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

ORDER MO-1914

Appeal MA-040156-2

Town of Oakville

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NATURE OF THE APPEAL:

The Town of Oakville (the Town) received two requests under the *Act* for the following information:

Request File #04-09

1. Confirmation of the completion of a noise study (the study) conducted on Lansdown Drive residences (with rear lots facing Ford Drive) in or around December 2003 by [a named company].

2. Copy of all contracts between the Town and [a named company] in respect of the study.

3. Copy of all reports (draft, preliminary or any other form whatsoever) prepared by [a named company].

4. Copies of all correspondence, phone call notes, memos or any other communication whatsoever between any Town employee, contractor or elected representative in respect of the study including any official or unofficial communications.

5. Copies of all invoices submitted to the Town by [a named company] in respect of the study.

6. Copies of all expense reports submitted by any Town employee, contractor, elected representative or [a named company] in respect of the study.

Request File #04-15

In this file, the requester stated,

> Attached is a copy of an email from [a named employee of the Town]. On page 2, he refers to "data the Town had previously collected, we did have more details for the consultant to use in their analysis at this location". I requested the details to which [the named employee] refers but none have been received to date.
>
> I am requesting the following information:
>
> 1. All information supplied by the Town to [a named company] in reference to the Thornlea area of the study, and in particular, the additional details that [the named employee of the Town] refers to whether written, verbal or otherwise communicated including the name of that person providing the information, the date and details on the information provided.

2. Copy of all contracts between the Town and [a named company] in respect of the study.

3. Copy of all reports (draft, preliminary or any other form whatsoever) prepared by [a named company].

4. Copies of all correspondence, phone call notes, memos or any other communication whatsoever between any Town employee, contractor or elected representative in respect of the study including any official or unofficial communications.

5. Copies of all invoices submitted to the Town by [a named company] in respect of the study.

6. Copies of all expense reports submitted by any Town employee, contractor, elected representative or [a named company] in respect of the study.

The Town identified records that were responsive to the requests. Item 3 of request #04-09, included both a final report and a draft report of a noise impact study prepared for the Town by a consultant. The Town disclosed the final noise impact study report to the requester. However, the Town noted that a draft of the noise impact study report (the draft report) contained information in relation to the consultant who conducted the study, and was concerned that the interests of the consultant may be affected by the disclosure of this record. The Town wrote to the consultant requesting its views on the disclosure of this information. The consultant requested that no information in this record be released. The Town then issued a decision denying access to the study.

In response to item one of request #04-15, the Town indicated that the named employee had received oral information about traffic speed data but could not recall the identity of the individual from whom he received the information, and therefore could not produce any records relating to this information.

The Town granted access to the other records sought in both requests.

The requester (now the appellant) appealed the Town's decision to withhold the draft noise study report under request #04-09. During the mediation stage of this appeal, the Town clarified that it is relying on the exemption in section 10(1)(b) of the *Act* (third party information) to withhold the draft report, not section 21 as stated in its decision letter. The Town issued a revised decision letter confirming this change. The Mediator contacted the consultant to discuss disclosure of the draft report. The consultant confirmed its objection to the disclosure of the draft report and that in addition to section 10(1)(b), it relies on sections 10(1)(a) and (c) of the *Act*.

The appellant also stated that he believes that additional information exists that is responsive to item one of request #04-15 relating to traffic speed data. This raised the issue of the reasonableness of the Town's search for records responsive to that item in request #04-15. During mediation, the Town conducted a further search and was able to provide the appellant with traffic speed data which it stated had previously been communicated orally by a named Town employee to the Town employee referred to in item one of request #04-15. The appellant was not satisfied that the additional information provided was complete and therefore the reasonableness of the Town's search remains at issue.

No further mediation was possible. After mediation, the record remaining at issue in this appeal is a draft noise impact study report prepared by a named company for the Town. The Town claims this record is exempt from disclosure under section 10(1)(b) of the *Act*. The consultant also claims that this exemption applies to the draft report and relies on sections 10(1)(a) and (c) as well as section 10(1)(b). The reasonableness of the Town's search for records in regard to item one of request #04-15, is the other outstanding issue.

At the inquiry stage of the appeal, this office initially provided the Town and the consultant with a Notice of Inquiry inviting them to provide representations. Representations were received from the Town and the consultant. The representations of the Town were shared with the appellant in their entirety and the non-confidential portions of the consultant's representations were also shared with the appellant, along with a Notice of Inquiry. The appellant was invited to respond to these representations and did so. I then asked the Town to respond to certain portions of the appellant's representations, providing a copy of those representations, and received reply representations from the Town.

