

Information and Privacy Commissioner,
Ontario, Canada



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

2014 CanLII 29006 (ON IPC)

ORDER MO-3053

Appeal MA13-352-2

City of Greater Sudbury

May 26, 2014

Summary: The city received a request for a number of records, including a draft report prepared by the city's Auditor General and a report prepared by an independent accounting firm. The city denied access to the draft report on the basis of the confidentiality provision in section 53(1) of the *Act* in conjunction with section 223.22 of the *Municipal Act, 2001*. It also denied access to portions of the accounting firm's report on the basis of the exemption in section 10(1) (third party information) of the *Act*.

This order finds that the Auditor General's draft report is captured by the confidentiality provision in section 223.22 of the *Municipal Act, 2001*, which prevails over the *Municipal Freedom of Information and Protection of Privacy Act*, and the city's decision to withhold that record is upheld. It also finds that the withheld portions of the accounting firm's report do not qualify for exemption under section 10(1), and orders this record to be disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 53(1); *Municipal Act, 2001*, section 223.22.

Orders Considered: Orders MO-2629-R and MO-2876-F.

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a seven-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for a number of records. Parts 1, 2 and 5 of the request were for the following:

- 1) A copy of a report prepared by the [named] city auditor general and provided to [a named city staff member] on or about July 2011 regarding matters with [a named numbered company].
- 2) A copy of the [named] city's auditor general complete report regarding the matters with [the named numbered company] presented to the Finance committee/City council. ...
- 5) The city's [named] external auditor's final report regarding matters related to [the named numbered company]. ...

[2] After notifying an affected party (the firm that prepared the report responsive to item 5) under the notice provisions in section 21 of the *Act*, the city issued an access decision. In that decision, the city stated as follows regarding the records responsive to parts 1, 2 and 5:

- That access to the record responsive to item 1 (identified as the City Auditor General draft report) was denied on the basis of section 223 of the *Municipal Act, 2001* (a confidentiality provision).
- That the City Auditor General's complete final report, responsive to item 2, was publically available on the city's website.
- That partial access was granted to the record responsive to item 5 (an accounting firm's final report), and that the withheld portions qualified for exemption under section 10(1) (third party information) of the *Act*.

[3] The appellant appealed the city's decision. During mediation the appellant confirmed that he is only appealing the city's response to items 1 and 5 of his request, and that the records responsive to these parts of the request are the only records at issue in this appeal.

[4] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process. I sent a Notice of Inquiry to the city and an affected party, initially. The city provided representations in response. The affected party did not provide representations to me.

[5] I then sent the Notice of Inquiry, along with the non-confidential portions of the city's representations, to the appellant, who also provided representations to me.

[6] In this order, I find that the City Auditor General's draft report (responsive to item 1) is not accessible because the confidentiality provision in section 223.22 of the *Municipal Act, 2001* prevails over the *Act*. I also find that the withheld portions of the

named accounting firm's final report (responsive to item 5) do not qualify for exemption under section 10(1), and I order that this record be disclosed to the appellant.

RECORDS:

[7] The records at issue are the following:

Record 1 - a City Auditor General draft report (in full), and

Record 5 - a named accounting firm's final report (in part).

ISSUES:

- A. Is Record 1 not accessible under *MFIPPA* by virtue of section 53(1) of *MFIPPA*, as a result of the confidentiality provision in section 223.22 of the *Municipal Act, 2001*?
- B. Does the mandatory exemption at section 10 apply to the withheld portions of Record 5?

DISCUSSION:

- A. Is Record 1 not accessible under *MFIPPA* by virtue of section 53(1) of *MFIPPA*, as a result of the confidentiality provision in section 223.22 of the *Municipal Act, 2001*?**

[8] The request in item 1 is for:

A copy of a report prepared by the [named] city auditor general and provided to [a named city staff member] on or about July 2011 regarding matters with [a named numbered company].

