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

ORDER MO-1683

Appeal MA-030018-1

Regional Municipality of Waterloo

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

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

> all records in the possession of the Region of Waterloo including, but not limited to, policies, guidelines, memoranda, notes to file, letters, e-mail, faxes, reports, meeting minutes and communication lines, regarding ESPA #36.

The Region located a large number of records responsive to the request and denied access to two of them. Access to the first record, consisting of e-mail correspondence between the Region's Manager of Environmental Planning and a solicitor in the Region's Legal Services Division, was denied pursuant to section 12 (solicitor-client privilege) of the *Act*. Access to the second record, a lengthy report dating from 1990, was denied under section 10(1)(a) and (b) (third party information) of the *Act*.

The requester, now the appellant, appealed the Region's decision to deny access to the records and raised the possible application of the "public interest override" in section 16 of the *Act*.

During the mediation stage of the appeal, the appellant agreed not to pursue access to the e-mail correspondence which comprises the first record at issue. In addition, the Mediator attempted to contact the creator of the second record in order to solicit his views on its disclosure. The Mediator determined that the author of the record is no longer in the country and the company which he controlled is not longer operating. As further mediation was not possible, the appeal was moved to the adjudication stage of the process.

As it was not possible to contact the author of the second report (the affected party), I decided to first seek the representations of the Region as it bears the onus of demonstrating the application of the section 10(1) exemption to the record. The Region provided submissions on the application of section 10(1)(a) and indicated that it was no longer relying on the exemption in section 10(1)(b). I then sent a Notice of Inquiry to the appellant, along with the complete representations of the Region. The appellant provided me with representations which I then shared with the Region, and invited it to make further submissions by way of reply. The Region declined to do so.

The record at issue consists of a report outlining a planning and development concept for certain lands which are located within a larger parcel of land referred to as EPSA [Environmentally Sensitive Policy Area] 36.

DISCUSSION:

THIRD PARTY INFORMATION

The Region relies on the exemption in section 10(1)(a) of the *Act*, which reads:

> 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;

For a record to qualify for exemption under section 10(1)(a), the Region 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 the harms specified in (a) of subsection 10(1) will occur.

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

Part 1: Type of Information

The Region submits that:

> The report consists of two parts – the proponent's development concept in relation to the site conditions and an appendix containing the results of the biophysical analysis of the site. In reviewing the first test of section 10 and prior orders of the Commission, it seems clear that the biophysical analysis can reasonably be deemed to be scientific information as it comprises data on the biological, geological and hydrogeological conditions of the site. Information about the development concept in the record me[e]t the criteria for commercial information as it proposes a draft subdivision and housing plan which would be constructed and marketed for sale with the goal of making a profit.

The appellant's submissions do not address the first part of the test under section 10(1).

In my view, the information contained in the record may also meet the criteria for "technical" information. The terms "scientific", "technical" and "commercial" information have been defined in previous orders of the Commissioner's office as follows:

Scientific information

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* [Orders P-454 and PO-2010].

Technical information

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* (Orders P-454 and PO-2010).

Commercial information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Orders P-493 and PO-2010].

Following my review of the information contained in the record, I agree with the submissions of the Region and find that the development concept portion of the record contains information which qualifies as commercial information for the purposes of section 10(1). In addition, the appendix to the report contains information which qualifies as scientific and technical information as it addresses certain engineering problems and includes a detailed analysis of the physical composition of the site from a geological and hydrogeological perspective. I find, accordingly, that the first part of the test under section 10(1) has been met.

Part 2: Supplied in Confidence

Was the information supplied to the Region by the affected party?

There is no dispute that the report which forms the record in this appeal was provided to the Region by the affected party.

Was the information supplied in confidence?

The Region submits that the report was supplied to it with an implied expectation that it would be treated confidentially. It concedes that the record contains:

> . . . no explicit markings or request with respect to confidentiality, however it would be presumptuous to deem that the proponent wished the information to be put in the public domain, as the concept was in limited circulation, and it had not been open to public scrutiny through a development application.

The appellant does not address this part of the section 10(1) test in his representations.

Based on my review of the record and the treatment this office has afforded similar documents in the past, I find that it is reasonable to conclude that the record was provided to the Region by the affected party with an expectation that it would be treated in a confidential manner. Therefore, I find that the second part of the test under section 10(1) has been satisfied.

Part 3: Harms

General principles with respect to the burden of proof

In Order PO-2014-I, Senior Adjudicator David Goodis addressed the burden of proof required in order to meet the third part of the test under the equivalent provision to section 10(1) in the provincial *Act* as follows:

> To discharge the burden of proof under the third part of the test, Hydro and the affected parties resisting 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 17(1) would occur if the information was disclosed.

In Order PO-1805, Senior Adjudicator Goodis stated that:

> The Commissioner's three-part test for exemption under section 17(1), and statement of what is required to discharge the burden of proof under part three of the test, have been approved by the Court of Appeal for Ontario. That court overturned a decision of the Divisional Court quashing Order P-373, and restored Order P-373. In that decision the court stated:
>
> > 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.)].

