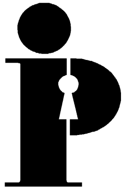

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1701

Appeal MA-020342-1

Municipality of Sioux Lookout

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NATURE OF THE APPEAL:

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

> …the hydro-geologist's reports and [to] photocopy some pages (chemical analysis) for the following plans of subdivisions that are not on record at Ministry of Environment and Energy as required by the subdivision approval procedures for the Town of Sioux Lookout. Chemical analysis refers to the laboratory testing for minerals in water . . .

relating to four subdivisions in the Municipality.

The Municipality located records responsive to three of the subdivisions described in the request and notified four affected parties under section 21 of the *Act*, seeking their views on the disclosure of the records. The affected parties objected to the disclosure of the hydro-geological reports. Accordingly, the Municipality denied access to the reports on the basis that they are exempt from disclosure under the third party information exemption in section 10(1) of the *Act*. The Municipality also indicated that it does not have records responsive to the request relating to one of the subdivisions specified in the request.

The requester, now the appellant, appealed the Municipality's decision.

During the mediation stage of the appeal, the appellant raised the possible application of the so-called "public interest override" provisions in section 16 of the *Act*. The appellant also maintains that a hydro-geological report relating to one of the subdivisions should exist. As further mediation was not possible, the appeal was moved to the adjudication stage of the appeal process.

I decided to seek representations from the Municipality and the four affected parties initially. The Municipality and three of the affected parties provided me with their submissions. The representations of the Municipality were shared with the appellant. I also provided the appellant with a summary of the positions taken by the affected parties, stating that they "object to the disclosure of the records as they take the position that they contain 'technical' information which was supplied by them to the Municipality with an expectation that they would be treated confidentially."

The appellant also made submissions, which were shared with the Municipality. I then invited the Municipality to make further representations by way of reply and it did so.

RECORDS:

The records at issue consist of three Hydro-geologic Reports relating to three proposed subdivisions in the Municipality.

DISCUSSION:

THIRD PARTY INFORMATION

The Municipality and the affected parties rely on sections 10(1)(a), (b) and (c) of the *Act* as the basis for denying access to the reports.

General Principles

Sections 10(1)(a), (b) and (c) of the *Act* read:

> 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, where 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;

For a record to qualify for exemption under sections 10(1)(a) or (c), the parties resisting disclosure (in this case the Municipality and the affected parties) 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 Ministry 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, M-37 and PO-2195]

Part 1: Type of Information

The Municipality submits that the records contain information which qualifies as "technical" and "commercial" information for the purposes of section 10(1). Previous orders of this office have defined the terms technical and commercial information as follows:

> ***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 10(1)(a) of the *Act*.
>
> [Order P-454]
>
> ***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.
>
> [Order P-493]

One of the affected parties submits that "The information we supplied under question is 'technical information' that was prepared by a professional in seeking approval for a small subdivision." The appellant simply states that the records he is seeking do not contain any information which falls within the categories of information under section 10(1).

I have reviewed the records at issue and find that they contain information which clearly qualifies as "technical" information for the purposes of section 10(1). The records describe in great detail the methodologies employed by the consulting engineers in undertaking the study of groundwater quantity and quality in the vicinity of the proposed subdivisions. However, I do not agree that the information in the hydro-geological reports qualifies as commercial information. The reports do not relate to the buying, selling or exchange of merchandise or services. I am satisfied that the records contain technical information and that the first part of the test under section 10(1) has been met.

Part 2: Supplied in confidence

There is no dispute that the records were supplied to the Municipality by the affected parties. In order for section 10(1) to apply to them, however, the Municipality and the affected parties must establish that the information was provided with a reasonably-held expectation that they would be treated confidentially.

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that there was a reasonable implicit or explicit expectation of confidentiality on the part of the supplier at the time the information was supplied. This expectation must have an objective basis. [Orders M-169 and PO-2195]

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:

- Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- 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.
- Not otherwise disclosed or available from sources to which the public has access.
- Prepared for a purpose that would not entail disclosure.

[Orders P-561 and PO-2195]

The Municipality restates each of the criteria listed above in support of its position that the reports at issue were submitted by the developers with an expectation that it would treat them confidentially. The Municipality goes on to add that:

> The reports have been treated consistently in a manner that indicates a concern for their protection from disclosure by the affected person prior to being communication to the government organization. This is indicated by the fact that it states on the cover page of each hydro-g report that it is 'Privileged and Confidential' and 'Prepared For' a specific business or individual.

