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

ORDER MO-1593

Appeal MA-010158-1

Municipality of Clarington

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Municipality of Clarington (the Municipality) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had initially sought access to information relating to the construction of a compound at a specified address. Part of the appellant's request included the applications that have been filed for building permits in respect of this compound. The properties in this compound are owned by an affected person.

Pursuant to section 21 of the *Act*, the Municipality notified the affected person of the appellant's request and invited him to make representations regarding disclosure of these records.

The affected person, through a letter submitted by his architect and consulting engineer, advised the Municipality that he "…opposed the release of any personal information or information which would jeopardize the integrity of the security surrounding [the premises] and its occupants…"

In a decision letter, the Municipality granted access to the building permit applications.

The appellant then wrote to the Municipality to clarify that he had been seeking more than the building permit applications. In his letter, the appellant stated that he was seeking access to the Municipality's full and complete record relating to three properties located at specified addresses.

The Municipality responded with a letter to the appellant to advise that it would seek representations from the affected person regarding the release of the supporting material that accompanied each of the building permit applications. The Municipality then notified the affected person of the appellant's request and invited the affected person to make representations. The affected person wrote to the Municipality and stated that he did not consent to the disclosure of the plans, drawings and specifications filed in support of his building permit applications for the properties. The affected person stated that release of this information would present a heightened security threat and a serious safety concern to the affected person and his family. The affected person also indicated that he would view disclosure of this information as an invasion of his personal privacy.

The Municipality issued a new decision letter to the appellant in which it denied access to the supporting material accompanying the building permit applications.

The appellant appealed the Municipality's decision to deny access to this material.

In a subsequent letter from the Municipality to the appellant the Municipality clarified that it was denying access to the supporting material pursuant to sections 14(1)(a) and 14(2)(f) and (h) of the *Act*.

During the mediation stage of this appeal, the mediator spoke to the affected person who consented to the release of his name and address and the building plans on condition that his phone number, the location of rooms and security features related to his home were not

disclosed. The Municipality also agreed to release a severed copy of "the sign in sheet for the Committee of Adjustment Meeting" with the phone number of the affected party severed.

The Municipality then issued a revised decision letter in which it described the responsive records, the documents that had been released, in whole or in part, the documents that had not been released, and the sections of the *Act* that the Municipality was relying upon to support the denial of access. The Municipality also raised in its decision letter, for the first time, its reliance upon sections 13 and 10(1) of the *Act*.

At the conclusion of mediation three records remained at issue: the building plans, denied in part pursuant to section 13, notes from a meeting on February 25, 2002, denied in full pursuant to section 10(1), and a letter dated June 3, 1999, denied in full pursuant to section 10(1).

I independently determined that some or all of the records at issue may contain the personal information of affected persons. Section 14 of the *Act* provides for a mandatory exemption where personal information is at issue. Under the circumstances, since section 14 may apply to some or all of the records at issue, I decided to seek representations on the possible application of section 14, in addition to seeking representations on sections 10(1) and 13 of the *Act*.

I initially sought representations from the Municipality and an affected person and they submitted representations. The Municipality agreed to share its representations in their entirety with the appellant and the affected person agreed to share the non-confidential portions of his representations with the appellant. I then sought representations from the appellant who submitted representations in response. The appellant agreed to share his representations in their entirety with both the Municipality and the affected person. I subsequently sought reply representations from the Municipality and the affected person**.** I received reply representations from the Municipality only.

RECORDS:

There are three records at issue, as described in the following table:

Record #	Description	Severed or Withheld in Full	Exemptions Claimed or Exemptions that Could Apply
40	Building Plans (33 pages) with two consultant reports attached to one of the building plans	Severed	13, 14
67(a)	Handwritten notes from meeting of February 25, 2000 between the affected person, an individual accompanying him, and four named officials of the Municipality (1 page)	Withheld in full	10(1), 14

69(a)	Letter dated June 3, 1999 from the affected person to four named officials of the Municipality regarding "New Agricultural Research facility and related manufacturing plant" (2 pages)	Withheld in full	10(1), 14

DISCUSSION:

PRELIMINARY MATTERS

Scope of Request/Responsiveness

In his representations the appellant raises an issue regarding the scope of his request and whether the Municipality has identified all records relating to his request. I note that the mediator issued an Amended Report of Mediator that outlines the scope of the appellant's request. The appellant did not comment on its accuracy or completeness at the time that it was issued, despite being given an opportunity to do so. Because the report does not identify this as an issue in dispute in this appeal, I will not consider it. The appellant is free to make a new request for any records he believes the Municipality has not identified as a result of this request.

