



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1225

Appeal MA-990026-1

Town of Niagara-on-the-Lake



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NATURE OF THE APPEAL:

The Town of Niagara-on-the-Lake (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the plans for the footings and foundations for King's Point and for copies of the Application for the Conditional Building Permit and the Footing and Foundation Permit for King's Point.

The Town located responsive records and following notification to the owner of the property (the third party), originally denied access to them. The Town subsequently revised this decision and granted access to the requested records.

The third party appealed the Town's decision to grant access to the records on the basis of the exemption in section 10(1)(a) of the Act. In addition, the third party indicated that it is the sole owner of the records and they are within its complete control. In this regard, the third party indicates that the Town may only use the records for the building permit application. The third party states that it does not believe that it is subject to the Act.

During mediation, the third party withdrew its appeal of the Town's decision to grant access to the application for a Conditional Building Permit and the Footings and Foundation Permit. Accordingly, these records are no longer at issue. The Town has indicated that access to these records has now been granted to the requester.

I sent a Notice of Inquiry to the third party, the Town and the requester on May 12, 1999. The Notice indicated that the parties had until June 3, 1999 to submit representations to this office. In particular, the Notice stated:

Section 42 of the Act stipulates that the burden of proof that a record or part of a record falls within one of the specified exemptions in the Act lies upon the head. However, where 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.

[Order 42]

This means that the party resisting disclosure must show how the information in the record satisfied all three parts of the section 10 test.

As of the date of this order, none of the parties have submitted representations in response to the Notice. Section 10 is a mandatory exemption. Therefore, despite the absence of representations from the third party, I have independently reviewed the Town's decision to disclose the records at issue.

RECORDS:

The records at issue consist of the plans for the footings and foundations for King's Point.

PRELIMINARY MATTERS:

RECORDS BELONGING TO A THIRD PARTY

As I noted above, the third party believes that because it is not subject to the Act, any records which belong to it, are, therefore, not subject to the Act.

In Order P-1001, former Adjudicator Anita Fineberg considered a similar argument raised by a Corporation. She made the following comments:

One of the purposes set out in section 1(a)(i) of the Act is to provide a right of access to information under the custody or control of an institution in accordance with the principle that information should be available to the public. It is my opinion that the issue raised by the Corporation must be based on the wording and intent of the Act.

Although the Corporation is not listed among those entities which are defined as "institutions" for the purposes of the Act, there is nothing in the Act which expressly excludes from its application records which originated from third parties such as the Corporation.

Section 10(1) of the Act provides as follows:

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 the record or the part of the record falls within one of the exemptions under sections 12 to 22. [emphasis added]

In Order P-239, former Commissioner Tom Wright addressed a similar argument made by the Office of the Ontario Ombudsman. In that case, the Ombudsman submitted that because the Ombudsman's office is not an institution listed in the Act, it would be inappropriate to construe the Act as applicable to records prepared by the Ombudsman which might be found in the possession of institutions. Commissioner Wright stated:

It is my opinion that to remove information originating from non-institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the Act.

He concluded that the Act applied to information that originated in the Ombudsman's office which was in the custody or under the control of an institution. To state this proposition a bit differently, the Act will apply to information in the custody or control of an institution

notwithstanding that it was created by a third party. I accept this approach and adopt it for the purposes of these appeals.

There are innumerable individuals, organizations, agencies and businesses that interact with government institutions on a daily basis. During the course of these interactions, information about these entities often comes into the possession of these institutions. In drafting its freedom of information legislation, the government determined that such information should be subject to the provisions of the Act, unless the exemptions contained in the statute applied. These exemptions are designed to not only protect the interests of government institutions, but also those of third parties (such as individuals, agencies and organizations) whose information may come into the custody or control of an institution as well. Based on the scheme of the Act, therefore, a third party, such as the Corporation, will have the opportunity to fully argue that its interests will be harmed by the release of such information.

In its representations, the Corporation has not provided any evidence to indicate that the Legislature intended that the Corporation should be treated differently from any other third party agency or business which provides information to an institution. Nor is there any dispute that the records at issue are in the custody of the Ministry.