DISCUSSION:

THIRD PARTY INFORMATION

As stated earlier, the Town and the consultant rely upon the exemption in section 10(a), (b) and (c) of the *Act* in support of withholding the draft report.

Section 10(1): the exemption

Section 10(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. 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, MO-1889].

For a record to qualify for exemption under section 10(1) (a), (b) or (c), the institution 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), or (c) of section 10(1) will occur.

Part 1: type of information

The Town submits that the noise study is a report "detailing some initial technical information and preliminary conclusions" by consultants retained by the Town. The Town does not describe which information in the report is "technical information" or why it falls within this category.

In the non-confidential portion of its representations, the consultant acknowledges that as a private consulting business it supplied the Town with a draft report containing results of a field test, analyses, conclusions and recommendations. The consultant also states that the draft report and the final report both contain "scientific" and "technical" information.

Neither the consultant nor the Town claim that the record in question contains trade secrets, commercial information, financial information or labour relations information.

The meanings of scientific and technical information in section 10(1) have been discussed in prior orders:

> *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].

The consultant provided the following representations on this issue:

> The scientific aspect of the study relates to the extensive field observations and testing or the measurements of the sound levels in the area using scientific instruments and based on the scientific procedures set by the Ontario Ministry of the Environment. The results of the field measurements/testing, analysis, etc. are in the most part contained in both; the confidential draft that is the subject of concern to the Appellant and the Final Report released for public use.
>
> …the field measurements, analysis and report writing were all performed by 2 Professional Engineers and a Senior graduate engineer who specialize in the fields of acoustics, noise and vibration control.
>
> Moreover, the noise study report deals with the issue of whether to construct or not construct a sound barrier wall, which is a structure. Therefore, the work clearly "describes the construction, operation or maintenance of a structure, or thing".

Most of the information in the draft report consists of measurements of existing noise levels, predictions of future noise levels, data upon which these predictions were based, descriptions of the methodologies by which these measurements and predictions are made, definitions of technical terms, standards for acceptable noise levels, conclusions as to whether existing and proposed noise mitigation measures would meet such standards, descriptions of and specifications for existing and proposed future physical structures to attenuate noise.

In my view, this information is scientific or technical information, and therefore meets part 1 of the test for exemption from disclosure under section 17 of the *Act*.

There is some information in the study which is not scientific or technical information, for example, page 1, parts of pages 2, 3, 5, 7, and 15, figure 1, four pages of photographs, and parts of an Oakville policy; however, in light of my conclusion below that none of the information in the record satisfies part 3 of the test for exemption, it is not necessary for me to identify more specifically those portions of the record that do qualify as scientific or technical information, as they are not exempt from disclosure in any event.

Part 2: supplied in confidence

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].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

Most of the information described above as scientific or technical was supplied by the consultant. Some of the technical information, such as certain standards and measurements, was clearly not supplied by the consultant. For example, at pages 2, 3, 8 and 11, there are noise measurements and predictions taken from previous studies by other consultants; at pages 4 there are criteria developed by a government agency; at p. 6 there are criteria adopted by a municipality. Again, it is unnecessary to identify which of the scientific or technical information was supplied to the Town and which was not, because of my conclusion below that the circumstances do not fall within part 3 of the test for exemption.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order 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 [Order PO-2043]

The parties' representations on confidentiality

In its representations, the Town states:

> The draft noise study…was a work in progress report…by the Town of Oakville's third party consultant, [a named company], which still needed to be finalized. They provided this to the Town but not as a public document and it is worthwhile to note that the draft study did not bear the stamp of the engineer in charge of the project, [a named individual]. Consultants do not expect their incomplete work to be reviewed and scrutinized except by their clients as there can sometimes be errors or omissions that they would have a reasonable expectation of addressing and correcting before the final study is released to the public.

