



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-1157

Appeal MA-980191-1

Regional Municipality of Hamilton-Wentworth



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Regional Municipality of Hamilton-Wentworth (the Municipality) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to the following information with respect to the construction of Freelon Water Tower:

1. "As-built" Construction Drawings - the contractor's own drawings marked up and submitted by him at the completion of the job.
2. Total cost of the project - including a breakdown of original contract prices and any additions or deletions from it.
3. Any "Contractor Survey" type report that might indicate your overall opinion of the contractor and his performance of the work.

The Municipality located a number of records responsive to the request. Under section 21 of the Act, it notified the contractor who performed the work on this project (the affected party), seeking its views on the disclosure of the information contained in the records. The affected party objected to the disclosure of the As-Built Construction Drawings and to the breakdown of the contract price on the basis that this information was exempt from disclosure under sections 10(1)(a) and (c) of the Act.

After receiving the submissions of the affected party, the Municipality granted access to the total contract price and to the Contractor Survey records. The Municipality denied access to the As-Built Construction Drawings and the breakdown of the contract price, including any deletions or additions, claiming the application of section 10(1) of the Act (third party information).

The requester, now the appellant, appealed the Municipality's decision.

During the mediation of the appeal, the appellant narrowed the scope of his request to include only the following specific information which is contained in five of the As-Built Construction Drawings:

1. Inside diameter of the concrete support pedestal.
2. Wall thickness of the concrete support pedestal.
3. Thickness of the concrete support dome at the top of the pedestal.
4. Details of the concrete dome/steel tank interface.
5. Plate thickness of the members in the tank, including the floor and roof.

A Notice of Inquiry was provided to the appellant, the Municipality and the affected party. Representations were received from the Municipality and the affected party.

The records at issue consist of five As-Built Construction Drawings which include the information responsive to each of the items listed above.

DISCUSSION:

THIRD PARTY INFORMATION

Both the Municipality and the affected party object to the disclosure of the information contained in the records on the basis that it is properly exempt under sections 10(1)(a) and (c). For a record to qualify for exemption under sections 10(1)(a) or (c) the Municipality and/or the affected 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 Municipality 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) or (c) of section 10(1) will occur.

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

Part One of the Test

The affected party and the Municipality submit that the records contain information which qualifies as technical information, as well as a trade secret which is the property of the affected party. The terms "technical information" and "trade secret" have been addressed in previous orders of the Commissioner's office.

In Order P-454, the term "technical information" was characterized by former Assistant Commissioner Irwin Glasberg as information:

belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

In my view, the information contained in the records clearly belongs to an organized field of knowledge which falls under the general category of mechanical arts; more specifically, the field of construction engineering. The records were prepared by a professional in the construction engineering field and describe the construction of a water tower structure in the most technical of terms. Accordingly, I find that the

[IPC Order M-1157/ November 2, 1998]

information in the requested records is properly characterized as “technical information” within the meaning of section 10(1).

In Order M-29, former Commissioner Tom Wright defined the term "trade secret" to mean information including, but not limited to a formula, pattern, compilation, programme, method, technique or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The affected party submits that the techniques employed in the construction of the water tower were developed over many years by its engineering staff at great effort and expense. It further argues that the methods applied in the construction of this, and many other water tower projects, is not generally known to its competitors in the industry. Because of the affected party's success in marketing the design and construction of its techniques, there exists an economic value in the methods used. Finally, the affected party describes in great detail the efforts which it has made to maintain the secrecy of the processes which it employs in the construction of these projects.

Based on the submissions of the affected party with respect to the nature of the techniques used in the field of water tower design and construction, I am satisfied that this information qualifies as a “trade secret” for the purposes of section 10(1).

Part Two of the Test

The Municipality submits that the information contained in the records was supplied to it by the affected party with an implicit expectation that it would remain confidential. It argues that this expectation was reasonably-held, given the steps taken by the affected party to ensure that the information remained out of the hands of its competitors. The Municipality relies on the principles established in Order M-772 where it was held that, based on the evidence submitted by the institution and the affected party, certain information contained in tender documents supplied to the Toronto Transit Commission (the TTC) were supplied with a reasonable expectation that they would be treated confidentially. The Municipality points out that its policy with respect to the disclosure of information submitted in response to a tender is similar to that of the TTC, as only the name of the bidding company, the amount of the bid and the presence of a bid bond are disclosed publicly. All other information which is submitted with a tender bid is treated in a confidential fashion.

The Municipality argues that while the drawings which are the subject of this appeal were not included in the initial tender documents, they were created and supplied to it by the affected party pursuant to its contractual obligations under the construction contract. It submits that because the initial bid and the subsequent construction contract were treated confidentially, any documents submitted under the contract which resulted from the bid submission should also be considered to be covered by the same confidentiality provision.

The affected party submits that all of the documents which it supplied to the Municipality in response to its contractual obligations were intended to be treated in a confidential manner.

Based on the submissions of the affected party and the Municipality, I am satisfied that the information contained in the As-Built Construction Drawings was supplied to the Municipality by the affected party. I am also satisfied that the information was supplied with an implicit expectation of confidentiality. The steps taken by the affected party to ensure that its construction methods remained out of the hands of its competitors clearly demonstrates its intention that the information be treated in a confidential manner by the Municipality. This concern was clearly understood and respected by the Municipality. I am also satisfied that the expectation on the part of the affected party was reasonable in the circumstances, given its established interest in maintaining the confidentiality of this information.

Part Three of the Test

Section 10(1)(a)

The Municipality submits that:

Disclosure of the construction drawings would prejudice the competitive position of the [affected party]. The design and techniques employed by the [affected party] to construct an Elevated Water Storage Water Tank for the Region of Hamilton- Wentworth has been obtained at great cost and through years of research by the [affected party].

...

As the originator of this design, the [affected party] should not be required to disclose its trade secrets so that a competitor can benefit from the knowledge and learning curve associated with the development of this unique and patented technical construction design. Disclosure of these drawings would be to the detriment of the [affected party], placing the [affected party] in an unfair competitive position when competing for future contracts.

The affected party similarly argues that the disclosure of the information contained in the drawings will result in the revelation of technical information that will significantly prejudice its competitive position as it will permit its competitors to acquire this information at no expense or effort on their part and to use this information in competition against it.

I find that I have been provided with the type of detailed and convincing evidence of harm which is required to meet the third part of the test under this exemption. The affected party and the Municipality have provided me with an abundance of evidence of the nature and extent of the harm to the affected party's competitive position which is reasonably likely to occur should the information in the drawings be disclosed. The affected party is engaged in a highly competitive industry. Innovations in construction techniques and methods such as those which are reflected in the information contained in the records are valuable to other participants in the industry and are carefully guarded by firms such as the affected party. I find that the disclosure of the information contained in the records could reasonably be expected to result in harm to the competitive position of the affected party, as contemplated by section 10(1)(a).

As all three parts of the section 10(1) test have been satisfied, I find that the information contained in the records is properly exempt from disclosure.

ORDER:

I uphold the Municipality's decision to deny access to the records.

Original signed by: _____
Donald Hale
Adjudicator

November 2, 1998