



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1823

Appeal MA-030059-1

The Corporation of the Township of Huron-Kinloss



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NATURE OF THE APPEAL:

This is an appeal from a decision of The Corporation of the Township of Huron-Kinloss (the Township), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The requester (now the appellant) sought access to the documentation relied on by the Chief Building Official of the Township to justify the decision to grant a building permit for a new hog barn on a farm. Specifically, the appellant asked for:

...an application for a building permit, construction drawings, a Nutrient Management Plan and the Environmental Assessment which is now required by the Township's manure pits and manure management by-laws.

In its decision, the Township granted partial access to the records. In denying access to some of the records, the Township relied on the mandatory exemptions under sections 10(1) (third party information) and 14(1) (unjustified invasion of personal privacy) of the *Act*.

As background, the records at issue all relate to the construction of a 3,000 head hog barn in the Township. In the year 2001, the Township issued a building permit to a local farm for the construction of two barns to house 4,000 hogs. There was local opposition to the proposed construction, which resulted in litigation and a court decision quashing the building permit [*Welwood v. Huron-Kinloss (Township) Chief Building Official*, [2002] O.J. No. 1131 (S.C.J.)]. The same farm owners applied for another building permit following this court decision, which was also granted by the Township, and it is the material in support of this second building permit that is sought by the appellant. The appellant is the ratepayer group involved in opposing the first building permit.

The appellant appealed the decision of the Township to deny access to some of the records. During mediation of the appeal through this office, the appellant agreed to withdraw its request for Records 1, 2, 3, 4, 5 and 22. The owners of the farm were also contacted and indicated their objection to release of the records.

I sent a Notice of Inquiry to the Township and to the farm owners, initially, inviting them to make representations on the facts and issues raised by the appeal. I also sent this Notice to the building contractor and the engineer for the owners. I received representations from the Township, the building contractor and the engineer. I did not receive any representations from the owners, although the Township's materials include correspondence from them explaining their objections to the disclosure of the records.

I then sent the Notice of Inquiry, along with the representations I received from the Township and the other parties to the appellant (with the exception of certain confidential portions), to invite its response. The appellant submitted representations that I subsequently shared with the Township and the other parties to seek their reply on certain issues, including the potential application of section 16, the "public interest override". The Township and the building contractor submitted reply representations.

RECORDS:

The records remaining at issue are described below:

- 6 General Review/Commitment Certificate;
- 7 Building Plans;
- 8 Building Plans;
- 9-11 Correspondence;
- 12 Building Plans;
- 13-16 Correspondence;
- 17 Hydrogeological Study (30 pages);
- 18 Correspondence;
- 19 Geotechnical Investigation, Proposed Hog Barn (23 pages);
- 20 Correspondence;
- 21 Minimum Distance Separation II – calculation for applicant (1 page);
- 23 Conditional Permit Agreement (1 page);
- 24 Agreement – Water Samples (1 page);
- 25-27 Fax transmissions;
- 28 Water Testing Results for Conditional Building Permit (12 pages);
- 29-34 Correspondence;
- 35 Nutrient Management Plan and related appendices/documents (157 pages);
- 36 Correspondence;
- 37 Draft Report – Water Quality of Eighteen Mile River, Boyd Creek, Clark Creek and the McNain Drain – (22 pages);
- 38 Working Notes – Manure pits check list (14 pages);
- 39 Working Notes – Nutrient Management check list (7 pages); and
- 40 Shop drawings for pre-fab slabs (6 pages).

DISCUSSION:

PERSONAL INFORMATION

The section 14(1) personal privacy exemption applies only to information that qualifies as “personal information”, as defined in the *Act*. In section 2(1), “personal information” is defined, in part, to mean recorded information about an identifiable individual.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in their professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

In this appeal, it is not in dispute that a named family owns the farm which is the subject of the records. Its owners buy and sell pigs and grow crops. The Township submits that all of the information sought by the appellant relates in some way to the history, management, operation, livestock, building construction and capacity, land area, water resources, manure production and water quality of the farm. It submits that this is information from which the owners' personal finances (farm revenues and expenses) can be calculated and information that is invaluable to their competitors in the industry.