For the purposes of the present appeal, I adopt the reasoning of the Senior Adjudicator with respect to the burden of proof in situations involving the application of the third part of the test under section 10(1) to a record.

Representations of the parties

In support of its decision not to disclose the record, the Region makes the following submissions:

> The third test in section 10 posed some interesting issues in this case. Normally, when a record may be subject to protection under section 10, notification to the affected party provides insight to permit the institution to make a fair decision on access. As noted above, the report was prepared about 13 years ago. Contact with [the affected party] was not possible as the address and telephone number listed in the report were no longer valid and internet-based searches on that name were fruitless. By all accounts, [the affected party] is understood to be a defunct concern. In this respect, it is difficult to conclude that release of the report would result in the harms enumerated in clause 10(1)(a). However, a number of consulting firms were utilized by [the affected party] in the preparation of the report. One of the consultants [a firm of landscape architects], was consulted as a proxy on behalf of [the affected party]. Discussions with [one of the principals of the landscape architectural firm] provided insight into the sentiments of [the affected party's] principal [a named individual] with respect to access to the report. [The landscape architect] advised that he believed that [the affected party's principal] is currently residing out of the country. However, at the time [the affected party] decided against taking the development concept to a formal application, [the landscape architect] recalls that [the affected party's principal] stated clearly that he did not want other parties having access to the information that had been compiled. While it is difficult to deduce [the affected party's principal's] concerns about release, it is possible that he did not want the informational assets compiled by [the affected party] to be used by another party for possible gain.

The Region goes on to comment about the unique circumstances surrounding the notification of the affected party as follows:

> It is worth noting that section 10 places a mandatory obligation on institutions to protect third party information when conditions are met. A decision to release the record is joined by a requirement in subsection 21(8) to provide the affected party with the opportunity to appeal. Given that the opportunity to appeal could not be provided, and given the comments believed to have been made by the affected party in the past (as provided by [the landscape architect]), a decision to release the report contrary to the mandatory protection provided by section 10 could not be recommended.

The Region concludes its representations on this issue with the following:

> As outlined above, many of the factors affecting this record suggest that it does not firmly fall within the protection of section 10. However, circumstantial issues around the possible expectations of the affected third party concerning the confidentiality of the information, and the inability to conduct a third party notification have tilted the balance against disclosure in the estimation of the Region. It is presumed that the Adjudicator will assess the feasibility of obtaining representations from the third party. If it is found that representations cannot be obtained, and that the harms test in section 10 is unfulfilled, the Region has no further concerns about release.

The appellant reiterates the statements made in the Region's submissions respecting the dearth of evidence of harm under section 10(1)(a). It goes on to add that:

> . . . it is highly unlikely that any such harm would or could occur since the company, [the affected party], has since dissolved. Subsequently, the former President of that company, [the principal of the affected party], is no longer residing in the country and therefore has no business interests or assets to protect in relation to the development concept that was proposed by [the affected party] over 13 years ago.

Findings

The Region concedes that, in the circumstances extant in this appeal, "it is difficult to conclude that release of the report would result in the harms enumerated in clause 10(1)(a)". However, as a result of its inability to notify the affected party under section 21 and out of a concern for the preservation of the informational assets of the affected party, it determined that the best course of action was to deny access to the record and leave the determination of this issue to the Commissioner's office, should the requester appeal that decision.

As noted above, the standard of proof required in cases involving a claim under section 10(1) is that the evidence tendered in support of the application of the exemption must be "detailed and

convincing". In the present case, the Region relies primarily on the comments made by the landscape architect as a "proxy" for the affected party's principal. In my view, this evidence does not meet the standard of proof required to demonstrate that the harm contemplated by section 10(1)(a) "could reasonably be expected to" occur if the record is disclosed. The Region has not provided me with sufficient evidence to demonstrate that the disclosure of the record could reasonably be expected to cause significant prejudice to the competitive position or interference with the contractual or other negotiations of the affected party.

It is unfortunate that neither the Region nor this office was able to contact the affected party in order to determine its views regarding the disclosure of the record. I note, however, that the record was submitted over 13 years ago and that the affected party is no longer carrying on business. As a result, I am able to confidently make a finding that the disclosure of the record could not reasonably be expected to prejudice the affected party's competitive position or interfere with its contractual or other negotiations.

I conclude by finding that the Region has not provided sufficient evidence to meet the third part of the section 10(1) test. As all three parts of the test must be met, I find that the record does not qualify for exemption under section 10(1) and I will order that it be disclosed to the appellant.

Because of my finding with respect to the application of section 10(1) to the record, it is not necessary for me to address the possible application of section 16.

ORDER:

1. I order the Region to disclose the record to the appellant by providing him with a copy by **October 8, 2003** but not before **October 2, 2003.**

2. In order to verify compliance with this order, I reserve the right to require the Region to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original Signed By: September 3, 2003
Donald Hale
Adjudicator