Late Raising of Discretionary Exemptions

Section 13 is a discretionary exemption that must be raised within 35 days of the issuance of the Confirmation of Appeal by this office. In this case, the Confirmation of Appeal for this file is dated July 26, 2001. The Municipality was advised in the Confirmation of Appeal that it had until August 30, 2001 to raise any new discretionary exemptions. The section 13 exemption was first raised by the Municipality in a letter to the appellant dated December 14, 2001, 106 days after this deadline. This raises an issue of whether or not I should consider this exemption, despite the fact that it was raised after the expiry of the 35-day time period.

This office's *Code of Procedure* (the *Code*) sets out basic procedural guidelines for parties involved in an appeal. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims. Section 11.01 is relevant to this issue and reads:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal

under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

The Municipality and appellant submitted representations regarding the late raising of section 13. The affected person did not make any submissions.

The Municipality states:

> [The Municipality] believed that an informal process was followed by the mediator which did not require strict compliance with the deadline set in the Commission letter of July 26, 2001.
>
> …[T]he appellant was well aware of the affected person's position regarding safety, health and security and so should have not been surprised when section 13 was raised by [the Municipality].
>
> By letter […], I advised [the appellant] that the record or parts of the records indicated on the […] index would be disclosed to him […], unless I heard from the third party. On page 4 of the index […], section 13 […] was noted as the applicable section relating to the [Municipality's] decision to sever portions of the building plans and to disclose the unsevered portions to the appellant.
>
> [The appellant] will not be prejudiced if [the adjudicator considers the application of section 13]. If section 13 is not considered […], the harm would be to the affected person who consistently had raised his reasonable concerns regarding safety, health and security of himself and his family on each occasion when [he was] asked […] whether he would consent to the disclosure of this severed portions of Record #40.

The appellant responds:

> …[T]he Municipality has not provided a satisfactory explanation for waiting [106] days after the 35 days limitation period expired before raising the section 13 [exemption].

> …[T]here would not be any harm to the Municipality if this new [exemption] was not considered for adjudication since the argument relating to the safety, health and security has been addressed [under the personal privacy exemption].

In the circumstances of this appeal, I have decided to permit the Municipality to raise the section 13 exemption. I have reached this conclusion for the following reasons:

- the Municipality's concerns regarding safety, health and security were known to the appellant prior to the section 13 exemption being raised;
- the appellant will not be prejudiced by the consideration of the section 13 exemption; and
- although it is a discretionary exemption, section 13 engages the interests of the affected person, who could suffer significant prejudice were I not to allow the Municipality's late exemption claim.

Accordingly, I will consider the section 13 exemption claim for Record 40.

Section 10(1) was also raised by the Municipality at the time that it raised section 13. However, section 10(1) is a mandatory exemption section and 11.01 of the *Code* does not apply. Accordingly, I will consider its application to Records 67A and 69A.

DANGER TO SAFETY OR HEALTH

Introduction

The Municipality is relying upon section 13 to deny access to the severed portions of Record 40. Record 40 is comprised of 33 pages of building plans relating to the construction of a compound at a specified address that contains the affected person's home and research facility. The plans contain drawings and provide specific details regarding construction specifications, materials, room locations and security features. There are also two consultant reports attached to one of the building plans. One consultant report provides an architectural and engineering assessment regarding the stud specifications required to meet the needs of the construction project. The other consultant report sets out the specifications and costs of constructing a particular phase of the project.