With respect to specific records, the Township submits that any record that identifies the farm owners by name as well as the location of their property contains their personal information. The Township submits that the building permit application number is an identifying number assigned to the farm owners as individuals.

The Township asserts that Record 11 (letter concerning the Nutrient Management Plan) contains the personal information of one of the owners in that it contains, in addition to his name and address, "detailed information about the operation and management of the pig barn and the livestock the barn contains." It submits that Records 17, 19, 28 and 37 (various soil and water studies) contain detailed information about the history, condition, resources, management and operation of the family farm, and that this qualifies as personal information. The Township states that the information relates to financial transactions in the sense that it can easily be used to assess the financial viability of the farm.

The Township also submits that Record 21 contains personal information consisting of the address of the farm, barn capacity, livestock units and dimensions of the barn. It is said that this information describes in detail the family assets and can be used to assist in calculating the family farm income, net worth, financial activities or credit worthiness. With respect to Records 23, 24 and 34, the Township states that these contain personal information relating to a financial transaction in which the owners have been involved, the application for a building permit and construction of the barn.

The Township asserts that the Nutrient Management Plan and related working notes (Records 28, 35 and 39) contain personal information of the owners relating to a financial transaction. It describes the owners' assets and liabilities (the farm) in detail and provides sufficient information for others to accurately estimate the family's finances, net worth and credit worthiness.

The farm owners submit, without elaboration, that the records contain their personal information.

Analysis

It should be noted that in its representations, the appellant states that it is content to have the address and telephone number of the owners (which address it understands to be different from the location of the barn) severed from the records. It is therefore unnecessary for me to make a finding about whether this information is personal information.

In his recent Order PO-2225, Assistant Commissioner Tom Mitchinson reviewed the meaning of “personal information” and its application to the information of individuals who carry on business activities. In assessing whether such information is “about” the individual in a personal sense as required by section 2(1), the Assistant Commissioner asked the following questions:

- In what context does the name of the individual appear? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
- Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

Applying these questions to the circumstances before him, the Assistant Commissioner found that information about individual landlords who were in arrears with respect to payment of fines, fees or costs to the Ontario Rental Housing Tribunal was not their personal information. In arriving at this conclusion, he stated:

...when someone rents premises to a tenant in return for payment of rent, that person is operating in a business arena. The landlord has made a business arrangement for the purpose of realizing income and/or capital appreciation in real estate that he/she owns. Income and expenses incurred by a landlord are accounted for under specific provisions of the *Income Tax Act* and, in my view, the time, effort and resources invested by an individual in this context fall outside the personal sphere and within the scope of profit-motivated business activity.

....

As far as the second point is concerned, the information at issue does not reveal precisely why the individual owes money to the Tribunal, and the mere fact that the individual may be personally liable for the debt is not, in my view, personal, since the debt arises in a business, non-personal context. The fact that monies owed have not been fully paid is also, in my view, not sufficient to bring what is essentially a business debt into the personal realm, nor is the fact that a landlord may be prohibited by statute from commencing an application under the *TPA*.

I agree with the above analysis. In applying it to the appeal before me, it is not contentious that the construction of the hog barn forms part of business or commercial activities engaged in by

the owners of the farm. The application for the building permit is one step in the realization of the farm owner's aspirations for a commercial livestock operation. In answering the first question, therefore, I am satisfied that the information about the individual farm owners arises in a business context, rather than a personal one.

The representations of the Township appear to be directed at the second question above, in asserting that the information reveals aspects of the farm owners' personal finances. The Township relies heavily on the decision of the Assistant Commissioner in Order P-364, in which certain information about a cattle farm was found to be the personal information of the owners of the farm. I have reviewed that order, and find it distinguishable. In Order P-364, the record at issue is described as containing "detailed information about the history, management and health of the cattle, **including a description of all purchases and sales made over a two year period.**" [my emphasis] The Assistant Commissioner found a "sufficient nexus" between the owners' personal finances and the contents of the report to conclude that the information in the record was their personal information.