The consultant made similar representations. In part it stated:

> Yes, [the consultant] supplied the Town of Oakville staff with one copy of the draft report with a reasonable expectation of confidentiality based on the following facts and events:
>
> (i) The draft reports contain technical data and draft recommendations that were <u>not</u>, at the time, approved by the undersigned as being the final Professional and responsible authority nor bearing the Professional Engineering stamp/seal of any professional as is the case with <u>every final report</u> prepared by this firm for engineering work. It is certainly a requirement of the Professional Engineers of Ontario (PEO) that engineering work bear the seal and signature of a P. Eng. This was NOT the case with the draft report.
>
> (ii) When my Project Engineer transmitted this draft document to the Town, it was understood by my staff and the Town staff who received the draft report that it would be treated as only a draft that is confidential for demonstrating the progress of the work and for review and comments by the Town of Oakville staff for consistency with their policies and practices.
>
> (iii) When the undersigned met with the City staff to discuss the progress of the study and our recommendations, (meeting took

> place on January 21, 2004), it was stated by the undersigned that the draft report is only a draft not for release beyond the municipal circle and that there was the need for several changes to make this report conclusions (sic) technical valid (sic) and consistent with the Town's published noise policy. (Emphases in original).

The consultant also refers to the information as "informational assets belonging to my firm". It states,

> The results of the field test, analyses, conclusions and recommendations in the draft report must be regarded as informational assets of this Company until such time it is supplied to the Town in a final report that becomes an information asset belonging to the Town.

In response, the appellant provided me with four draft consultants' reports and stated that he received each of them from the Town. He made the following representations that are pertinent to this issue:

> If [the consultant] expected confidentiality they failed to communicate that point to the Town. Town policy appears to retain drafts and provide them on request.
>
> [The consultant] is not a new supplier to the Town. They have conducted many studies and are well known to public officials. It is reasonable to expect the issue of distribution of draft Reports to have arisen many times before. Given the level of concern expressed by [the consultant] it is also reasonable to expect their concerns to be in writing - most likely in each and every contract they sign with government. At the very least, one would expect a letter to the Town requesting confidentiality. [The consultant] produced nothing.
>
> [The consultant] provides point 7 of their proposal as the only written evidence [of] their expectations. Point 7 reads :
>
> > *"A draft report will be transmitted to the Town (3 copies) for review and comments by the staff to contain all the necessary details, results etc."*
>
> There is no request for confidentiality of the information. There is no reasonable basis for [the consultant] to claim the drafts were provided in confidence to the Town.
>
> <u>[The consultant] is Part of a Public Process</u>
>
> [The consultant] was contracted by the Town to conduct a noise study. The study was initiated as a result of a public petition submitted by residents in Oakville. The petition was required under the Town of Oakville's approved public noise retrofit policy. Retaining [the consultant] was part of this process to help elected officials make a decision on the application of public policy.

> It is reasonable to expect the entire process, from submission of the petition to the final decision by council, to be a public process. Since the public have a vested interest in the outcome of Town's decision, it is reasonable to expect access to information used in arriving at their conclusion.
>
> The Town Regularly and Consistently Retain Draft Documents and Release them to the Public on Request
>
> Both [the consultant] and the Town of Oakville assert that draft documents are not public documents. A reason cited by the Town is that drafts are a "work *in progress"*. [The consultant] says *"they certainly expect"* the Town to understand their claim of confidentiality.
>
> In practice, the Town policy is not as claimed by the parties. Enclosed are four draft engineering Reports produced by the Town as a result of the information request I submitted. Two of the drafts are from [the consultant], one from [a second named consultant] and one from [a third named consultant].
>
> The draft Report from [the second consultant], together with the draft Town of Oakville public policy, was provided to the public at two meetings held in 2001. [The second consultant] attended the meetings to explain their draft report.
>
> My information request is limited to one issue, yet the Town produced four draft engineering reports. It is reasonable to conclude that many, perhaps thousands, of draft reports are in Town files. The willingness of the Town to release these Reports on request, and freely at public meetings, proves the Town views drafts as public documents. Professional engineers are willing to provide, and discuss publicly their draft Reports, demonstrating they are aware of, and agree with, Town policy.

I asked the Town for its response to the appellant's allegation that it had disclosed these draft reports to him, and it replied:

> If the purpose of a draft report or study is to solicit public comment, prior to finalizing the work, then it is obviously copied and distributed for this purpose by the consultant or the client (Oakville).
>
> Not all draft reports are prepared for the purpose of public circulation and comment. Some take the form of incomplete works-in-progress which are used by the consultant and the client to help develop the documents in a form intended for public use. We take the position these works-in-progress draft materials are the property of the consultant, and, due to their incomplete nature and inherent errors & omissions that may reflect unfavourably on the consultant, are not to be released to the public without the consent of the consultant involved.

