



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-303

Appeal M-9300578

City of Toronto



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ORDER

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of an engineer's report on the structural condition of a building located at a named municipal address. Access was also sought to a copy of the building inspector's notes.

Partial access was granted to the inspector's notes. Portions were not disclosed pursuant to section 14 of the Act. Pursuant to section 21 of the Act, the City notified the owner of the building and the consulting company which had prepared the engineer's report. Both the owner and the company objected to disclosure of the report. The City subsequently issued a decision granting the requester access to the engineer's report in its entirety. The owner of the building appealed this decision of the City.

Mediation was not successful. Notice that an inquiry was being conducted to review the decision of the City with respect to the engineer's report only was sent to the owner of the building (now the appellant), the original requester and the City. Representations were received from the appellant and the City only.

The record at issue consists of those portions of a report dated December 14, 1992 that address the condition of the property at the municipal address named by the requester. The report was commissioned by the owner of the building in response to two Orders to Comply under the Building Code Act which the City had issued against the appellant. The report was prepared for the appellant by the consulting company.

The sole issue arising in this appeal is whether the mandatory exemption provided by sections 10(1)(a), (b) and/or (c) of the Act applies to the relevant portions of the record. These sections 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;
- (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;

Pursuant to section 42 of the Act, the burden of proof that a record falls within a specified exemption lies upon the head. However, if, as in this case, a third party appeals the head's decision to release a record, the burden of proving that the record should be withheld from disclosure falls on the third party (the appellant).

For a record to qualify for exemption under sections 10(1)(a), (b) and/or (c) of the Act, the appellant 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 (a), (b) or (c) of section 10(1) will occur.

[Orders 36, M-29 and M-37]

Failure to establish the requirements of any part of this test will render the section 10(1) exemption claim invalid.

Part One

In order to meet part one of the test, the appellant must establish that disclosure of the record would reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

The information contained in the record was prepared by a professional engineer and describes the condition of a structure, namely a building. In these circumstances, the City accepts, and I agree, that the record contains technical information. Therefore, the requirements of the first part of the test are met.

Part Two

The second part of the test has two elements. First, the information must be **supplied** to the City and secondly, it must be supplied **in confidence**, either implicitly or explicitly.

The appellant indicates that the record was submitted to the City in accordance with the orders issued by the City's Building Department. I therefore find that the record was "supplied" to the City.

As far as the issue of confidentiality is concerned, the City submits that the record itself contains no explicit assurances of confidentiality. Nor did the City give any explicit assurance of confidentiality. However, it does acknowledge that:

... the Department of Buildings and Inspections treat as implicitly confidential those engineer's reports which are submitted as part of an active inspection file, not related to a building permit. This report falls in this category.

In these circumstances, I find that it was reasonable for the appellant to have expected that the City would treat the information contained in the record as confidential. I therefore find that the record was supplied to the City implicitly in confidence, and the second part of the test has been met.

Part Three

To satisfy part three of the test the appellant must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harms described in sections 10(1)(a), (b) or (c) of the Act would occur if the information was disclosed (Order 36).

The appellant indicates that if the report is disclosed, it will incur expenses because of a legal action which may be brought against it by the original requester who is a tenant in the building. I do not find this evidence to be "detailed and convincing" so as to establish that the harms outlined in sections 10(1)(a) and (c) could reasonably be expected to occur.

As far as section 10(1)(b) is concerned, the appellant states that had it known that the report would have been made public it would not have commissioned it; nor will it do so in the future except pursuant to a court order. The City has the authority to inspect buildings and have reports, such as the record at issue, produced.

I do not accept that if the record is disclosed to the original requester, it can reasonably be expected that similar information will no longer be supplied to the City.

In summary, I am not satisfied that the third part of the test has been met. Therefore the section 10(1) exemption does not apply to the record. I uphold the decision of the City to disclose the record to the original requester.

As I have previously noted, the record at issue in this appeal is only a portion of the engineer's report which was prepared by the consulting company. For greater certainty, I have provided the Freedom of Information Co-ordinator of the City with a copy of those parts of the report which should be disclosed pursuant to this order. The highlighted portions should not be disclosed.

ORDER:

1. I order the City to disclose the record to the original requester in accordance with the highlighted copy of the record I have provided to the Freedom of Information and Protection of Privacy Co-ordinator at the City with this order. The highlighted portions should **not** be disclosed.
2. I order the City to disclose the record to the original requester within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with this order, I order the City to provide me with a copy of the record disclosed to the original requester pursuant to Provision 1, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ April 15, 1994