



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1957**

**Appeal MA-050089-1**

**The Township of Tay**



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## NATURE OF THE APPEAL:

The Township of Tay (the Township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to documentation relating to two named companies involved in the operation of an identified marina. Specifically, the requester sought access to the following:

1. Proof of insurance for the years 1984 to date, as specified in the Lease Agreement between the Municipality and [a named company] regarding [the identified marina].
2. All records retained by the Municipality in the building permit file for [the two named companies] from May 10, 1984 to date including structures/buildings located on the leasehold lands.

After notifying the affected party that owns the two named companies (the third party), and considering its oral representations, the Township issued a decision letter to the requester. It advised the requester that the request was denied as it was frivolous pursuant to section 4(1)(b) of the *Act*. With respect to the request for proof of insurance, the Township stated that these records do not exist.

The requester (now the appellant) appealed the Township's decision.

During the mediation process a number of events occurred.

The Township located a number of responsive records and provided the appellant with an index of them. The Township identified that the records at issue relate to six (6) different building permits, and stated that:

- the records relating to four (4) of the building permits pertain to the construction of four similar structures (covered boat slips);
- the records for one of the building permits relate to identified renovations;
- the records for the other building permit relate to the construction of a temporary structure.

The Township also identified that it was no longer denying access to the records under section 4(1)(b) of the *Act*. Rather, in a supplementary decision letter, the Township advised both the appellant and the third party that access to the records was denied based on sections 10(1)(a) and 10(1)(c) of the *Act* (third party information).

The appellant was satisfied with the explanation provided to her regarding the search for records relating to the proof of insurance, and the question of whether the search for these records was reasonable is no longer an issue in this appeal.

However, the appellant continued to appeal the denial of access to the identified building permit records. In addition, the appellant asked why the records responsive to the request only date

back to 1999, when the request was for records from 1984. The Township responded by identifying that records prior to 1999 do not exist, since its Records Retention Schedule provides a retention period of seven (7) years for records contained in building permit files. The Township provided the appellant and this office with a copy of the Records Retention Schedule (By-Law No. 97-56).

The appellant took the position that further records dating from 1984 to 1999, such as final inspection reports of the buildings, ought to exist. Accordingly, the question of whether the Township's search for responsive records was reasonable remains an issue in this appeal.

Further mediation did not resolve the remaining issues, and this appeal was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Township and the third party, initially, and received representations from them. I then sent a Notice of Inquiry, along with a copy of the representations received from the Township and the third party, to the appellant. The appellant provided representations in response.

## **RECORDS:**

The records remaining at issue are the building permit files for six identified building permits retained by the Township in the building permit file for the two (2) named companies. They consist of various documents which include correspondence, applications, work permits, inspection reports, inter-office memos, e-mails and plans, and are described in greater detail in the six (6) indices of records prepared by the Township and provided to the parties.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

As a preliminary matter, the third party identifies in its representations that it has no concerns regarding the release of the building permit records relating to the identified renovations, nor to those relating to the construction of a temporary structure. The Township's representations do not directly address the application of section 10(1)(a) and (c) to these records and, in the absence of representations supporting the application of section 10 to those records, I will order that the records in those two building permit files be disclosed to the appellant.

The Township and the third party claim that the records relating to the construction of the four identified structures are exempt under section 10(1)(a) and/or (c) of the *Act*. Those sections read:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, 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;

- (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 "informational assets" of businesses or other organizations that provide information to the government (Order PO-1805).

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 information which, while held by government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

For a record to qualify for exemption under sections 10(1)(a) or (c) the Township and/or the third party must satisfy each part of the following three-part test:

the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a) or (c) of section 10(1) will occur. (Orders 36, P-373, M-29 and M-37).

### **Part one: type of information**

The third party takes the position that the construction designs and drawings contained in the records that relates to the construction of the four structures is "technical information" for the purpose of the first part of the three-part test.

Technical information has been defined in previous orders as follows:

*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].

I adopt this definition for the purpose of this appeal.

On my review of the records, I am satisfied that those portions of the records that contain detailed drawings and plans relating to the construction of the four structures contain “technical information” for the purpose of the *Act*. These drawings, which are identified in each of the building permit files as “structural plans”, contain details of the construction design of the structures, and include specific information such as load conditions and related engineering matters. The third party identifies that they were prepared with the assistance of draftsmen and engineers, and describe the construction of a structure (See Order MO-1823). Accordingly, I am satisfied that the records identified as “structural plans” (Record 12 in permit file ending with the number “36”, Record 17 in permit file ending with number “37”, and Record 13 in permit files ending in numbers “38” and “47”) contain information that qualifies as “technical information” for the purpose of the *Act*.