> Of the four draft report cover pages enclosed by the adjudicator, two are from Halton Region, one is from [a named company] (private), and one is a Town of Oakville staff report to a Committee of Town Council. These are all examples of drafts that have been prepared for the express purpose of public review and comment or have otherwise been released with the consent of the owners.

Analysis and findings

The fact that a document is a draft rather than a final version of a report is not determinative of whether the document is supplied in confidence. This will depend on all the circumstances of the case. As illustrated by the reply representations of the Town, there is an expectation that some draft reports are to be kept confidential while others are intended for release to the public.

Nor is ownership of the information in a draft report conclusive evidence of whether it was supplied in confidence, although it may be a significant factor in determining this.

I asked both the Town and the consultant to provide a copy of the contract between the Town and the consultant for the noise study in question, as the contents of a contract are often informative on this issue. Although neither the Town nor the consultant provided me with a copy of the contract for the noise study, the consultant did provide a copy of its proposal to the Town. The consultant's representations indicate that this proposal is provided in response to my request for the contract, and I infer from the consultant's representations that the contents of this proposal form part of the contract.

As the appellant indicated, the proposal states:

> A draft report will be transmitted to the Town (3 copies) for review and comments by the staff to contain all the necessary details, results, etc.

This proposal does not support the position of the Town and the consultant that the contents of the draft report continue to be the property of the consultant until the final version of the report is submitted. Nor does the proposal contain any language indicating an expectation by either party to the contract that the information in this draft is to be kept confidential.

However, I do not agree with the appellant that because a final document will be made public, the entire process in which that document is generated is public. The fact that the study was prepared for a purpose that would entail making the final report public does not mean that this would necessarily entail making drafts public. Given the statements of both the Town and the consultant that their expectations when the draft was submitted were that it was not intended to be public, on balance I am satisfied that the weight of the evidence supports an inference that information in question was supplied in confidence in the circumstances of this appeal. The technical and scientific information in the report therefore meets part 2 of the test for exemption under s. 10(1) of the *Act*.

Part 3: harms

General principles

To meet this part of the test, the institution and/or the affected party 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].

For the most part, the draft study, the disclosure of which the consultant opposes, is similar to the final study, which is available to the public. The harms about which the appellant is concerned, therefore, can result only from information in the draft report that is different from the information in the final report. Three differences between the draft and final reports concern the consultant: the failure to consider a particular criterion in the draft report which the consultant considered in the final report and the consideration in the draft report of certain options for addressing the noise concerns of residents that were not addressed in the final report.

The question, therefore, is whether disclosure of this particular information could reasonably be expected to result in any of the harms listed in sections 10(1)(a), (b) or (c).

The parties' representations on harms

In its initial representations, the Town described the potential harm from disclosure as follows:

> Consultants do not expect their incomplete work to be reviewed and scrutinized except by their clients as there can sometimes be errors or omissions that they would have a reasonable expectation of addressing and correcting before the final study is released to the public. If other consultants retained by the Town or other public agencies were led to believe their incomplete study or project work would be released or exposed to public review without an opportunity to correct inaccuracies or omissions, it would undermine a productive and useful client/consultant relationship.

In its subsequent representations, the Town stated:

> [T]heir incomplete nature and inherent errors & omissions … may reflect unfavourably on the consultant… .

The consultant has asked that the portion of its representations dealing with anticipated harms be kept confidential, and I shall attempt to explain why these representations do not provide detailed

and convincing evidence to establish a reasonable expectation of harm without revealing the contents of those representations.

The representations of the consultant on harms are often unclear.

The harms addressed in section 10(1) consist of three different categories of impact set out under subsections (a), (b) and (c). However, the heading under which the consultant addresses these harms refers only to the third category of harm, undue loss or gain [section 10(1)(c)].

The heading indicates that the consultant is addressing "Question 1 on Test 3". This appears to be a reference to the first question asked in the Notice of Inquiry provided to the consultant under the heading "Part 3: harms". However, that question relates to prejudice to competitive position [section 10(1)(a)] rather than to undue loss or gain [section 10(1)(c)].

The consultant divides its representations on harm into items (i), (ii) and (iii).

Item (i) of the consultant's representations appears to address the possible impact of an error or omission in the *final* report on a particular benefit or service available to the consultant. However, there is no evidence of any error or omission in the final report, and, in any event, the subject of this appeal is the draft report.

The second last paragraph of item (i) is particularly unclear to me. It appears to assume facts not in evidence.