Section 13 of the *Act* reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The words "could reasonably be expected to" appear in the preamble of section 13, as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms." In

the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *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 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

However, in *Ontario (Minister of Labour)*, the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under the provincial equivalents to sections 8(1)(e) and 13, and harms under other exemptions. The court stated (at p. 6):

> The expectation of harm must be reasonable, but it need not be probable. Section [8(1)(e)] requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. Similarly [section 13] calls for a demonstration that disclosure could reasonably be expected to seriously threaten the safety or health of an individual, as opposed to there being a groundless or exaggerated expectation of a threat to safety. Introducing the element of probability in this assessment is not appropriate considering the interests that are at stake, particularly the very significant interest of bodily integrity. It is difficult, if not impossible, to establish as a matter of probabilities that a person's life or safety will be endangered by the release of a potentially inflammatory record. Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [sections 8(1)(e) and 13] to refuse disclosure.

In my view, despite this distinction, the party with the burden of proof under section 13 still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment could be expected to result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated (see Orders MO-1262 and PO-1747).

Representations

The Municipality submits:

> Disclosure of the severed portions of Record #40 would seriously threaten the security, health and safety of the affected person and his family. The affected person employs security persons who […] are on his property 24 hours of each day. Disclosure of the severed portion of Record #40 […] would compromise the

> affected person's security, safety and health by making it possible for intruders intending to harm him or his family swifter access to him before the security persons could intervene.
>
> . . . . .
>
> The evidence that supports the reasonableness of the expectation of harm are the statements made by the affected person and by his Chief of Protective Services to [the Municipality]. [The Municipality] found these statements credible and persuasive in the circumstances.

The affected person submits:

> The affected [person] […] is a scientist who has over the years developed major products for publicly traded corporations[…] Much of [the affected person's] work involves patenting new ideas. If these ideas are revealed prior to their patent being applied for, then the validity of the patent is lost. Therefore, security is an issue.
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> . . . . .
>
> In addition to the invitation to review the premises, the appellant has received plans for the subject premises which show the basic footprint of the building and the location of the various rooms. What he has not been given would show the location of not only the doors and hallways, but the wiring harnesses and other systems responsible for the security systems in the premises. To reveal these would substantially breach the safety and security of [the affected person] and his family.

The appellant states in response:

> […T]he Municipality has not provided "detailed and convincing evidence" of a reasonable expectation of harm to the affected person. There is no evidence that the appellant would use the information to "mak[e] possible for intruders intending to harm him or his family swifter access to him before the security persons could intervene", as stated […in …] the Municipality['s] submissions. The only evidence listed by the Municipality are the self serving statements made by the affected person and by his Chief of Protective Service which have never been disclosed to the appellant or subjected to cross examination.
>
> […T]he 24 hours security as well as the concrete stone wall surrounding the compound were not put in place to protect the affected person. [They] are there to protect and conceal the business activities tak[ing] place in the compound…

Findings

The Municipality and the affected person have provided detailed and convincing evidence of a reasonable expectation of harm to the affected person and his family should there be disclosure of the severed portions of Record 40 to the appellant.

In reaching this conclusion I have taken into account all of the surrounding circumstances. The affected person's evidence suggests that he is a high profile scientist who is proposing to conduct proprietary research out of what is also a home to himself and his family. The Municipality and affected person also suggest that the nature of the affected person's work and the inherent security risks that it poses to his business and family have caused the affected person to employ a Chief of Protective Security and to arrange for 24 hours per day security. I acknowledge the appellant's statement that the security measures taken have been put in place not to protect the affected person, but rather, to protect and conceal the affected person's business activities. However, on the evidence before me, I cannot accept the appellant's conclusion. In my view, the Municipality and the affected person have established that the affected person's work combined with its presence in his home presents a real and palpable security risk to the affected person and his family. In my view, the security of a person's home is closely tied to the security of that person and any other residents, and I cannot accept the distinction offered by the appellant.

In the circumstances, I find that the Municipality and the affected person have demonstrated that resistance to disclosure is based on more than a frivolous or exaggerated expectation of endangerment to safety and security. Therefore, section 13 applies to Record 40.

THIRD PARTY INFORMATION

Introduction

The Municipality and the affected person claim that Records 67A and 69A contain third party information that should not be disclosed as a result of the mandatory exemption contained in section 10(1) of the *Act*.