In addition, portions of the correspondence contained in two of the building permit files refer in detail to the structural plans or the specifics of the materials referenced in the structural plans, including information such as load-bearing capacities and design details. Specifically, Record 3 and the two duplicate copies of a record described as “Attachment 2” in Records 7 and 11 of the building permit file ending with the number “37, and Records 1, 7, 9, 10, 11 and pages 3, 4 and 5 of Record 8 in the building permit file ending with the number “47” also contain “technical information” for the purpose of section 10 of the *Act*.

There are numerous other documents contained in the building permit files. These include correspondence, applications, work permits, inspection reports, inter-office memos and e-mails. Many of these records contain the details relating to the process of applying for and obtaining the building permits. On my review of these records, I find that many do not contain the type of information set out in section 10 of the *Act*. A few of them contain information that may be considered “commercial” information for the purpose of section 10 of the *Act*; however, in view of my findings under part three of the section 10 test set out below, it is not necessary for me to identify in detail which portions of the remaining records contain any of the other categories of information referred to in section 10 of the *Act*.

In summary, I find that those portions of the records that contain detailed drawings and plans relating to the construction of the structures, and correspondence that identifies details about the construction of those structures, constitutes “technical information” and meets Part 1 of the test for exemption under section 10(1).

## **Part 2: supplied in confidence**

With respect to the records that I have found contain or reveal “technical information” as described in section 10(1), I must also consider whether this information was supplied in confidence to the Township, either implicitly or explicitly. Concerning the remaining information, in view of my findings under part three of the section 10 test set out below, it is not necessary for me to determine whether this information was supplied in confidence to the Township.

The third party states that “the information in question was supplied in confidence and with a reasonable expectation of the same”. In the affidavit sworn by the director of the third party in support of this position, the director states:

... this technical information was supplied to the [Township] in confidence, as I did not hold a realistic expectation that the [Township] would be distributing it to third parties.

The affidavit also states:

I have taken every step available to me that I am aware of to try and maintain the confidentiality of this information.

In the other affidavit provided by the third party in support of its position, and sworn by the professional engineer who was involved in obtaining the building permit, the affiant states:

The information supplied to me by [the third party] was supplied to me in confidence ... and was forwarded by me/[the third party] to the [Township] with the expectation that it was supplied strictly for the purposes of allowing or not allowing a building permit to be issued and not for disclosure to any other party.

The representations of the Township state that persons who apply for a building permit are under the impression that it is implied that all documents relating to the permit will be kept confidential. The Township identifies that, in certain instances, documents provided in the course of applying for a building permit could contain detailed confidential information such as building ingress points, alarm locations and other information which may be used for improper purposes by other persons. The Township also states that, with respect to the specific records at issue:

... the [third party] had mentioned ... that he expected the records would be kept confidential and made specific reference to his concerns with respect to the [identified structures].

The appellant disputes the position that the records contained in the building permit files were supplied by the third party “in confidence”. She states that during the processing of this file she was advised by the Township that no documentation submitted by the third party was identified as “confidential”.

On my review of the records, I note that one of the sets of drawings contained in the records includes a cover page which identifies the drawings and states:

These drawings and the data contained therein, are the exclusive property of [the third party] issued in strict confidence and shall not be reproduced, copied or used for any purpose whatsoever, without written permission of [the third party].

### *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 detailed drawings and plans relating to the construction of the identified structures, as well as correspondence which refers in detail to the structural plans or specifics of the materials required for the structural plans, were supplied to the Township by the third party or its representative, or would reveal or permit the drawing of accurate inferences with respect to information supplied by the third party. As evidenced by the affidavits provided by the third party, the information relating to these structures was provided to the Township for the purpose of applying for a building permit for the construction of the structures. I am satisfied that the detailed drawings and plans remaining at issue, as well as the portions of the records which I have found contain technical information, were “supplied” to the Township for the purpose of section 10(1) of the *Act*.