The engineering firm which prepared the reports expresses its concerns about the confidentiality of the records. The firm notes that the client for whom the report was drafted owns the report and that the engineering firm cannot disclose these documents to anyone without the client's permission. In the present appeal, the records sought are not in the custody or control of the

engineering firm but rather with the Municipality. I find that the concerns raised by the engineer have no application to the present appeal.

One of the affected persons states that the reports were submitted to the Municipality to assist in the subdivision approval process and points out that the information in them relates only to the land which is the subject of the subdivision application. Another affected party reiterates that the information was only submitted for the purpose of obtaining the Municipality's approval of its subdivision plan. He states that the records were provided with an expectation that they would be kept confidential "and therefore give us some protection against unfair competition in regards to the sale of the lots on our subdivision."

The appellant, on the other hand, argues that:

> These reports do not have the privilege of being supplied to a subdivision process in confidence, they are by law meant to be reviewed by a qualified public agency (the Ministry of the Environment) and put in public records.

The appellant argues that the hydro-geological reports sought are essentially the same as the well-water quality records filed with the Ministry of the Environment (the Ministry) and are treated as public documents.

In its reply submissions, the Municipality points out that the reports sought by the request are not the same as what the appellant describes as "well-water records". The Municipality states that the records at issue in this appeal "are different reports, contain different information and are created differently." It acknowledges that "well-water reports" are available to the public through the Ministry but that hydro-geological reports serve a different purpose and are not made public.

I have carefully reviewed the contents of the hydro-geological reports. I find that they contain information as to water quality which may also be included in the "well-water reports" referred to by the appellant. However, this analysis forms only a small fraction of the information in the reports. The majority of the work performed by the engineering firm addressed issues surrounding the availability of water and the feasibility of creating appropriate septic systems to service the proposed development. In my view, the information contained in the records is not similar to the types of information which might be contained in the water quality reports filed with the Ministry. I find that the appellant's contention that the information is already publicly available is without merit.

In my view, the hydro-geological reports were supplied to the Municipality by the developers with a reasonably-held expectation that they would be treated confidentially. I accept the Municipality's submissions that reports of this nature are not made public but rather are used only to assist it in making a determination as to the propriety of granting approval of a proposed subdivision. Based on the submissions of the affected parties and the Municipality, as well as

my review of the records themselves, I find that the second part of the test under section 10(1) has been met.

Part 3: Harms

Under part 3, the Municipality and/or the affected parties must demonstrate that disclosing the information "could reasonably be expected to" lead to a specified result. To meet this test, the parties resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient. [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.)].

With respect to sections 10(1)(a) and (c), the Municipality states that:

> Release of the reports would negatively effect the competitive positions of the engineering firm and of the subdivision developers. The third parties would suffer undue loss. Future reports may not be made available as the engineering firm would be unable to guarantee that the reports would remain confidential or used only for the purposes for which they were submitted, i.e. the subdivision approval process.

With respect to the application of section 10(1)(b), the Municipality argues that:

> . . . disclosure of information acquired by the business [in this case, the developers] only after a substantial capital investment has been made could discourage other firms [in this case, other developers] from engaging in such investment. Second that fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.
>
> Lack of developers could have a devastating effect on the growth and economic vitality of the Municipality. In addition, taxpayers (at all levels) resent bureaucracy and having to provide voluminous documents for government processes. If the Municipality can't be trusted with information, supplied in confidence, we will have further difficulties obtaining compliance with reporting requirements in the future.

One of the affected parties indicates that:

> If this information is disclosed to our competitor we shall be very hesitant in supplying similar information in the future. In the future in order to alleviate the Municipalities concerns we may simply have a professional certify that the analysis done meets or exceeds the guidelines and keep the information ourselves.

> This issue is important to us as we are in the process of developing another phase of the subdivision at this time and the supply of water and sewer services are central in making a decision as to proceed.

The appellant's representations are premised on the assumption that the records contain information which is similar in nature to that provided in "well-water reports" that are provided to the Ministry. He also argues that the disclosure of the records will not affect the competitive position of the engineering firms who prepared them as "they are simply interpreting data." The appellant submits that:

> There are no informational assets of businesses or other organizations in these reports or anything in these reports that can relate to them. The reports are simply on the hydrology or water that is available in the ground in a certain area.
>
> The reports are done in accordance with provincial guidelines and procedures, which are freely available to all.