[9] The city's position is that Record 1, identified as a City Auditor General draft report, falls outside the scope of the *MFIPPA* by virtue of section 53(1), as a result of the application of the "confidentiality provision" in section 223.22 of the *Municipal Act, 2001*. Section 53(1) of the *MFIPPA* states:

This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

[10] Section 223.22 of the *Municipal Act, 2001* sets out the duty of confidentiality to which the Auditor General is bound, as follows:

(1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

(a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

(b) under the *Criminal Code* (Canada).

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 223.20 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

(4) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

[11] If Record 1 is subject to the confidentiality provision contained in section 223.22 of the *Municipal Act, 2001*, then section 53(1) of the *MFIPPA*, in conjunction with section 223.22(4), acts to bar the information from the application of the *MFIPPA*.

[12] In the Notice of Inquiry sent to the parties, I invited the parties to address the impact of section 53(1) of the *MFIPPA* and section 223.22 of the *Municipal Act, 2001*, on the record responsive to item 1 of the request.

Representations

[13] The city provided representations in support of its position that the report responsive to item 1, which it refers to as the "City Auditor General draft report," is captured by the wording of section 223.22 of the *Municipal Act, 2001* and that section 53(1) of the *MFIPPA* therefore applies.

[14] The city states that Record 1 is a draft report, and that the City Auditor General's final report (responsive to item 2 of the request) was disclosed to the public. The city reviews the Auditor General's mandate and powers as set out in sections 223.20 and 223.21 of the *Municipal Act, 2001*, and states that these include:

... the authority to acquire information relating to the powers, duties, activities, organization, financial transactions and methods of business of municipalities, local boards, and municipally-controlled corporations and grant recipients free access to all books, accounts, financial records, electronic data processing records, reports, files and all other papers, things and property belonging to or used by the municipality, the local board, the municipally-controlled corporation or the grant recipient.

[15] It then confirms that section 223.22 of the *Municipal Act, 2001* sets out the duty of confidentiality to which the Auditor General is held, and that section 53(1) of *MFIPPA* states that it will prevail over a confidentiality provision in any other Act unless the other Act specifically provides otherwise. As a consequence, the city takes the position that the draft report falls outside of the scope of *MFIPPA* by virtue of section 53(1) and as a result of the confidentiality provision in section 223.22(4) of the *Municipal Act, 2001*.

[16] The city's representations then read:

The City states that the record is a draft report and not a final product. It is not meant to be considered as an audit rather a work in progress. It is the City's position that a report, such as the one at issue, does not become an audit unless and until it has been sent in draft form for comment, the comments have been received, and the work is then finalized. It is only at that point that the final document is considered an audit.

The City states that by virtue of the proper interpretation of section 223.22 of the [*Municipal Act, 2001*] the public has no right to examine a draft of what may or may not become a future report by the Auditor General.

The City submits that the content of the draft report is something that came to the knowledge of the Audit Committee members in the course of their duties, since their duties include assisting and providing oversight to the City Auditor.

The Draft Report has not been made public and was only shared with a limited number of individuals and done so under the control and direction of the Chief Administrative Officer on a "need to know basis" in order to receive comments.

The City argues that the two exceptions set out in section 223.22(2) of the [*Municipal Act, 2001*] do not apply to the Draft Report as there is no

legal obligation that reports made available to the public must include earlier drafts of those reports. ...

The final audit report was completed and made publicly available for residents to review.

[17] The city also refers to Order MO-2876-F in support of its position that the confidentiality provision in section 223.22 of the *Municipal Act, 2001* applies to the draft report.

[18] The appellant provides lengthy representations on this issue. He begins by reviewing some of the background to the preparation of the report, and identifies a number of his concerns regarding the timing of the preparation of the report. He then provides a number of arguments in support of his position that Record 1 does not fit within the confidentiality provision of section 223.22 of the *Municipal Act, 2001*, which can be summarized as follows:

- The city's interpretation of section 223.22 of the *Municipal Act, 2001* is too broad.
- The city has the onus of proving that the record fits within the confidentiality provision.
- The record is under the control of the City's Clerk, and therefore section 223.22 does not apply.
- The interpretation of the words "under the instructions" and "matters" found in section 223.22(1) mean that this section does not apply to Record 1.
- Record 1 should not be characterized as a "Draft Report," but as a "Report" and therefore can be disclosed.
- Applying the confidentiality provisions in section 223.22 is contrary to the accountability and transparency purposes of *MFIPPA*.