### *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]

After considering the circumstances, and in particular the affidavit evidence provided by the third party and the third party’s engineer, I am satisfied that the third party had a reasonable expectation of confidentiality when it submitted the detailed drawings and plans, and correspondence relating to the construction of the structures, to the Township. I find further support for this position in the following statement made by Adjudicator Liang in Order MO-1823 where she stated:

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 summary, the detailed drawings and plans relating to the construction of the structures, and the correspondence containing similar details, meet Part 2 of the test for exemption under section 10(1). I will now consider whether disclosure of this information could reasonably be expected to result in one or more of the harms specified in sections 10(1)(a) or (c).

### **Part 3: harms**

#### ***General principles***

To meet this part of the test, the institution and/or the third 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.)].

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

The Township and the third party claim that the records relating to the construction of the four identified structures are exempt under section 10(1)(a) of the *Act*. This section reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

The third party submits that, over a period of years and with the assistance of draftsmen and engineers, it designed the structures identified in the four building permits. In the affidavit prepared by the director of the third party, the director states that the design of these structures is, to the best of the affiant’s knowledge and belief, unique in the Province of Ontario. The affiant states that the information is clearly used for the benefit of the third party’s business, has economic value to the third party, and that the third party is “in the process of having it reviewed by counsel for the purposes of patent/trademark”. The third party then states that revealing this information would significantly prejudice its competitive position and interfere significantly with any present or future negotiations, and that the value of the third party’s assets would be affected by disclosing the information.



The affidavit provided by the engineer for the third party supports the position taken by the third party. It identifies the uniqueness of the information relating to the structures, and the economic value of that information.

The Township supports the third party's position that the disclosure of this information would prejudice the competitive position of the third party.

The appellant disputes the third party's position that the disclosure of the records will result in the identified harm. She states that the third party's claim that it is in the process of having it reviewed by counsel for the purpose of patent/trademark is "not realistic" since the structures have been in use for a number of years. She also identifies that the structures are open to the public. In addition, she provides numerous attachments to her representations which relate to similar structures. She states that details regarding product specifications and weight loads for these similar structures are readily available, and that therefore the information in the building permits regarding the third party's structures should also be available. In addition, the appellant refers to the third party's own promotional material, which identifies some of the benefits of the structures, as evidence in support of her position that the information relating to these structures is not confidential, and that its disclosure would not result in the identified harm to the third party.

### ***Findings***

I have carefully reviewed the material provided by the parties as well as the records at issue in this appeal. I find that the third party has provided sufficient evidence to satisfy me that the disclosure of the records containing detailed drawings and plans relating to the construction of the structures, and the disclosure of correspondence that identifies details about the construction of those structures, could reasonably be expected to prejudice significantly its competitive position.

I make this finding based primarily on the affidavit evidence provided by the third party which specifies the nature of the information contained in these records and identifies the prejudice to its competitive position that could result from the disclosure, and on the basis of the details contained in the drawings, plans and correspondence at issue themselves. Although I understand the appellant's scepticism regarding the harms that may result from disclosure, particularly in light of the fact that these structures are accessible by the public, I find that the third party has provided sufficient evidence to satisfy me that the disclosure of the detailed, technical information in the records could reasonably be expected to result in the identified harms.

However, I am not satisfied that the remaining information contained in the records could reasonably be expected to result in the harms identified in either section 10(1)(a) or (c). As identified above, the remaining records contained in the building permit files consist of correspondence, applications, work permits, inspection reports, inter-office memos and e-mails. Many of these records contain the details of the timing and process of applying for the building permits, the disclosure of which, on their face, could not reasonably be expected to result in the identified harms. Furthermore, the representations of both the third party and the Township focus predominantly on the harms which will result in the disclosure of the detailed plans,

drawings and specifications. I find that there is very little evidence to support a finding that the disclosure of the remaining records could reasonably be expected to result in the identified harms, and I am not satisfied that their disclosure would result in those harms. Accordingly, I conclude that the disclosure of the remaining information contained in the building permit files could not reasonably be expected to result in the harms set out in Part 3 of the test for exemption under section 10(1).

As all three parts of the test must be met in order for information to qualify for exemption under section 10(1), I find that the remaining information contained in the files is not exempt under section 10 (1)(a) and/or (c), and I will order that it be disclosed to the appellant.

## **REASONABLE SEARCH**

### **Introduction**

In appeals involving a claim that additional responsive records exist, as is the case in this appeal, the issue to be decided is whether the Township has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the decision of the Township will be upheld. If I am not satisfied, further searches may be ordered.