Section 10(1) of the *Act* states, in part:

> 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.

[Section 10(1)(d), which relates to certain information in the employment and labour relations context, clearly does not apply here.]

For a record to qualify for exemption under sections 10(1)(a), (b) 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 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, P-373, M-29 and M-37)

Part 1 – Type of Information

The Municipality suggests that Record 67A contains commercial and technical information regarding the affected person's intention to purchase land for stated technical research purposes. Record 67A contains information regarding potential parcels of land that the affected person is interested in purchasing to meet his needs, general information regarding specifications for a research facility, proposed construction ideas and planned activities on site. The Municipality does not provide any comments regarding the type of information contained in Record 69A. However, on my review, I find that Record 69A contains detailed information about the affected person's past research activities and his intentions to purchase properties in two specified locations to create a research facility and manufacturing plant. Record 69A also contains details regarding the physical requirements, specifications and staffing needs for the research facility and manufacturing plant. I also find that Record 69A contains one sentence about the affected person and his family. I address this information in detail below in my discussion of personal information and the section 14 exemption.

The affected person and the appellant both provide brief comments. However, their representations do not assist me in my analysis of part 1 of the section 10(1) exemption test.

I find that the information contained in Records 67A and 69A, with the exception of the one sentence identified above, constitutes "technical" information in that it is information belonging to an organized field of knowledge which falls under the general categories of agricultural research, mechanical engineering and applied science (see Order P-454). Accordingly, I am satisfied that part 1 of the test has been met.

Part 2 – Supplied in Confidence

Introduction

In order to satisfy part two of the test, the affected person and/or the Municipality must show that the information was *supplied* to the Municipality *in confidence*, either implicitly or explicitly.

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which provided the foundation of this *Act*:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind.
> (pp. 312-315) [emphasis added]

To meet part 2 of the test, it must first be established that the information in the record was actually "supplied" to the Municipality, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Municipality (Orders P-203, P-388 and P-393).

With respect to whether the information was supplied "in confidence", part 2 of the test for exemption under section 13(1) also 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 (Order M-169).

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)

Representations

The Municipality submits:

> The information withheld in Records #67A and #69A was "supplied" by the affected person. In the case of Record #67A, it was supplied by him at a meeting […], attended by the affected person, the affected person's Chief of Protective Services, and four municipal officials. In the case of Record #69A, it was supplied by a letter addressed to the then Mayor […], a Regional Councillor and two municipal officials…
>
> Record #69A was explicitly supplied to the addressees in a letter marked "Private and Confidential"…
>
> The Municipality's practice is to treat all correspondence marked private and confidential as "confidential" until it is authorized by the author to disclose it…
>
> Record #67A comprises notes of a meeting with municipal officials which was attended by the affected person and his Chief of Protective Services…[..A]ll participants at this meeting…reasonably expect that information supplied at it will be treated as confidential and not disclosed to third parties…
>
> . . . . .
>
> The information in question has been treated as confidential by the Municipality and the participants at the meeting at which it was supplied.

The affected person states:

> [Record 69A] is a letter […] to the Municipality […] to the attention [of] the mayor, the CEO, the local council member and the director of planning marked "Private and Confidential"[…] [Record 67A] contains notes of a private meeting between the affected [person] and the Municipality discussing the proposed use of land that was to be purchased. The letter and the meeting were both held in confidence with the expectation of privacy…

The appellant offers the following in response:

> [...T]he confidentiality provisions of [section]10(1) are not applicable in that neither the [a]ffected [person] nor the Municipality has presented any evidence "that is detailed and convincing" and describing "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 information was disclosed.

Findings

I am satisfied on the evidence before me, including the records themselves, that the "technical" information contained within Records 67A and 69A was "supplied" by the affected person to the Municipality within the meaning of section 10(1) of the *Act*.

With respect to the "in confidence" portion of part 2 of the test, Record 69A is marked "Private and Confidential", an indication of an explicit expectation of confidentiality. In the circumstances, based on the material before me, I am satisfied that there was an explicit expectation of confidentiality on the part of both the affected person and the Municipality when this record was submitted. Regarding Record 67A, I am persuaded, based on the evidence before me, that there was a reasonable expectation on the part of both the affected person and the Municipality that the information contained in this record was supplied with an implicit expectation of confidentiality.