[19] I will address some of these arguments below.

Analysis and findings

[20] The issue I must determine is whether Record 1 is captured by the wording of section 223.22 of the *Municipal Act, 2001* and the application of section 53(1) of *MFIPPA*. If that is the case, then the confidentiality provision of the *Municipal Act, 2001* prevails over the access rights provided to the appellant under *MFIPPA*.

[21] Sections 223.22(1) and (4) of the *Municipal Act, 2001* read:

- (1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that

come to his or her knowledge in the course of his or her duties under this Part.

(4) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*.

[22] As set out in the city's representations, the record is a "draft report" written by the City Auditor General. In my view, it clearly fits within the wording of subsection (1) of section 223.22, as it is a record prepared by the Auditor General concerning matters coming into his knowledge in the course of his duties under Part V.1 of the *Municipal Act, 2001*, as identified by the city in its representations.

[23] The appellant has provided representations arguing that Record 1 does not fit within the ambit of section 223.22(1), as summarized above. Two of the appellant's arguments relate to the specific wording of section 223.22(1). The appellant argues that 1) the record is under the control of the City's Clerk, and therefore section 223.22 does not apply; and 2) that the interpretation of the words "under the instructions" and "matters" found in section 223.22(1) mean that this section does not apply to Record 1.

[24] Regarding the appellant's argument that section 223.22(1) does not apply because the record is under the control of the clerk, the appellant appears to be taking the position that, because the record is in the custody of city administrators, the confidentiality provision in another statute cannot apply to override the rights to records in the custody or control of institutions found in section 4(1) of *MFIPPA*. The appellant states:

... any record in the custody or under the control of an institution, whether or not it is covered by a confidentiality provision that prevails over the access and disclosure provisions of [*MFIPPA*], nevertheless remains subject to the processes established under [*MFIPPA*] for determining these questions.

Section 223.22 of [the *Municipal Act, 2001*] is a confidentiality provision which, if applicable, prevails over [*MFIPPA*], to the extent that the relevant statutory provisions are in conflict, and nothing more. Section 223.22 does not state that it ousts the City's custody or control of the Auditor General's records.

[25] The appellant then reviews the indicia of custody and control set out in previous orders of this office, in support of his position that the city has custody and control of Record 1.

[26] I accept the appellant's basic position that the city has custody or control of Record 1; however, this does not negate the application of section 53(1) of *MFIPPA*.

This provision still applies to records in the custody or control of institutions, but confirms that *MFIPPA* prevails over a confidentiality provision in any other Act *unless the other Act* specifically provides otherwise. Section 223.22(4) of the *Municipal Act, 2001* does specifically provide otherwise and Record 1 is, therefore, captured by section 53(1) of *MFIPPA*.

[27] With respect to the appellant's second argument, that section 223.22(1) does not apply to Record 1 because of the words "under the instructions" and "matters" found in section 223.22, the appellant states:

Other than the Auditor General, the only other City staff members affected by this provision are those acting under the Auditor General's "instructions." A further limit on the reach of this section arises from the stipulation that a person who is required to preserve secrecy must do so in relation to "matters" that come to his or her knowledge "in the course of his or her duties under this Part." ...

[28] The appellant then reviews at some length the meaning of the specific words set out in section 223.22, with reference to section 223.20(1). He states that city staff are not required to preserve secrecy for information that comes to their attention during the course of their ordinary work. He also states that most staff members do not perform duties under Part V.1. At the conclusion of the appellant's review, he summarizes his position by stating:

... in the hands of city staff ... who are not staff of the Auditor General, original information that remains in the hands of the staff member for the purposes of his or her ordinary tasks would not be subject to section 223.22, even if a copy has been given to the Auditor General. ...