A number of previous orders have identified the requirements in reasonable search appeals (see, for example, Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920). In Order PO-1744, acting-Adjudicator Muntaz Jiwan made the following statements with respect to the requirements of reasonable search appeals:

... the *Act* does not require the [institution] to prove with absolute certainty that records do not exist. The [institution] must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

I agree with acting-Adjudicator Jiwan's statements.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist.

## **Representations**

The Township provided detailed representations in support of its position that the search it conducted for responsive records was reasonable. After identifying that the scope of the request was defined by the requester in the request, the Township's representations, which were prepared by its Chief Administrative Officer and Clerk, state:

The search process was arranged and overseen by myself. The process included my Secretary, and the Deputy Clerk locating the related building permit files including checking contents of other building permit files in front of, and behind the subject files to ensure no misfiling of relevant documentation had occurred. In addition, my Secretary and the Deputy Clerk searched the related property file to determine if any building file documents may have been inadvertently filed in that system. In addition, three property files on each side of the subject property file were searched to ensure no records from the subject files were missing. My Secretary also conducted an electronic search for files in the Township records management software program.

It should be noted ... that the search was somewhat more involved than normal, due to the fact the property is located in an area that amalgamated with the Township in 1994 ...

Due to the fact that the amalgamation was relatively recent and the fact that the time frame indicated in the request went back to 1984, it was necessary for us to search off-site records to confirm all relevant records ... were accounted for.

The Chief Administrative Officer and Clerk then states that, due to his previous work with the predecessor municipalities, he personally carried out the off-site records search. He states that he was unable to locate any additional related records.

The Township's representations go on to identify that the only known former employee of the amalgamated municipality was contacted and asked about the record-keeping methods that the former municipality used for building permits and related records. The Chief Administrative Officer and Clerk then states:

After this conversation, I was satisfied that there were no records missing which were still in existence.

Furthermore, the Chief Administrative Officer and Clerk states:

It is entirely possible that with respect to the former [municipality's] records that related records may have existed which no longer exist.

In support of the Township's position the Township also provides an affidavit, sworn by the Chief Administrative Officer and Clerk, which details the specific searches carried out in response to the request.

The Township's representations and supporting affidavit were shared with the appellant. The appellant identifies the extent of the development of the identified property, and questions why only the identified responsive records exist. The appellant also references the Township's Records Retention Schedule (By-Law No. 97-56), and suggests that the requirement to retain building permit records for 7 years only relates to residential permits, not to the building permits at issue in this appeal.

### **Findings**

As indicated above, in appeals involving a claim that additional responsive records exist, as is the case in this appeal, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

In the circumstances of this appeal, I am satisfied that the searches conducted by the Township for records responsive to the request were reasonable. I make this finding primarily on the basis of the detailed representations provided by the Township on the nature of the searches conducted, the complexities of the searches in this case due to the amalgamation of former municipalities, and the affidavit evidence provided by the Chief Administrative Officer and Clerk.

Although the appellant questions why additional building permit records do not exist, and suggests that such records ought to exist, the appellant does not question the nature of the searches or the results of the searches carried out by the Township.

In the circumstances, I am satisfied that the search conducted by the Township for records responsive to the request was reasonable.

### **ORDER:**

1. I uphold the Township's decision that records containing detailed drawings and plans relating to the construction of the structures, and correspondence that identifies details about the construction of those structures, qualify for exemption under section 10(1)(a) of the *Act*. These are:
  - the records identified as "structural plans" in each of the building permit files (Record 12 in permit file ending with the number "36", Record 17 in permit file ending with number "37", and Record 13 in permit files ending in numbers "38" and "47"), and

- the portions of the records contained in two of the building permit files which I have found contain "technical information" (Record 3 and the two duplicate copies of a record described as "Attachment 2" in Records 7 and 11 of the building permit file ending with the number "37, and Records 1, 7, 9, 10, 11 and pages 3, 4 and 5 of Record 8 in the building permit file ending with the number "47").
- 2. I order the Township to disclose the remaining records at issue to the appellant by sending the appellant a copy by **October 5, 2005** but not before **September 30, 2005**.
- 3. I find that the search conducted by the Township for responsive records was reasonable in the circumstances of this appeal.
- 4. In order to verify compliance with the terms of provision 2, I reserve the right to require the Township to provide me with a copy of the material which it discloses to the appellant.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ August 30, 2005