Neither the Municipality or the affected parties have provided me with the kind of detailed and convincing evidence which is required in order to establish the application of sections 10(1)(a) or (c) to the records. Based on my review of their representations and the information contained in the records themselves, I am not satisfied that prejudice to the competitive position of the affected parties or significant interference with their contractual or other negotiations could reasonably be expected to occur should the information in the records be disclosed. Similarly, I have not been provided with evidence of the nature of any "undue loss or gain" which may accrue to the affected parties should the information in the records be disclosed. Consequently, I find that neither section 10(1)(a) or section 10(1)(c) have any application in this appeal.

I find support for this finding in an earlier decision of this office. In Order M-668, a decision by a Municipality to deny access to certain reports prepared in support of an aborted subdivision plan was upheld under section 10(1)(c). On the facts of that case, the requester was the new owner of a parcel of land which was the subject of an earlier, uncompleted subdivision plan. The new landowner sought to obtain access to the records in order to spare himself the expense of preparing similar reports in support of his own subdivision plan. Former Inquiry Officer Mumtaz Jiwan upheld the Municipality's decision (and the original owner's objections) not to grant access to the reports on the basis that to do so would result in an undue gain to the appellant at the expense of the original landowner.

In the present appeal, I have not been provided with any evidence to suggest that the appellant is seeking the hydro-geological reports to assist him in obtaining approval for a subdivision, either at the same site or elsewhere. As a result, I find that I have not been provided with the kind of detailed and convincing evidence required to establish that the appellant may benefit "unduly" should the records be disclosed, within the meaning of section 10(1)(c). Accordingly, I find that this exemption has no application in the current appeal.

With respect to section 10(1)(b), I note that paragraph 35 of a document entitled "Subdivision Approval Procedures – A Guide for Applicants" which was provided to me by the appellant, mandates the provision of a hydro-geological report to the Ministry. In my view, the creation of the type of report that is the subject of this appeal is mandatory for developers seeking the Municipality's approval of a plan of subdivision. To suggest that developers may simply not supply this information or provide the same information in some other fashion in order to obtain approval is not credible. As a result, I find that section 10(1)(b) also has no application to the responsive records in this appeal.

In conclusion, I find that the exemption in sections 10(1)(a), (b) and (c) does not apply to the subject records and I will, accordingly, order that they be disclosed to the appellant. Because I have found that the records do not qualify for exemption under section 10(1), it is not necessary for me to determine whether the public interest override provision in section 23 has any application to them.

REASONABLE SEARCH

The appellant maintains that a hydro-geological report respecting a fourth subdivision application should exist. During the mediation stage of the appeal, the Municipality provided the appellant and the Mediator with a lengthy and detailed explanation as to why such a record does not exist. It submitted that the guidelines applicable to subdivision approvals were amended in 1998 and that the subdivision proposal referred to by the appellant predated those changes. Because the proposal was made under the old guidelines governing approvals, it was not necessary for the developer to include a hydro-geological report with the subdivision application to the Municipality. The Municipality indicates that no such report was submitted with this particular subdivision application, as none was required at that time.

The appellant argues that the Municipality is attempting to characterize the records he is seeking to be a document which is not a public record. He submits that he is seeking access to "well-water reports" and that these are public documents.

I note that the appellant's original request indicates that he is seeking "to have access to the hydro-geologist's reports" relating to four plans of subdivisions. In my view, the appellant is clearly seeking access to the reports identified by the Municipality as responsive to the request. To characterize the request in some other fashion at the mediation and adjudication stages in order to support an argument that additional records should exist does not assist the appellant's case.

I find that the Municipality correctly interpreted the appellant's request and provided a decision on those records identified as responsive. In my view, the Municipality has conducted a reasonable search for those records and has also provided a clear explanation as to why the remaining record sought by the appellant does not exist. I will, accordingly, dismiss this part of the appellant's appeal.

ORDER:

1. I find that the Municipality has conducted a reasonable search for records responsive to the request and I dismiss that part of the appeal.

2. I order the Municipality to disclose the three hydro-geological reports to the appellant by providing him with copies by **December 3, 2003** but not before **November 26, 2003**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the Municipality to provide me with a copy of the records disclosed to the appellant.

Original signed by: October 28, 2003
Donald Hale
Adjudicator