



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

ORDER MO-1503

Appeal MA-010228-1

City of Toronto



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

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 certain environmental studies undertaken with regard to a property development in the City. After notifying the owner of the property (the affected party) of the request under section 21 of the *Act*, and receiving no response, the City decided to disclose the records to the requester, in their entirety, and advised the affected party of its intention to do so.

The affected party, now the third party appellant, appealed the City's decision to disclose the records to the requester on the basis that the information contained in the records was exempt from disclosure under section 10(1) of the *Act* (third party information).

Mediation efforts were not successful and the appeal was moved into the adjudication stage of the process. I decided to seek the representations of the third party appellant, as he is the party resisting the disclosure of the records and bears the onus of proving that the exemption in section 10(1) applies. The third party appellant did not respond to the Notice of Inquiry provided to him. Because section 10(1) is a mandatory exemption, I am obliged to independently review the contents of the records in order to determine whether the third party information exemption applies to them, regardless of the absence of submissions from the third party appellant.

The records consist of three documents: a) an Environmental Site Assessment (Phase I) for a specific address, dated October 1999; b) a second Environmental Site Assessment (Phase II) for the same address, along with an adjacent property, dated September 2000; and c) a Clearance Environmental Site Assessment (Phase III) for the earlier addresses and an additional property, dated November 2000.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the third party 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 City 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 Third Party Appellant's Submissions

As noted above, the third party appellant did not make representations in response to the Notice of Inquiry which I provided to him. In the letter of appeal filed with our office, however, he sets out the reasons for his objections to the disclosure of the records, stating that:

The requested documents are Environmental reports which were commissioned and paid for by [the third party appellant] and were furnished to the City of Toronto in confidence, with the understanding that they would not be shared with outside parties. Furthermore, these reports were sent to the Health Department and the Ministry of the Environment and approved.

The third party appellant then goes on to explain the reasons for his belief that the disclosure of the information contained in the records could reasonably be expected to cause harm to his “bargaining position for the sale of the remaining houses.”

Part One of the Section 10(1) Test

In Order P-454, former Assistant Commissioner Irwin Glasberg defined the term “technical information” as follows:

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 10(1)(a) of the *Act*.

I adopt this definition for the purposes of the present appeal. Based on my review of the contents of the records at issue, I find that each of them contains “technical information” within the meaning of section 10(1). The information relates to a technical evaluation of various fill materials and soil samples taken from the subject properties and an examination of them with a view to determining whether they meet existing Ministry of the Environment Guidelines. The reports also address above-ground environmental concerns and their compliance with the Guidelines in place.

I find that the information contained in the records qualifies as technical information for the purposes of section 10(1) of the *Act*. Part One of the section 10(1) test has, accordingly, been satisfied.

Part Two of the Section 10(1) Test

As noted above, the third party appellant indicates that the reports were filed with the City and the Ontario Ministry of the Environment prior to the commencement of construction on the subject properties. He also states that they were provided to the City in confidence.

I note that the records themselves do not contain any indication that they were supplied to the City in confidence, either explicit or implicit. The third party appellant has not provided me with any other evidence to demonstrate that the records were supplied with an expectation of confidentiality, beyond this statement in his letter of appeal.

There is no dispute that the records were provided to the City by the third party appellant. However, I must now determine whether they were furnished to the City with an expectation, either explicit or implicit, that they would be treated confidentially. Based on the evidence submitted to me by the third party appellant, I am not satisfied that the records at issue were, in fact, provided to the City with an expectation that they would be treated confidentially. I have not been provided the kind of evidence required to enable me to make a finding that the records were supplied with either an explicit or implicit understanding that they would be handled in a confidential manner.

Accordingly, I find that the third party appellant has failed to satisfy me that the second part of the section 10(1) test has been met. I will, however, also evaluate whether he has met his onus of proof with respect to the third part of the section 10(1) test despite my findings with regard to Part Two.

Part Three of the Section 10(1) Test

To discharge the burden of proof under the third part of the test, the third party appellant, who is opposing disclosure, must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed. [Order P-373]

As noted above, the third party appellant simply states that the disclosure of the information contained in the records may make it more difficult for him to sell the remaining homes which have been constructed on the subject lands. He has not, however, provided me with any evidence to indicate why this is so.

I find that I have not been provided with the kind of “detailed and convincing” evidence required to allow me to make a finding that the “harms” portion of the section 10(1) test has been made out. Accordingly, I find that the third part of the section 10(1) has also not been met. As all three components must be satisfied, I find that the section 10(1) exemption does not apply to the records and that they should be disclosed.

ORDER:

I uphold the City’s decision to disclose the records to the original requester and order it to do so by **March 1, 2002** but not before **February 25, 2002**.

Donald Hale
Adjudicator

January 25, 2002