[29] I accept the appellant's position on this point. Senior Adjudicator John Higgins made a similar finding in Order MO-2439 where he reviewed a similar provision in the *City of Toronto Act*, and stated:

... I conclude that, in the hands of City staff ... who are not staff of the Auditor General, original information that remains in the hands of the staff member for the purposes of his or her ordinary tasks would not be subject to section 181(1), even if a copy has been given to the Auditor General. *Only information about the complaint or investigation being conducted by the Auditor General would be caught.* [emphasis added]

[30] The record at issue in this appeal, however, does not consist of information remaining in the hands of city staff members for the purposes of their ordinary tasks; rather, it is the report prepared by the Auditor General in the course of his duties. In my view, this information is clearly caught by the wording of section 223.22(1).

[31] The appellant also argues that, even if Record 1 is captured by the wording of section 223.22(1), the exception in section 223.22(2)(a) applies. That section reads:

Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

[32] The appellant refers to that section, and states:

References to “administration of this Part” and “proceedings under this Part” would relate to the process adopted by the Auditor General in performing his or her duties. For example, evidence may be gathered and proceedings [e.g. akin to those under the *Public Inquiries Act* — see section 223.21 (2)] may be conducted as needed.

[33] In addition, the appellant’s concerns that Record 1 ought not to be considered a “draft report” but a “report” seem to be made in support of his position that Record 1 ought to be disclosed under this exception.

[34] I have considered the appellant’s representations, and find that the exception in section 223.22(2)(a) does not apply to Record 1.

[35] In the first place, based on the representations of the city and the records at issue, I am satisfied that Record 1 is the City Auditor General’s draft report of his final audit report which was completed, presented to City Council, and made publicly available for residents to review. Previous orders have confirmed that draft reports by the Auditor General fall within the confidentiality provision in section 223.22¹ and are not covered by the exception in section 223.22(2)(a).

[36] In addition, previous orders have established that the exception in section 223.22(2)(a) is limited to the administration of the part of the *Municipal Act, 2001* that outlines the functions of accountability officials (Part V.1),² and I have not been provided with sufficient evidence to satisfy me that this exception applies to the circumstances of this appeal.

[37] As a result, I find that Record 1 is captured by the wording of section 223.22 of the *Municipal Act, 2001* and that section 53(1) of *MFIPPA* applies. Therefore, the

¹ See Orders MO-2629-R and MO-2876-F.

² See Orders MO-2629-R and MO-2876-F.

confidentiality provision of the *Municipal Act, 2001* prevails over the access rights provided to the appellant under *MFIPPA*.

[38] I also note that this outcome also respects the important purpose behind the confidentiality provisions of the *Municipal Act, 2001*, which is that the Auditor General must be able to perform his or her functions in an independent manner.

B. Does the mandatory exemption at section 10 apply to the withheld portions of Record 5?

[39] The city takes the position that the withheld portions of Record 5, which is an accounting firm's final report, qualify for exemption under sections 10(1)(a), (b) and (c), and it provides representations in support of its position. The affected party (the firm that prepared the report) did not provide representations in this appeal. The appellant provides representations in support of his view that section 10 does not apply.

[40] Section 10(1) states in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (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

[41] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.³ 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.⁴

³ *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.).

⁴ Orders PO-1805, PO-2018, PO-2184, and MO-1706.

[42] For section 10(1) to apply, the institution and/or the third party 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 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.

[43] In the circumstances, I will begin by reviewing the application of the third part of the three-part test.

Part 3: harms

[44] To meet this part of the test, the party resisting disclosure must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not sufficient.⁵

[45] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.⁶

Section 10(1)(a) and (c)

[46] The city’s representations on this part of the test for sections 10(1)(a) and (c) state that releasing the report would result in prejudice to the accounting firm’s competitive position, and would result in an undue loss to the accounting firm. It refers to Order MO-2070, which found that a third party operating in a competitive industry could suffer prejudice to its competitive position where the third party’s information would be laid open to public scrutiny by competitors. It then states:

The City sought the specific expertise of an accounting firm to provide an analysis to the City because it is sophisticated work for which the City required expertise.

⁵ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

⁶ Order PO-2020.

The firm was selected for its expertise as a recognized and qualified firm. Should its work product be made publicly available, it would allow competitors the advantage of knowing or inferring what the firm's style is thereby giving competitors, particularly less expert competitors, the opportunity to gain expertise by unfair means when the firm had to develop its approach on its own through practical application, research and development.