In the appeal before me, the records at issue relate to the application for a building permit. Not surprisingly, they include structural drawings, notes and specifications and shop drawings. The materials also include a Minimum Distance Separation calculation, a Nutrient Management Plan and studies in relation to an environmental risk assessment, all of which is required because of the nature of the proposed project. The Minimum Distance Separation calculation assesses the distance between the proposed barn and its neighbours. The Nutrient Management Plan provides a plan for the containment and dispersion of the manure produced by the livestock. The environmental risk assessment analyzes the conditions of the natural environment to identify any potential risks posed by the project and suggest measures to combat them.

Although all of this information can be said to be about the farm, none of it is about the farm owners themselves. Further, I am unable to identify any information about the farm that reveals anything of a personal nature about its owners. There is nothing in the material that comes close to the detailed information about the commercial activities of the farm (such as found in Order P-364) that could lead to inferences being drawn about the personal finances of the owners.

I therefore reject the submissions of the Township that this information can be used to accurately estimate the family's finances, net worth and credit worthiness. The information relates to certain aspects of the proposed operation and whether it meets the requirements of local building by-laws. It is not a comprehensive analysis of the financial viability of the proposed barn, much less of the farm in its entirety. I am not convinced that accurate financial information about the farm or its owners could be extrapolated from this information.

It should be noted that in Order PO-2295, Assistant Commissioner Tom Mitchinson arrived at the same conclusion with respect to a version of the NMP in the possession of the Ministry of Agriculture and Food, in the context of similar submissions that the NMP contained the "personal information" of the farm owners.

Having found that the records at issue do not contain personal information (with the exception of certain discrete portions that I discuss at the end of this decision), I thus conclude that they do not qualify for exemption under section 14(1) of the *Act*. As no other exemptions apply to Records 23, 24 and 34, I will order their disclosure. With respect to the other records, the Township also relies on the exemption in section 10(1) to support denial of access and I will now turn to consider the application of this section.

THIRD PARTY INFORMATION

Section 10(1)

General principles

Section 10(1) states:

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; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

In order for section 10(1) to apply, the information in the records must be at least one of the types listed in the section.

The Township submits that most of the records contain trade secrets, technical information and scientific information. The farm owners have not made any specific submissions on the application of section 10(1).

The building contractor and engineer also submit that the records contain trade secrets and technical information, focusing on the building plans and related correspondence.

The appellant agrees that at least some of the information in the records constitutes scientific or technical information.

The types of information listed in section 10(1) that are relevant to this appeal have been defined in previous orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Scientific information is information belonging to an organized field of knowledge in 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 a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The following are my findings on whether the records contain the type of information described above:

Record 6 is a General Review/Commitment Certificate. This record does not contain a trade secret or scientific, technical, commercial or financial information. As a condition of permit issuance, it confirms the identity of the third party engaged to provide an ongoing review of the construction of the barn to ensure conformity with the plans and specifications that are the basis of the permit. Most of the information is from a standard form under the Ontario Building Code. The other information serves to identify the specific project to which the agreement applies and the engineer who has agreed to undertake the review.

Records 7, 8, 12 and 40 consist of the building plans and shop drawings (which I will collectively refer to as the construction plans). I am satisfied that they contain information of a technical nature as they “involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing”, specifically, the plans for the construction of the hog barn.

Records 9, 10, 13, 14, 15 and 16 consist of correspondence between the consulting engineer, retained by the Township to assist it in evaluating the application for the building permit, the Township’s Chief Building Official (CBO), and the engineer for the farm owners. I am satisfied

that these records contain technical information in that they discuss the plans and specifications for the project.

Records 18, 25, 26, 27, 29, 30, 31 and 33 consist of the engineer's site inspections. I am also satisfied that these records contain technical information in that they consist of the engineer's assessment of the conformity of the construction with the plans.

Record 11 consists of correspondence from an official with the Ministry of Agriculture, Food and Rural Affairs (OMAFRA) to the farm owner, attached to which is a checklist for third party review of Nutrient Management Plans. I find that these contain technical information about the proposed management of manure produced from the hog barn.