The appellant, who was not provided with the portion of the consultant's representations regarding harms, makes the following representations in regard to potential harms from disclosure:

> Could Disclosure Result in Undue Loss or Gain?
>
> The Town of Oakville offered no information on harms they expect would occur other than undermining the client/consultant relationship (which I addressed earlier).
>
> Any professional rendering services to the Town should expect their work to be reviewed by others - including the general public. If any harm were to arise it would likely be due to a negligent action by the professional. This is a risk applicable to all professionals and is accepted as a risk inherent in the provision of a professional service.
>
> Assuming [the consultant] conducted the study in accordance with professional engineering standards, there is no cause for concern about releasing a draft report. Differences between draft and final Reports should be easily explainable and supported by engineering principals (sic). It is reasonable to conclude that [the consultant] would not automatically suffer an undue loss from the release of the draft and therefore Section 10(1)(c) has no application.

> Releasing drafts is a normal practice of the Town. The practice may not be widely known, but it is reasonable to assume service providers know of the Town policy and accept it. If the policy were documented there would be little change in how professionals operate with the Town. Section 10(l)(b) has no application.
>
> The information contained in the [consultant's] study is public knowledge and accessible to anyone. Assuming the draft contains similar information as the final Report then [the consultant] willingly assumed any competitive risk associated with the release. Section 10(l)(a) therefore has no application.

Analysis and findings

Section 10(1)(a): prejudice to competitive position

As stated earlier, the harm with which this subsection is concerned is significant prejudice to the competitive position or significant interference with the contractual or other negotiations of a person, group of persons, or organization.

The Town makes the general statements that release of incomplete information or information containing errors and omissions can reflect unfavourably on a consultant and that release of drafts can undermine client/consultant relationships. However, the Town does not allege or provide any information that suggests that disclosure of the particular information at issue could reasonably be expected to have these effects.

In items (ii) and (iii), the consultant also makes representations that appear to relate to section 10(1)(a).

I find that there is no detailed or convincing evidence of harm in relation to the competitive position of the consultant or to negotiations between the consultant and anyone else. The Town does not allege any possible harm to negotiations between it and the consultant or anyone else. As indicated below, I believe there is a possibility that members of the public might refer to some of the information in the draft in their efforts to persuade the Town to take action on noise concerns. However, I would not characterize the process of petitioning government to provide services as "negotiation". Moreover, section 10 is intended to protect the interests of the person who supplied the information, in this case the consultant, and therefore the contemplated harm must be to negotiations involving the consultant and not to discussions of any kind between the Town and its residents.

Section 10(1)(b): similar information no longer supplied

As discussed earlier, the harm contemplated by section 10(1)(b) is that similar information will no longer be supplied to the Town where it is in the public interest that similar information continue to be so supplied.

Item (ii) of the consultant's representations appears to refer to section 10(1)(b). In their representations, neither the Town nor the consultant explicitly address whether it is in the public interest for the Town to continue to receive this particular type of information.

Nor does the Town address whether disclosure will result in similar information no longer being supplied by its consultants.

I infer from paragraph (i) of item 2 that the consultant has already decided not to include certain information that is found in the draft report in future draft reports for the Town, regardless of whether the draft report is disclosed. Therefore, I am not satisfied that disclosure will have any effect on whether such information continues to be supplied to the Town.

In my view, the disclosure will have no effect on whether consultants provide this type of information to the Town in future. If the Town wishes to continue to receive such information, the Town is free to provide for this in the terms of reference for future noise studies and in contracts with consultants. Nor is there any reason to believe consultants will refuse to bid on or enter into contracts where such information is sought.

Section 10(1)(c): undue loss or gain

As indicated earlier, the harm in this subsection is undue loss or gain to any person, group, committee or financial institution or agency.

Although the consultant alleges that disclosure would cause this form of harm to the Town, in item (iii) on page 6 of Part 2 of its representations, section 10 is intended to protect the supplier of information from harm, not the institution that receives it. In any event, the Town itself does not allege that such harm could reasonably be expected from disclosure of the draft report. Moreover, what the consultant refers to as "harm" in this section, I would characterize simply as the reasonable operation of the democratic process.

Conclusions regarding harm

The harms described by the Town are potential general impacts from disclosure of drafts containing errors or omissions. They do not address the impacts of the disclosure of the particular information at issue in this appeal. The harms described by the consultant are speculative and lack substance.