Finally, the loss of competitive position that could result from the disclosure of the report would likely result in undue loss to the firm and its staff members because they are the persons who have honed the specific expertise to make themselves marketable to institutions seeking such advice.

[47] The city also states that release of the report would "limit the opportunities for which the firm could market their services."

Findings

[48] In this appeal, I have not been provided with sufficient evidence to satisfy me that the disclosure of the withheld portions of the accounting firm's report could reasonably be expected to prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations, nor that disclosure would result in undue loss or gain to any person.

[49] The city's representations in support of the application of this exemption are general in nature, referring to the expertise of the firm and the competition it faces in the marketplace. However, the record at issue is the work product of the firm, providing a report to the city on an identified matter, and I am not satisfied that disclosure of the withheld portions would result in the identified harms. Previous orders have also established that, even if disclosure may result in a more competitive bidding process in the future, this does not, in and of itself, significantly prejudice their competitive position or result in undue loss to the party.

[50] Furthermore, on my review of the report, I note that significant portions of it have been disclosed. It is not clear to me how the remaining withheld portions differ in nature from the disclosed portions, nor why disclosure would cause the types of harms contemplated by sections 10(1)(a) and (c) any more than the disclosed portions would. In the absence of specific representations on harms resulting from the disclosure of information, I am not satisfied that the harms in sections 10(1)(a) or (c) have been established, and I find that they do not apply to the withheld portions of Record 5.

Section 10(1)(b)

[51] The city's representations on this part of the test for section 10(1)(b) identify two reasons why the city believes that this section applies.

[52] First, the city argues that accounting firms would have "greater reluctance to provide such detailed information and would be discouraged to offer similar services in the future should this type of report be released." It states that "[r]eleasing [the report] would jeopardize the business relationship between the city and the firm and would negatively impact the service the city normally receives and relies upon."

[53] Second, the city states that, if the withheld portions of the record are disclosed, accounting firms "would be inclined to share such information in a manner less easily disclosed." This would result in the information being "of little long term value" for institutions. The city also states that, if the firms no longer disclose their methodology, institutions would be "left without proper guidance and forced to pay higher prices for the information in order for accounting firms to be compensated by the disclosure of such information to competitors." The city argues that this would be detrimental to institutions.

[54] The city also states that it would be detrimental to the city if it were to lose the services of the firm as a result of the disclosure of the withheld portions of the report.

[55] I note the third party (the accounting firm) did not provide representations in this appeal.

Findings

[56] I am not satisfied that the disclosure of the withheld portions of the accounting firm's report could reasonably be expected to result in similar information no longer being supplied to the city where it is in the public interest that similar information continue to be so supplied.

[57] The representations of the city are general and speculative in nature, making reference to the possibility that firms that are paid to prepare reports for institutions would be less inclined to do so, or would charge more, if the withheld portions of the report are disclosed. The city does not provide any evidence in support of its statements (such as whether these results have occurred in the past), nor did the firm provide any representations supporting this position. In the circumstances, I find that I have not been provided with sufficiently detailed and convincing evidence to establish that section 10(1)(b) applies.

[58] Furthermore, as I also noted above, the record at issue is the withheld portions of a report prepared for the city by the firm. Portions of the report have been

disclosed, and in the absence of representations identifying any differences in the nature of the information disclosed and that which was withheld, I am not satisfied that the exemption applies to the withheld portions of Record 5.

[59] In summary, I find that the withheld portions of Record 5 do not qualify for exemption under section 10(1).

ORDER:

1. I uphold the city's decision that Record 1 is captured by the wording of section 223.22 of the *Municipal Act, 2001* and that section 53(1) of *MFIPPA* applies.
2. I find that the withheld portions of Record 5 do not qualify for exemption under section 10(1), and order the city to disclose these remaining portions of Record 5 to the appellant by **June 30, 2014** but not before **June 25, 2014**.

Original signed by: _____
Frank DeVries
Adjudicator

_____ May 26, 2014