Records 17, 19 and 20 contain scientific and/or technical information in relation to the environmental risk assessment carried out as part of the application for the building permit.

Records 28 and 37 contain information of a scientific nature, relating to water quality testing and evaluation at and around the farm.

Record 32, correspondence from the engineer to the building contractor, contains information of a technical nature relating to the plans for the project.

Record 21 is the Minimum Distance Separation calculation, completed by the Township's CBO. I am not convinced that this form contains any scientific or technical information. It contains a straightforward mathematical calculation of the distance separating the intended barn from areas zoned for other uses, which does not require the type of expertise and knowledge associated with scientific or technical endeavours. I find that the form does not contain commercial information. Although there is some basic information about the new barn, I am not convinced that the information reveals anything about the farm's operations. The intent of the form is to address the question of physical separation of the farm from its neighbours and not the farm's ongoing operations.

Record 35 is a Nutrient Management Plan, prepared by an agricultural consultant. Some of the information in it, such as the results of soil testing, qualifies as technical and/or scientific information. Although this was not asserted by any party, I am satisfied that, in general, this record qualifies as commercial information in that it provides a plan for one aspect of the farm's operations, the management of the manure produced by the hog barn.

Record 36 contains a brief review of the Nutrient Management Plan by another agricultural consultant. By itself, the review may not qualify as commercial information, but as it comments on Record 35, I find that in conjunction with Record 35, it contains commercial information about the operation of the farm.

Records 38 and 39 are the working notes and checklists completed by the Township's CBO, in which he records the status of the application for a building permit and its conformity with the

various elements of the Township's By-laws. I am not convinced that these records contain any of the information described in section 10(1).

Based on my findings above, Records 6, 21, 38 and 39 do not contain or reveal the types of information described in section 10(1). Since these records fail to meet Part 1 of the test for exemption under section 10(1), they are not exempt from disclosure under this section. As no other exemptions apply, I will order their disclosure.

Part 2: supplied in confidence

With respect to the records that contain or reveal the types of information described in section 10(1), I must consider whether this information was supplied in confidence to the Township, either implicitly or explicitly.

The Township asserts that the records were received by it in confidence. In some cases, the Township relies on an implicit understanding of confidentiality, based on the context in which it received the records. For instance, with respect to the correspondence between the CBO and the Township's consulting engineer, it is said that these documents were prepared strictly for use by the CBO in the discharge of his duties and were thus prepared and supplied to the Township in confidence. The Township submits that other documents or information were supplied to it in confidence solely for the purpose of assisting the farm owners in their application for a building permit. The Township relies on the statement in some records that they were "prepared for" or "submitted to" the farm owners to establish that these records were in turn supplied to the Township in confidence. In other cases, the Township states that the records were marked either "confidential" or "for review purposes only."

The building contractor submits that when submitting any documents and correspondence for a project to a CBO, it is always considered to be submitted for use on the specific project and it is assumed that it is submitted in confidence. The contractor states that it has "always been considered that any plans we have had drawn by others, were drawn by our own forces, were solely [our] property and under no circumstances could they be passed on, used, or allowed to be viewed by anyone other than those involved in that particular project."

The engineer submits that the design and all of its features are the property of the building contractor, and that it has always treated them as confidential.

As indicated above, although the owners object to release of the information, they have not made any specific submissions on the application of section 10(1).

The appellant states that before the commencement of litigation over the first building permit, the building permit application, construction drawings and Nutrient Management Plan were given to it to review, without objection from the third parties. The appellant states that the records to which it has been denied access are essentially the same documents, with different specifics, as have already been given widespread public circulation.

The appellant relies on the history of the previous proceedings around the first building permit, and submits that at no time during those proceedings did any of the third parties or the municipality raise any question or issue with respect to public access to the documents. It states that all documents produced during the course of examinations in connection with those proceedings were made exhibits and are therefore now public documents, available for inspection at the Court House. They were referred to extensively during the course of the litigation and were the subject of media coverage.

