



**Information and Privacy
Commissioner/Ontario**

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

Reconsideration Order MO-1530-R

Appeal MA-010034-2

ORDER MO-1500

District Municipality of Muskoka



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NATURE OF THE APPEAL:

The District Municipality of Muskoka (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

All records in any way referring to, relating to, or possibly relating or referring to [a named construction company] that [the company] has not already received for the period between Jan. 1, 1996 to date [December 29, 2000]. This would also include but not be limited to records that relate in any way to the contract between the District and [the company] for the Ferndale Road Water Treatment Plant and Minto Street Water Treatment Plant. This request is for written documents, as well as e-mail, handwritten notes, phone messages, personal diary entries, etc, of any individual and each member of council.

The Municipality originally refused to process the request, claiming that under sections 4(1)(b) and 20.1 of the *Act*, the request was frivolous and vexatious. By way of Order MO-1427, dated May 1, 2001, Adjudicator Sherry Liang did not uphold the decision of the Municipality not to process the request on the basis that it was frivolous and vexatious. Accordingly, the Municipality was required to process the request.

During the mediation stage of the earlier appeal dealing with the issue of whether the request was frivolous and vexatious, the requester clarified that he was not seeking any documents which he has received from the Municipality as a result of previous requests under the *Act* or through the normal course of events during the progress of the construction project.

Following the issuance of Order MO-1427, the Municipality issued a decision letter denying access in full to the responsive records, claiming the application of sections 7(1) (advice or recommendations) and 12 (solicitor-client privilege) to them. The Municipality also stated that there were no records responsive to that portion of the request relating to council members' records as these individuals are not employees of the Municipality.

In a subsequent decision letter, the Municipality also claimed the application of section 6(1)(b) and the mandatory exemptions in sections 10(1)(a) and (c) of the *Act* to the records.

The requester, now the appellant, appealed each of these decisions. He also indicated that he was not seeking access to minutes of public Municipal council meetings, but is interested in receiving records relating to any in-camera meetings.

During the mediation stage of this appeal, the appellant agreed to remove the council members' records and the issue of any in-camera records from the scope of the appeal. Accordingly, the application of section 6(1)(b) to the records is no longer at issue. The Municipality continued to claim the application of one or more of the remaining exemptions to the 78 documents still at issue. As no further mediation was possible, the appeal was moved into the Adjudication stage of the process.

Following the partial exchange of representations between the appellant and the Municipality, I issued Order MO-1500 in which I ordered the disclosure of certain records to the appellant. I decided to reconsider my decision and to afford a number of third party individuals and companies the opportunity to make representations to me on whether the mandatory exemption in section 10(1) of the *Act* applies to the records which I ordered disclosed in Order MO-1500. It was necessary for me to re-open the inquiry process in order to ensure that the principles of natural justice were adhered to and enable all potential parties to the appeal to have their say with respect to disclosure. Seventeen third parties were invited to make submissions on the application of the section 10(1) exemption to the records relating to them and their companies.

I received representations from three of the third parties and shared the submissions of two of them with the appellant, along with a copy of this Notice. The representations of the remaining third party were not shared with the appellant as I had concerns about the confidentiality of what is contained in them. In my view, if I were to share them with the appellant, the contents of the records would be thereby disclosed. The appellant was also invited to make submissions with respect to the application of section 10(1) to the records and did so.

In Order MO-1500, I found that Records 1, 5, 8, 9, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41 and 47 qualify for exemption under section 12 (solicitor-client privilege), that portions of Records 2, 3 and 4 contain information which qualify for exemption under section 7(1) (advice or recommendations) and that Record 11 is exempt from disclosure under section 10(1) (third party information). As a result, this order will address only the possible application of the mandatory exemption in section 10(1) to Records 6, 10, 20, 21, 22, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77 and 78.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the Municipality and/or the affected party resisting disclosure 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), (b) or (c) of subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

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 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

The Submissions of the Parties Regarding Sections 10(1)(a) and (c)

The Municipality's representations on the application of the section 10(1)(a) and (c) exemptions are not detailed or specific to each record. Rather, with respect to Records 42 to 65, the Municipality simply states that the “documents provide commercial or financial information about the lien claimants claims against [the appellant].” They go on to add that:

release of the correspondence will be prejudicial to the lien claimants. Clearly the documentation reveals positions adverse in interest to [the appellant] and the third parties could reasonably expect to find themselves the subject of a harassment lawsuit. This is a very negative position to be in.

With respect to Records 66 to 70, the Municipality reiterates that these documents contain “information about various sub-trades and the status of their work. Such information has a financial component and the release of the information would be prejudicial to the claims of those entitled against [the appellant].”

The appellant has not made any reference whatsoever to the third party information exemptions in sections 10(1)(a) or (c).

One of the third parties who made representations objects to the disclosure of certain information which was supplied by the third party to the Municipality during the course of the construction project which is the subject matter of the records. The third party suggests that the disclosure of this information will have a deleterious impact on its competitive position and would result in a breach of the third party's obligations to the Municipality. The remaining two third parties who chose to make submissions simply object to the disclosure of any information relating to them to the appellant.

Findings

In Order MO-1500 I made certain findings with respect to the application of section 10(1) to the remaining records at issue. These findings were based on my review of the submissions of the Municipality and the records themselves. As noted above, I have solicited the representations of the affected parties with a view to affording them the opportunity to present evidence as to whether the information in the records qualifies for exemption under section 10(1). The submissions which I received were not persuasive or of any assistance with respect to such a determination, with one exception. Accordingly, I will address the application of section 10(1) to one record which relates to one of the affected parties only. My findings with respect to the remaining records remains unchanged, however.

One of the affected parties objects to the disclosure of certain information contained in Record 10 on the basis that it contains technical information which was provided to the Municipality in confidence. It argues that disclosure of Record 10 could reasonably be likely to result in harm to its competitive position, as contemplated by section 10(1)(a).

I note, however, that the information contained in this record relates not to the affected party but to the appellant. It describes the results of certain inquiries made by the affected party about the appellant and refers to the appellant's "track record" on another construction project. In my view, in order for this information to satisfy the first requirement of the section 10(1) test, it much relate to a party other than the requester. That is not the case here.

As all three parts of the section 10(1) test must be met in order for the record to qualify under the third party information exemption, I find that Record 10 is not exempt from disclosure.

By way of summary, I find that Records 6, 10, 20, 21, 22, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77 and 78 do not qualify for exemption under section 10(1) of the *Act* and will order that they be disclosed to the appellant in accordance with my decision in Order MO-1500.

ORDER:

1. I order the Municipality to disclose Records 6, 10, 20, 21, 22, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 73, 74, 75, 76, 77 and 78 to the appellant by providing him with copies by **May 24, 2002** but not before **May 20, 2002**.

2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Municipality to provide me with copies of the records which are disclosed to the appellant.

Original signed by: _____
Donald Hale
Adjudicator

_____ April 19, 2002