Part 3 – Harms

Introduction

To discharge the burden of proof under part 3 of the test, the parties 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).

The words "could reasonably be expected to" appear in the preamble of section 13(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of

proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order *in 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 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

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.)]

Representations

The Municipality submits:

> The Disclosure of Records #67A and #69A other than with the affected person's consent […] can be reasonably expected to cause the prejudice and interference referred to in clause 10(1)(a) and also to result in the undue loss or gain referred to in clause 10(1)(c) of the Act.

The affected person states:

> [Record 69A] and [Record 67A] were both held in confidence with the expectation of privacy and it would, therefore, fall under section 10(1)(a) and would prejudice the competitive position or interfere with the contracts or the negotiations of the affected [person].
>
> . . . . .
>
> The information will expose [the affected person] and his family to harm. The nature of the harm is to pecuniary interest in the event that security is breached and patentable knowledge is revealed and personal safety with respect to the secret nature of the work for other institutions.

The appellant submits in response:

> […T]he confidentiality provisions of [section] 10(1) are not applicable in that neither the [a]ffected [person] nor the Municipality has presented any evidence "that is detailed and convincing" and describing "a set of 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.

Findings

The Municipality and the affected person have made general statements that disclosure of Records 67A and 69A could reasonably be expected to significantly prejudice or interfere with the contractual or other negotiations of the affected person. The Municipality has also suggested that disclosure could reasonably be expected to result in undue loss to the affected person. In paragraph two of his representations, the affected person suggests that disclosure of "the information" would result in pecuniary and personal harm if, through a breach of security at his research facility, patentable knowledge or secret information belonging to another organization, with whom the affected person was doing business, was revealed as a result of the disclosure of the information in question. Unfortunately, the affected person does not indicate, specifically, how disclosure of these records - Records 67A and 69A - would result in the harms suggested. The Municipality and the affected person have not supported their generalized statements with detailed and convincing evidence of how disclosure of the contents of these records could reasonably be expected to result in the impacts suggested in their representations. The evidence before me consists of generalized conclusions regarding harm without any basis for reaching these conclusions. I note also that these records contain relatively brief and generalized descriptions of the nature of the affected person's proposed research facility and his work. The records do not contain information such as proposed methodologies, theories or data, or any other information that, on its face, could reasonably be expected to be useful to a competitor, result in undue loss or gain or interfere with contractual negotiations.

I find that part 3 of the section 10(1) exemption test has not been established with respect to Records 67A and 69A. Therefore, none of the information in Records 67A and 69A qualifies for exemption under section 10(1) of the *Act*.

INVASION OF PRIVACY

Personal Information

Introduction

The section 14 exemption can apply only to "personal information". Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)], the address of the individual [paragraph (d)], the personal views of the individual [paragraph (e)], confidential correspondence between the individual and an institution [paragraph (f)], and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The contents of Records 67A and 69A are described above in my discussion of the section 10(1) exemption.

Representations

The Municipality submits that the information contained within Record 67A qualifies as personal information under paragraph (e) of the definition as it is confidential information provided to four named officials of the Municipality by the affected person at a meeting regarding matters raised by the affected person. With respect to Record 69A, the Municipality takes the position that it contains personal information within the meaning of paragraph (f) since it is marked "Private and Confidential". The Municipality also states that Record 69A contains "personal information of a commercial nature."

The affected person does not make any specific representations regarding the characterization of Records 67A and 69A but submits that "[…] information regarding the security of the premises is personal information within the overall meaning of [s]ection 2(1) because the security system is designed for the personal safety of [the affected person] and his family."

The appellant makes the following submissions:

> […I]n considering whether the information contained in Records […] 67A and 69A constitute personal information […], one has to distinguish between "personal information" versus "corporate information".
>
> […T]he Municipality's officials and the [a]ffected [person] in communicating, meeting and corresponding with each other were acting in their corporate

> capacities – the city officials as a representative of the Municipality and the [a]ffected [p]erson as representative of a corporation[…]
>
> […T]he *Act* was not intended to protect "corporate information" relating to the development of "major products for publicly traded corporations (Representations of the [a]ffected [person], par. 4, page 2)" in buildings zoned for single detached family dwelling.