Supplied

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 [Order MO-1706]. Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

I find that that the information in or revealed by the records at issue was supplied to the Township by third parties, specifically, the farm owners or their building contractor/engineer. Many of the records were created by the building contractor or engineer. Other records were produced by environmental or agricultural consultants retained by the owners, for the purpose of meeting the requirements of the Township’s by-laws. Some of the records were authored by the Township’s consulting engineer, but reveal information from the construction plans submitted by the building contractors.

In confidence

In order to satisfy the “in confidence” component of Part 2, it must be shown that the supplier of the information had a reasonable expectation of confidentiality at the time the information was provided. An expectation of confidentiality is not enough – the expectation must be reasonable, and have an objective basis. It can arise explicitly or implicitly [PO-2020].

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 [PO-2043].

After considering the circumstances, I conclude that the farm owners, building contractor and engineer had a reasonable expectation of confidentiality when they submitted the information to the Township. I find it reasonable to conclude that parties who submit documentation required by a municipality to support a building permit application hold a reasonable expectation that such documentation will not be disclosed for purposes unrelated to the application: see Order MO-1225, in which a similar finding was made.

In conclusion, the information in the records meets Part 2 of the test for exemption under section 10(1). I will now turn to consider whether disclosure of this information could reasonably be expected to result in one or more of the harms specified in section 10(1).

Part 3: Harms

To meet this part of the test, the institution and/or the affected parties must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The Township submits that disclosure of certain records can reasonably be expected to harm the competitive position of the farm owners in relation to other farms, or cause them undue loss. Among other things, it is said that disclosure will prejudice their ability to assure engineers and contractors in the future of their ability to keep construction designs and drawings confidential. The Township also submits that disclosure of information about manure management practices at the farm, the environmental assessment, and the operation and size of the farm will prejudice the farm owners’ competitive advantage.

The building contractor submits that disclosure of the construction plans would prejudice its competitive position. A competing contractor would be able to use these designs without the burden and expense of development costs. The contractor submits that the fact that previous plans were given widespread public circulation is the exact reason why it does not want any of these records released to the public. It alleges that one of its competitors has joined the coalition opposing the hog barn in order to obtain a copy of its plans and documentation for his personal use. The contractor submits that it has spent thousands of dollars to design and engineer the barn (although it also states that the costs were paid by the farm owners) and it would be extremely detrimental to have these documents given freely to its competition.

The farm owners have not directly made submissions on this point. However, in prior correspondence to the Township, a lawyer for the farm owners stated his clients' position that this information should not be made available to the general public, and in particular, to the citizens' group that he understood to have made this request. It is said that this group is directly adverse in interest to the farm owners and publicly committed to interfering with their commercial activities.

The appellant submits, in general, that disclosure of the records will not result in any of the harms specified in section 10(1). In relation to the construction plans, it is said that neither the building contractor nor the engineer had any objection when the drawings for the previous barn were released to the requester as part of the prior building permit process. It is said that this previous disclosure does not appear to have in any way impaired the competitive position or interfered with any contractual or other negotiations. The owner has retained the same building contractor and engineer in relation to the new proposed barn. Any prejudice to a competitive position is therefore, in the appellant's submission, speculative.

The appellant submits that the plans for the current barn will be of an identical type to the previous plans. The appellant also states that the mathematical, engineering, analytical, geotechnical and any other assessments which went into the final design are not part of the plans. It is these "underpinnings" which may be worthy of protection, not the final product.

The appellant also submits that the drawings and design details are, by their nature, project specific. Thus, the disclosure of a specific design for this specific farm's facility could not reasonably be expected to prejudice the competitive position of either the farm owners or the other affected parties.

Analysis

I am not convinced that disclosure of the information in the records can reasonably be expected to prejudice significantly the competitive position of any of the affected parties, or lead to any of the other harms specified in section 10(1).

I note initially that I have little evidence to support the contention that disclosure of the records can reasonably be expected to harm the commercial interests of the farm owners. Apart from the brief submission referred to above, they have not made representations in this appeal. To the extent that a general concern has been expressed about the disclosure of the records to a ratepayers group that has opposed the farm owners' plans in the past, I am not convinced that this constitutes the detailed and convincing evidence required to substantiate an allegation of harm under section 10(1).