In the result, former Adjudicator Fineberg concluded that the records in question were subject to the provisions of the Act. I agree with the approach outlined in Order P-1001 and adopt it for the purposes of the present appeal. Therefore, I find that the records provided to the Town by the third party are subject to the Act. I must now determine whether the mandatory exemption claimed by the third party applies to them.

DISCUSSION:

THIRD PARTY INFORMATION

As I indicated above, the Town has decided to disclose the records at issue to the requester. For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the party resisting disclosure, in this case, 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 (a), (b) or (c) of section 17(1) will occur.

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words “**detailed and convincing**” do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

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

The third party relies on section 10(1)(a) as the basis for withholding the records at issue from disclosure.

Type of Information

The definition of scientific and technical information was established in Order P-454. In this order, former Assistant Commissioner Irwin Glasberg examined these two types of information and found:

In my view, scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally,

scientific information must be given a meaning separate from technical information which also appears in section 17(1)(a) of the Act.

...

In my view, technical information is 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. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

I adopt these definitions for the purposes of this appeal.

The records consist of plans for the footings and foundations for King's Point. They were prepared by structural and consulting engineers and architects. In my view, the records were prepared by professionals in the field of engineering and architecture and pertain to the construction of a structure. Therefore, they qualify as technical information.

Supplied in Confidence

In order to satisfy part two of the test, the information must have been **supplied** to the Town **in confidence** either implicitly or explicitly. In Order M-169, Adjudicator Holly Big Canoe made the following comments with respect to the issue of confidentiality in section 10(1) of the Act :

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

I agree with this approach.

The third party indicates in its letter of appeal that it provided the records to the Town for the purposes of obtaining the necessary building permits for the proposed construction. I am satisfied that the records were supplied to the Town.

The third party also indicates that the Town may only use the records for the building permit application. In my view, this statement is based on the third party's belief that its records are not subject to the Act because they belong to it. Neither the Town nor the third party have provided any evidence regarding the third party's expectations with respect to confidentiality. However, I appreciate that the third party may not have understood or even known about the Act and the consequences of providing information to the Town. I have no evidence before me which would indicate that the Town advised the third party of the possibility that its records could be subject to disclosure. In my view, it would be reasonable for the third party to expect that its records would not be distributed outside the Town or for any purpose other than to obtain the building permit. Therefore, although tenuous, I accept that the third party had a reasonably held expectation of confidentiality.

Harms

In order to satisfy the third requirement of this exemption claim, the third party must present evidence which is detailed and convincing, and must describe a set of facts or circumstances that would lead to a reasonable expectation that one or more of the harms described in section 10(1)(a) would occur if the information was disclosed (Orders P-278 and P-249); see also, Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1995), 23 O.R. (3d) 31 (Div. Ct.); reversed on appeal, unreported decision, dated September 3, 1998 (Ont. C.A.).

Section 10(1)(a) provides:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

As I indicated above, the third party did not submit representations. Neither does his letter of appeal speak to any expected harm. I have reviewed the records to determine whether they might, in and of themselves, establish evidence which would lead me to conclude that their disclosure could reasonably be expected to result in the harm in section 10(1)(a).

As I noted above, the records consist of plans for the construction of a particular structure. The building permit for the construction was issued in September 1998. I have no evidence before me to indicate that there are any current or anticipated contractual or other negotiations regarding these plans or that disclosure of the plans would interfere in any way with such negotiations if they exist. Further, I see nothing in the records which would lead me to draw such a conclusion. Finally, in objectively reviewing the records, I am unable to conclude that there is any correlation between these plans and the third party's competitive position. Consequently, I find that the third party has not provided detailed and convincing evidence that would lead to a reasonable expectation that the harm described in section 10(1)(a) would occur if the information was disclosed. Therefore, the third party has failed to satisfy the third requirement of the section 10(1) test. Consequently, I find that the mandatory exemption in section 10(1) does not apply to the records and they should be disclosed to the requester.

ORDER:

1. I uphold the Town's decision to disclose the records.
2. I order the Town to disclose the records to the requester by providing her with a copy of them by **August 23, 1999**, but not before **August 16, 1999**.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Town to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 2.

Original signed by: _____
Laurel Cropley
Adjudicator

July 16, 1999