The Municipality submits in reply:

> The [a]ppellant seems to distinguish "corporate information" from "personal information"[…] Central to the [a]ppellant's argument is the proposition that the term "identifiable individual" as used in the definition of "personal information" in [s]ection 2(1) of the *Act*, includes only flesh and blood persons and excludes corporations which are legal persons. A private corporation is substantially an alter ego for a flesh and blood person. The [a]ffected [p]erson's corporation referred to in the record is the alter ego of the [a]ffected [p]erson and cannot be distinguished from the [a]ffected [p]erson under the provisions of the Act.
>
> The term "individual" is not defined in the *Act*. In ordinary speech "individual" is synonymous with "person" (*Canadian Oxford Dictionary* (1988)). […T]he term "person" is defined in subsection 29(1) of the Ontario *Interpretation Act*, to include a corporation, that is to include a legal person. The Municipality submits that the context provided by the […] *Act* does not justify a restricted interpretation being assigned to an identifiable "individual" as the term is used in the *Act* so that it is taken to refer only to an identifiable flesh and blood person, and not an identifiable corporate person.
>
> If […] the [a]ppellant's submission [….] [is accepted] […] the protective provisions of the *Act* would be inapplicable whenever for business or tax reasons, a corporation was employed as a vehicle to achieve someone's purposes.

Findings

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [Orders 16, 113, P-257, P-427, P-1412, P-1621].

Beginning with Order 16, former Commissioner Sidney Linden found the information relating to a sole proprietorship, partnership, unincorporated association or corporation does not qualify as "personal information" because the "protection provided with respect to the privacy of personal information relates only to natural persons".

In Order 113, Commissioner Linden modified this interpretation by stating that, "in some circumstances, information with respect to a business entity could be such that it only relates to an identifiable individual, that is, a natural person, and that information might qualify as that individual's personal information". In Order P-364, Assistant Commissioner Tom Mitchinson found that the exceptional circumstances described in Order 113 were present with respect to a cattle farm operated by a family. In that case, it was held that there existed a "sufficient nexus between the affected parties' [the farmers'] personal finances and the contents of the report to properly consider the information contained in the record to be the personal information of the affected parties."

In Order M-454, former Inquiry Officer John Higgins applied the reasoning described above to information relating to a commercial kennel operation. He found that the special circumstances contemplated in Orders 113 and P-364 were not present with respect to information pertaining to the kennel business. This information consisted of the name, address and telephone number of the business, the name of one of its operators and information relating to a specific incident which occurred there and was found to relate only to the ordinary operations of the business. Former Inquiry Officer Higgins went on to find that the business address and telephone number, even though they were the same as the residential address and telephone number of the business operator, did not qualify as the personal information of the operator. A distinction was made between the home address of an individual who happens to carry on a business and the situation where the business is carried on at a residential address and the records relate to the operation of that business.

Turning to this case, having carefully reviewed the parties' representations and Records 67A and 69A I have reached the following conclusions:

The information in Record 67A is directly and exclusively related to the affected person's business activities. The contents of the record deal only with the affected person's plans for the development of a research facility and to other related business activities. I see nothing in this record that addresses the "personal" safety of the affected person and/or of his family or that could qualify as the "personal" opinions or views of the affected person or any other person.

With respect to Record 69A, I also find its contents, with one exception, to be related to the affected person's business activities. The first part of the record outlines the affected person's past research activities while the second part of the record outlines the affected person's plans for a research site and manufacturing plant. The marking of this document as "Private and Confidential" does not, in my view, alter its characterization as business correspondence. As with Record 67A, there is no discussion of "personal" safety and security issues. There is, however, one sentence (page 1, paragraph 1) that consists of personal information of the affected person and his family within the meaning of section 2(1) of the *Act*.

To conclude, only the one sentence in Record 69A qualifies as "personal information". The remaining information in this record, and Record 67A, do not qualify as "personal information" and, therefore, cannot be exempt under section 14.