With respect to the construction plans (Records 7, 8, 12 and 40), which were the subject of the building contractors' submissions, I accept that previous versions of these plans have been given widespread public circulation, as part of a process of public debate and then litigation. The appellant believes, and it has not been contested, that the current version is of an "identical type",

with changes to permit the housing of more hogs in a single barn. I find this a reasonable conclusion. It is also consistent with the building contractor's assertion that the new barn configuration was adopted in order to meet Minimum Distance Separation requirements, which relate to the distance between the barn and lands used for other purposes, rather than the design of the barn itself.

I also accept the appellant's assertion that drawings and design details must by their nature be project specific. It is likely that the building contractor and engineer made professional assessments in deciding on the particular design for this farm, and the basis of these assessments is not found in the records themselves. Neither are any of the mathematical, engineering or other types of assessments and calculations supporting the final design.

I have considered the building contractor's assertions as to the participation of one of its competitors in the ratepayers' group opposing the construction. I am unable to draw any conclusions about the motives of any particular member of this group based on the evidence before me but in the context I have described, I am not convinced that release of the drawings will in itself provide any significant advantage to a competitor in any event.

In reaching this conclusion, I do not dismiss the prospect that disclosure of construction design information can have an adverse effect on the competitive position of those to whom they belong, within the meaning of section 10(1)(a). It is the particular circumstances of this case, as outlined above, that leads me to conclude that this potential detriment is not significant here.

For the same reasons, I find that disclosure of these records cannot reasonably be expected to lead to undue loss or gain to any party within the meaning of section 10(1)(c).

It has not been asserted that disclosure of these records could result in similar information no longer being supplied to the institution within the meaning of section 10(1)(b), and I find no basis for such a finding here.

Besides the construction plans, other records at issue contain information about or reveal aspects of the design or construction of the barn (Records 9, 10, 13 to 16 and 32). I am also not satisfied that disclosure of the information in these records could reasonably be expected to result in any of the harms described in section 10(1). My findings above apply equally to these records, insofar as they contain or reveal the type of information found in the construction plans. With respect to the records of the engineer's site inspections (Records 18, 25 to 27, 29 to 31 and 33), the representations did not address these specifically and I am not convinced that disclosure of this information could lead to any of the harms in section 10(1).

With respect to the records that relate to the environmental risk assessment or water testing (Records 17, 19, 20, 28 and 37) I am also not convinced that the Township or the affected parties have established that their disclosure could lead to any of the harms described in section 10(1). Only the Township addressed these records in its submissions. The Township submits that harm to the competitive interests of the farm owners will ensue, on the basis that the information

contained in the documents can be used to assess the financial viability of the farm or disclose details about the resources and management of the farm. I do not accept this assertion. As may be expected, these records speak to physical conditions of the farmlands and surrounding area. I find it highly unlikely that sufficient detail about the operations of the farm as a going concern could be extrapolated from these records so as to have an effect on competitive advantage.

Finally, Records 11, 35 and 36 relate to the Nutrient Management Plan. Neither the representations nor a review of these records provide any basis for concluding that their release could reasonably be expected to lead to the harms in section 10(1). Although the Township submitted that section 10(1) applies to the NMP, it did not provide support for its broad assertion that its disclosure could prejudice significantly the competitive position of the farm owners or cause them undue loss. The other parties have not addressed this record in their submissions.

In conclusion, I am not satisfied that disclosure of the records at issue, in the particular circumstances of this appeal, could reasonably be expected to lead to the harms addressed in section 10(1). Accordingly, these records are not exempt from disclosure under section 10(1).

As the Township has asserted in the alternative that section 7(1) applies to exempt some of these records from disclosure, I will turn to consider whether this exemption applies.

ADVICE TO GOVERNMENT

Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)]

Examples of the types of information that have been found not to qualify as advice or recommendations include:

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation.

[Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

The Township submits that section 7 exempts Records 9, 13, 15 and 20 from disclosure. The Township states that the author of these documents is its consulting engineer, retained to assist the CBO in reviewing and evaluating the building permit application.

