commercial information supplied to the firms by the private equity investors – for example, construction costs, and concert and event financing models – is also a competitive advantage to those investors, and the disclosure of this information could significantly prejudice the competitive position of those investors. The city also takes the position that disclosure of the records could interfere significantly with the contractual obligations or negotiations of one or more third parties.

[19] The appellant does not directly address any of the three parts of the section 10(1) test in her representations. However, throughout the inquiry process her position has consistently been that the records in this appeal do not qualify for exemption under section 10(1)(a).

[20] As noted above, I contacted the two firms who authored the reports at issue and invited their representations on whether section 10(1)(a) applies to the records. Neither of the firms submitted representations.

Analysis and findings

[21] The city is the only party claiming that section 10(1)(a) applies to the records and the only party to provide representations in support of that claim. Neither of the firms whose third party information is purportedly at issue in this appeal provided representations. While the lack of representations from the firms is not determinative of whether section 10(1)(a) applies to the record, it is indicative of the firms' lack of concern about the disclosure of the information in the records.

[22] In addition to arguing that the records contain the informational assets of the firms, the city argues that the "construction costs, and concert and event models" and other proprietary information provided by certain equity investors to the firms are a "competitive advantage to those investors" the disclosure of which could significantly prejudice the competitive position and/or contractual obligations or negotiations of the equity investors. This argument does not correspond to the contents of the records at issue. On my review of the records, there is no link between the information contained

in them and an identified equity investor, such that any equity investor's informational assets can be said to be in play. In fact, the equity investors and their proportional involvement in the proposed transaction are not identified in the records. I therefore reject this argument.

[23] With respect to the firms, even if I were to accept that the first two parts of the section 10(1)(a) test are satisfied in this appeal, the city's claim of section 10(1)(a) fails on part 3. The city has not satisfied me that the third part of the test has been met for any of the information contained in the records at issue. It has not provided me with detailed and convincing evidence that the harms in section 10(1)(a) could reasonably be expected to occur if the records were disclosed. The Supreme Court of Canada has recently described the "could reasonably be expected to" standard as requiring an institution to provide evidence "well beyond" or "considerably above" a mere possibility.[12] The city has not provided me with such evidence. Instead, it offers speculative assertions that are not supported by evidence. In these circumstances, I find that the records do not qualify for mandatory exemption under section 10(1)(a).

[24] As a result of my findings, I will order records 3 and 4, for which the city has not claimed any other exemptions, disclosed to the appellant. I will address below, the city's decision to continue to withhold records 1 and 2 under the discretionary solicitor-client privilege exemption in section 12.

B. Did the city properly re-exercise its discretion under section 12 in accordance with provisions 1 and 2 of Interim Order MO-3176-I?

[25] In Interim Order MO-3176-I, I found that the statutory solicitor-client communication privilege under branch 2 of the exemption in section 12 applies to records 1 and 2 in this appeal. I made this determination based on the representations of the city and the appellant on the section 12 exemption, including the sworn evidence of the city solicitor that records 1 and 2 were prepared for her by Firm 1 for use in giving legal advice. I followed the ruling of the Divisional Court[13] which dictates that the statutory solicitor-client communication privilege stands on its own and applies if the records fit within the definition in the section. The Divisional Court specifically stated that the test for the application of the second branch of section 12 is the definition in the section, and not whether the records are privileged at common law.

[26] Having found that records 1 and 2 qualify for exemption under section 12, I ordered the city – in provisions 1 and 2 of Interim Order MO-3176-I – to re-exercise its discretion to deny access to the records under section 12 in accordance with four factors that I set out in paragraph 7 and repeated in paragraph 47 of that Interim Order.

---

[12] *Supra*, note 10 above at paras.
[13] *Ontario (Attorney General) v. Big Canoe,* [2006] O.J. NO. 1812 (Div. Ct).

[27] The city responded to provisions 1 and 2 of my Interim Order MO-3176-I with a revised decision withdrawing its reliance on the other discretionary exemptions it had claimed, but maintaining its claim that section 12 applies to records 1 and 2. In continuing to withhold records 1 and 2 under section 12, the city states that it re-exercised its discretion.

[28] In response to the city's re-exercise of discretion, the appellant states the following factors are relevant:

- The report found in records 1 and 2 was the first report that was commissioned by the city to review the GTA Centre project in 2010 at a cost of $143, 215.00 and then an additional cost in 2011 of $121,000, for a total cost of $264,215.00.

- Records 1 and 2 do not contain legal advice but rather, relate to business advice and contain factual information on the project.

- Records 1 and 2 were prepared for discussion purposes and should not remain privileged.

- The records are no longer relevant to any future project in the city.

- There is a compelling public interest in disclosure of the records because the residents would like to know why the city continued to spend taxpayers' money when there was no evidence that a sports arena was viable in the city.

- The GTA Centre project could have been a financial burden on taxpayers for years to come and residents pulled together in an unprecedented way to oppose it. Residents should be able to see what their taxes paid for.

Analysis and findings

[29] On my review of the city's representations, I find that I have insufficient evidence to satisfy me that, in re-exercising its discretion, the city properly considered all relevant factors, including some of the factors set out in Interim Order MO-3176-I.

[30] The only passage in its representations that addresses the factors I ordered the city to consider in its re-exercise of discretion is a single paragraph in which the city states that a significant amount of time has passed between the time that it received the Notice of Inquiry in this appeal and the issuance of Interim Order MO-3176-I, and it acknowledges that there has been a material change in circumstances, namely, that it is no longer pursuing the GTA Centre project. The city does not indicate that it considered the other factors referred to in Interim Order MO-3176-I including the

publication of information about the city's plan for the GTA Centre; the publication of information about this appeal and about related Appeal MA13-261; and the motion before Council in February 2015 to have all of the records at issue in this appeal and in related Appeal MA13-261 disclosed to the public, and the defeat of this motion on the basis that the *Act* prohibits disclosure. The city's representations also contain no indication that it turned its mind to the public interest considerations that should properly form part of its re-exercise of discretion.

[31] By failing to indicate whether or not it considered three of the four factors I ordered it to consider in Interim Order MO-3176-I, and any public interest in disclosure of the records that may exist, I find that the city failed to take into account relevant considerations in re-exercising its discretion. As a result, I will order it to re-exercise its discretion to withhold records 1 and 2 under section 12 again, having regard to all of the relevant factors, including the three factors which I originally set out in paragraph 7 of Interim Order MO-3176-I and I repeat at paragraph 2 above, the factors referred to by the appellant in her representations listed in paragraph 28 above, and public interest considerations.

[32] In addition, I direct the city to the factors under Issue F of the original Notice of Inquiry provided to it in this appeal, and in particular, I note the following relevant factors which the city should consider and address in its second re-exercise of discretion:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information.

INTERIM ORDER:

1. I order the city to disclose records 3 and 4 to the appellant in their entirety immediately.

2. I order the city to again re-exercise its discretion to deny access to records 1 and 2 under section 12 in accordance with the factors set out above and to advise this office and the appellant of the result of its second re-exercise of discretion in writing by **October 21, 2015.**

3. If, after re-exercising its discretion again, the city decides to disclose records 1 and 2, it may do so immediately.

Stella Ball
Adjudicator

September 30, 2015