Section 14

I have determined that only one sentence in Record 69A constitutes the personal information of the affected person and his family. Where records contain only the personal information of individuals other than an appellant, section 14 of the *Act* prohibits disclosure of this information unless one of the exceptions listed in the section applies. The onus is on the appellant to establish the application of one or more of these exceptions.

In his representations, the appellant relies on the exception under section 14(1)(b) and the factors under sections 14(2)(a) and (d).

The appellant makes the following representations under the section 14(1)(b):

> At page 2 of the [M]unicipality's submissions, the Municipality states that [section] 14(1)(b) "is intended to permit the disclosure of personal information in compelling circumstances in order to protect the health or safety of the ***affected person*** (emphasis added)". This subsection in fact refers to "…affecting the health or safety of ***an individual*** (emphasis added)["].
>
> […T]he Municipality has misconstrued [section] 14(1)(b), which in fact allows the Municipality to disclose personal information if there are compelling circumstances affecting the health or safety of an individual – not the affected person. In this particular case, the individual is the [a]ppellant and his family and the compelling circumstances are the fact that the appellant resides only a few feet away from the affected person alleging fears for his and his family safety because of the business activities taking place in the compound. Based on the said allegations, it is not unreasonable for the appellant and his family, who reside only a few feet away [from] the affected person and his family, to fear for their own safety.

The appellant's position appears to be that his family's close proximity to the business activities of the affected person gives rise to safety concerns for him and his family. The appellant views these safety concerns as compelling circumstances that warrant the disclosure of Record 69A. In my view, disclosure of the portion of this record that contains the personal information of the affected person and his family would have no effect on the health or safety of the appellant or his family and, therefore, section 14(1)(b) does not apply.

The appellant makes the following submissions under section 14(2)(a):

> […T]he Municipality's submissions (page 3, last paragraph) stating that "disclosure of the […] withheld [Record 69A] is not required for the purpose of subjecting the municipality to public scrutiny" because "that would dissuade residents from meeting with municipal officials to discuss matters of commercial concern (emphasis added) before making public applications for official plan, zoning or other development approvals." appears to totally disregard the Public's

> right to scrutinize and question the conduct of Municipality's official when there are serious allegations of possible misconduct, preferential treatment and abuse of discretionary power...
>
> […D]isclosure for the purpose of subjecting the activities of Municipality to scrutiny is not only desirable but necessary, not only to determine whether the Municipality's officials acted properly and in good faith in this matter, but also to maintain confidence and trust on public officials.

The appellant makes the following representations under section 14(2)(d):

> […T]he appellant has a legal fundamental right to security and safety as well as a legal and fundamental right to enjoy his residential property free of any nuisance. The information requested is necessary to determine whether the Municipality breached its own By-Laws and the provisions of the Building Code in issuing building permits for the compound.
>
> […T]here are serious allegations of improprieties, misconduct and abuse of discretionary power by Municipality officials in allowing business activities at [the subject properties], turning a blind eye on the business activities being carried out at [the subject properties], refusing to enforce its own Zoning By-Laws, abusing its discretionary power and totally ignoring the appellant's concerns.

The appellant's expressed concerns under sections 14(2)(a) and (d) are acknowledged. However, in my view, the small portion of Record 69A that contains the personal information of the affected person and his family does not address the appellant's concerns under these factors.

In conclusion, I find that the exception and factors raised by the appellant under section 14 do not apply. Accordingly, I find the personal information contained within Record 69A exempt from disclosure under section 14.

ORDER:

1. I uphold the Municipality's decision to withhold portions of Records 40 and 69A.

2. I order the Municipality to disclose all of Record 67A no later than **January 3, 2003,** but not earlier than **December 27, 2002**.

3. I order the Municipality to disclose a portion of Record 69A no later than **January 3, 2003**, in accordance with the highlighted version of this record included with the Municipality's copy of this order. To be clear, the Municipality should **not** disclose the highlighted portion of this record.

4. In order to verify compliance with terms of provision 2 and 3, I reserve the right to require the Municipality to provide me with a copy of the material it discloses to the appellant.

Original signed by: November 28, 2002
Bernard Morrow
Adjudicator