The appellant acknowledges that the author of these records is a consultant retained by the institution "for the purposes of section 7", but states that the comments in these records are likely factual in nature. It is submitted that the consultant likely expresses requirements for compliance with the *Ontario Building Code*, the *National Farm Building Code* and any other applicable statutes. They likely provide statements of "what is wrong, or right, or what is needed or not". Further, the appellant submits that such advice and recommendations as those comments contain were previously disclosed to the appellant in relation to the previous barns, and suggests that there is a need for public scrutiny of the Township's actions in evaluating the merits of this building permit application.

I am satisfied that Records 9, 13, 15 and 20 qualify for exemption from disclosure under section 7(1). These records contain the comments of the Township's consulting engineer with respect to the structural drawings and other elements of the building permit application submitted by the

farm owners. Implicit in these comments is the advice or recommendations of this consultant on actions to be taken in respect of the application. Although it is true that the records contain information which can be considered factual, analytical or evaluative, this information is intertwined with the advice of the consultant. In noting “what is wrong, or right, or what is needed or not” (as expressed by the appellant), the consultant is implicitly advising the Township on how to proceed with the application.

Accordingly, I find that Records 9, 13, 15 and 20 qualify for exemption under section 7(1), and that the mandatory exceptions in section 7(2) do not apply.

PUBLIC INTEREST OVERRIDE

The appellant has submitted that whether or not any of the exemptions under the *Act* apply to the records, the public interest override in section 16 supports their disclosure. As I have found Records 9, 13, 15 and 20 exempt under section 7(1), I must consider whether section 16 overrides this exemption.

Further, if I am wrong in my conclusion that section 10(1) does not apply to exempt the records for which this exemption was claimed, I will also consider the application of section 16 to these records.

Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4196 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]
- the integrity of the criminal justice system has been called into question [Order P-1779]
- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]
- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]
- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellant has described at length the history of this request, the litigation over the prior building permit issued by the Township to the farm owners, the quashing of that building permit by a court decision, and the relationship between the prior building permit and the one at issue in this appeal. Although the Township has submitted that this background commentary is not

germane to the issues before me, I am satisfied that they are relevant to the issue of whether a compelling public interest in disclosure of the records exists.

As described in the decision in *Welwood v. Huron-Kinloss (Township) Chief Building Official* (above), in 2001, the Township issued a building permit for construction of two barns to house 4,000 hogs from which operation would be generated annually some 1.75 million gallons of liquid hog manure to be spread in the Township and in the adjoining township. The project was described in the decision as a “high-profile undertaking with strong emotional issues” (para.90), and was the subject of local opposition, discussion and debate. Litigation was launched to challenge the correctness and reasonableness of the Township’s decision to issue the permit.

In the decision quashing the building permit, the court was critical of some of the actions of the Township or its CBO, describing them as “unreasonable”, an “improper exercise” of discretion” and “wrong” (para.84). On other issues, the court found the actions of the Township’s CBO “not unreasonable”. In the decision, the court expresses the view that “I would hope with the benefit of this application the CBO would not issue a building permit in similar circumstances” (para.91).

The court explicitly acknowledges the existence of legitimate competing interests, on the one hand, ratepayers that generally do not want an intensive livestock operation in their own back yard, and on the other, intensive livestock operations which are existing viable agribusineses. At the conclusion of its decision, the court states:

The balancing of the legitimate competing interests is not resolved in these reasons. The issue of balance continues and those charged with the overall responsibility would be advised to consider the following: Does the existing multi-faceted approach through different legislation, different offices, different tribunals and different levels of government balance interests? This question involves consideration whether existing legislation furnishes a proactive approach to the balance of legitimate competing interests as compared to a reactive approach.

I suggest there is an appearance the playing field is not level. The competing interests before this court apply or are applicable to those having standing. There remain the interests of the broader community, and a rationalization and protection of all interests. The questions remaining are beyond the scope of these reasons. (paras. 102-103)

The decision of the court was issued in March of 2002. Within a few months, the farm owners submitted an application for a single hog barn, to house 3,000 hogs. It is this application which forms the basis of the request and appeal before me.