I want to comment specifically on two aspects of the contemplated harm.

The first aspect is the concern that the public, if permitted to see the information in the draft, will be confused and believe it is the final opinion of the consultant. In my view, the possibility of such a misunderstanding is minimal, for three reasons. First, the fact that the draft does not contain the seal or stamp of the Professional Engineer who prepared it indicates clearly that it is not to be relied upon as the professional opinion of the consultant. The Town, the consultant and the appellant all acknowledge this. Second, the copy of the record provided to this office has the

word "draft" written on the cover page, indicating clearly that it is not the final version. Third, the final version of the study is available for comparison.

The second aspect is the concern that may be summarized as harm to the consultant's reputation. I accept that it is possible for disclosure of a record to result in harm to the reputation of a person who supplied information in the record, and that this loss of reputation in turn can have the potential to result in a harm listed in section 10(1), such as undue gain to competitors. Whether disclosure of information could reasonably be expected to harm the supplier's reputation depends on factors such as the nature of the particular information and the nature of any errors or omissions. Having reviewed the draft report and the representations on this issue, I see nothing in this information or in the circumstances of this case that could reasonably be expected to result in this kind of harm. While I am not convinced the information in the draft report that is absent from the final report is in any way damaging to the consultant's reputation, I note that if it were, any damage to the consultant's reputation with the Town will already have resulted from the inclusion of the information in the draft report submitted to the Town, and would not be the result of disclosure of the information.

There is a possibility that some residents of the Town might use some of the information to attempt to persuade the Town to change or differently apply certain policies. As noted above, this is not a concern expressed by the Town. In any event, informed discussion and debate of public policy and availability or distribution of government services in a democratic country is not in itself a harm covered by section 10(1).

I find that the Town and the consultant have not provided detailed and convincing evidence that any of the harms in part 3 of the test could reasonably be expected as a result of disclosure of the information.

I find, therefore, that the information is not exempt under section 10(1).

SEARCH FOR RESPONSIVE RECORDS

Did the institution conduct a reasonable search for records?

As indicated earlier, the appellant believes that the Town has further information about the source of certain information communicated by a Town employee to a named company that it has not provided to him.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Town was asked by this office to provide a written summary of all steps taken in response to the request. In particular, the Town was asked to respond to the following in affidavit form:

1. Did the Town contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the Town did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the Town outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the Town inform the requester of this decision? Did the Town explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Analysis and findings

The Town provided an affidavit sworn by the Town employee who received the information in question and passed it on to the named company. The affidavit described his attempts to determine whether there are further records in the Town's custody or under its control. He stated, in part:

> I searched all relevant file records and forwarded the requested documents to the Town's Information and Privacy Coordinator, [a named individual].
>
> I could not recall who had orally communicated the existence of traffic speed data but later learned the identity of the person and forwarded the additional

> information to the Information & Privacy Coordinator, who supplied it to the applicant (sic).

In response, the appellant made the following submissions:

> [The consultant] stated they met with the Town of Oakville on January 21, 2004. The Town failed to produce notes from the meeting. It is reasonable to assume that notes were made at the meeting that were not produced. I consider this another indicator that the Town failed to conduct a reasonable search.

I asked the Town to reply to this portion of the appellants' representations, and received the following response:

> There are no notes of the meeting of January 21/04 in our files.
>
> [A named official's] recollection would be that the consultant [name omitted] took notes for their own use in order to finalize their noise study report. This was also at the time that the Region of Halton had assumed jurisdiction over Ford Drive (effective Jan 1/04) and they may have taken some notes for their own use and reference in taking over the noise wall concerns as a Regional Road matter. Otherwise, no minutes or notes were transcribed and circulated from this meeting. Our current file on the Ford Drive noise assessment issue was thoroughly compiled and organized with correspondence dating back to 2002 from three different Oakville staff members who have been involved since that time [names omitted] in an effort to address [the appellant's] FOI request in good faith.

I am satisfied by the Town's representations that it undertook a reasonable search for further records responsive to this aspect of the appellant's request.

ORDER:

1. I order the Town to disclose the draft report to the appellant by sending a copy by **May 6, 2005** but no earlier than **April 29, 2005**.

2. I find that the search for responsive records conducted by the Town is reasonable.

3. To verify compliance with this order, I reserve the right to require the Town to provide to me a copy of the record disclosed to the requester.

Original signed by: April 1, 2005
John Swaigen
Adjudicator