Based on the above circumstances, I am satisfied that there is a compelling public interest in disclosure of the information in the records. The venture that is the subject of the records has

and continues to rouse strong interest and attention in this community, and has been the subject of public debate, litigation and judicial scrutiny. It has been recognized by the court in its decision of March 2002 as engaging the interests of the broader community. The court recognized the continuing importance of the issues raised in that litigation, and the ongoing balancing of interests between residents and agribusinesses that would extend beyond the conclusion of that litigation. I find that in these circumstances, there is a compelling public interest in having the information in the records made available for public scrutiny.

The existence of a compelling public interest is not sufficient to lead to disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances. As I have indicated above, I have rejected the application of section 10(1) to the records, on the basis that I am not satisfied that disclosure could reasonably be expected to result in the harms described in that section. If I am wrong in my conclusion on the harm issue, I nevertheless am satisfied that in the circumstances of this case, the public interest clearly outweighs the purpose of the section 10(1) exemption.

As expressed in previous cases, the purpose of the section 10(1) relates to the protection of the interests of private parties whose commercial activities lead to the sharing of their information with a government institution. Essentially, it protects these private interests from public scrutiny. In this case, it has been recognized that the proposed development engages more than just the private interests of the farm owners, the building contractor and the engineer, but extends to the "broader community" and requires the balancing of legitimate competing interests. In this context, I am satisfied that the compelling public interest in disclosure outweighs the purpose served by the section 10(1).

As to section 7(1), I am also satisfied that the compelling public interest in disclosure clearly outweighs the purpose of this exemption, in relation to Records 9, 13, 15 and 20. The Township has submitted on this issue that it is extremely important that municipalities be able to seek external advice without fear that the advice or recommendation will be disclosed to a third party. It submits that this is particularly important in the context of a building permit application, in that it is often necessary for a chief building official to seek expert advice. This is precisely what was done in this instance, it is submitted, and is a necessary, important and desirable part of the building permit process which should be encouraged.

I have considered carefully the submissions of the Township, and I agree with them in a general sense. However, I find that in the particular and extraordinary facts of this appeal, the interest in disclosure outweighs the purpose of the section 7(1) exemption. The building permit application at issue follows on the heels of a court determination that inquired into the process for approving a prior application by the same proponent, for a very similar structure, and found that process wanting. It is significant that the parties involved in that prior process, the farm owners, the building contractor, the engineer and the Township, are again the key parties in the current process. In these circumstances, I am satisfied that there is a significant public interest to be served in disclosing to the community the comments of the Township's consultant in evaluating the building permit application.

I am also mindful of the fact that to order disclosure of the construction plans without providing the comments of the Township's consultant would result in gaps in information, in that those comments resulted in revisions to the original plans.

In conclusion, I find that section 16 applies to the circumstances of this appeal. Notwithstanding the application or alleged application of sections 7(1) and 10(1), a compelling public interest in the disclosure of the records clearly outweighs the purposes of these exemptions in this case.

It should be noted that specific portions of the records refer to individual neighbouring property owners. One portion also describes the professional history of a consultant. As these portions contain the personal information of these individuals, and it is not apparent that the appellant seeks this information in any event, I will order these portions to be severed from the records disclosed to the appellant. The appellant has indicated that it is content to have the address and telephone number of the farm owners withheld, and this information shall also be severed. As well, I understand from appeal PA-030189-1 that the appellant does not seek access to the Crop Insurance Renewal Notice included in the NMP and this document can be withheld (see Order PO-2295).

ORDER:

1. I order the Township to disclose the records to the appellant with the exception of the portions I describe above. For greater certainty, I have enclosed copies of the relevant pages showing the portions to be severed in yellow highlighting.
2. Disclosure is to be made by sending the appellant copies of the records ordered to be disclosed by October 4, 2005 but not before September 27, 2004.
3. In order to verify compliance, I reserve the right to require the Township to provide me with a copy of the records disclosed to the appellant pursuant to the above provisions, upon request.

Original Signed By: _____
Sherry Liang
Adjudicator

August 27, 2004 _____