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

ORDER MO-1974

Appeal MA-040158-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records pertaining to environmental compliance issues and environmental assessments for an identified property.

The City located records responsive to the request and notified two affected parties that they might have an interest in the disclosure of the records at issue. One of the affected parties, the company proposing to develop the property, responded to the notice and took the position that the information in which it had an interest should not be disclosed. The other affected party, a firm of consulting engineers and environmental scientists that prepared some of the responsive records for the development company, did not respond to the notice.

The City subsequently issued a decision letter to the requester and the affected parties advising that it had decided to grant access to the records with personal information severed. In the decision letter, the City also advised the parties that the affected parties had thirty days from the date of the decision to appeal the disclosure of the records.

Through their lawyer, the affected party that responded to the City's notification letter objecting to the disclosure of the information (now the appellant) filed an appeal of the decision. The records have not been released pending the outcome of this appeal.

At issue in this appeal is whether the records are exempt from disclosure by virtue of the provisions of section 10(1) (third party information) of the *Act*.

Mediation efforts did not resolve the appeal, which moved on to the adjudication stage of the process.

As the appellant is the party resisting disclosure of the records and bears the onus of proving that the exemption in section 10(1) applies, a Notice of Inquiry setting out the facts and issues on appeal was sent to the appellant, initially. At that time, a Notice of Inquiry was also sent to the firm of consulting engineers and environmental scientists (the consultant company), which authored some of the records at issue. In response to the Notice of Inquiry, representations were received from both the appellant and the consultant company, which were then provided, in their entirety, along with a copy of the Notice of Inquiry, to the City and the original requester. The City provided representations in response, while the original requester chose not to do so.

RECORDS:

The records at issue include three reports on various environmental assessments of the specified property, authored by the consultant company. Also at issue are various forms, notices, memoranda and correspondence relating to the proposed development of the property. The City has identified the records by page number and the pages that remain at issue are pages 100 through 355. The pages can be grouped as follows:

- Record 1: Environmental Site Assessment Report - April 4, 2000 (pages 100 to 193).

- Record 2: Environmental Site Assessment Report - August 31, 2000 (pages 194 to 286).

- Record 3: Clean-up and Restoration Report - September, 2000 (pages 267 to 307).

- Record 4: Miscellaneous forms, notices, memoranda and correspondence relating to the development of the specified property (pages 308 to 355).

DISCUSSION:

THIRD PARTY INFORMATION

The appellant takes the position that the exemption in section 10(1) of the *Act* applies to the records at issue.

Section 10(1): the exemption

Section 10(1) is a mandatory exemption that applies to exempt third party information from disclosure. Section 10(1) reads:

> 10(1) 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; 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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 parties resisting disclosure, in this case the appellant and the consultant company, 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 Board in confidence, either implicitly or explicitly; and,

3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harm specified in paragraph (a) of section 10(1) will occur.

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 discussed the application of the three-part test:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB [Workers Compensation Board]. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

Representations, analysis and findings

City's representations

Addressing the application of section 10(1) to the records at issue in this appeal in a general manner, the City provided brief representations submitting that the mandatory three-part test required for the application section 10(1) of the *Act* has not been met and the records should be disclosed.

The City also submits:

> [T]he type of information in the records, and the circumstances in which the records were supplied to the City, are comparable to the type of information and circumstances outlined in Order MO-1503. In that Order, the Commissioner upheld the City's decision to disclose the record. The City has applied the Commissioner's reasoning in Order MO-1503, with regard to its decision on the records under Appeal MA-040158-1.

Order MO-1503 dealt with a request for access to environmental studies undertaken with regard to a property development in the City. In the circumstances of that appeal, the City decided to disclose the records to the requester, in their entirety, and the affected party appealed the City's decision on the basis that the information contained in the records was exempt from disclosure under section 10(1) of the *Act*. Adjudicator Donald Hale upheld the City's decision and ordered the records disclosed.

Part one of the section 10(1) test: type of information

Addressing the type of information contained in the records, the appellant submits:

> The three reports of [named consultant company] are clearly "technical information" within the meaning of section 10(1).

In its representations, the consultant company provides greater detail on the type of information contained in the records. Specifically, the consultant company states that "the reports describe an approach to quickly and very economically remediate volatile organic compound (VOC) contamination in soil and ground water" and goes to describe in further detail the approach taken to accomplish that task.

The types of information that meet part 1 of the section 10(1) test have been discussed in prior orders. Significant to this appeal is the definition of "technical information" established by former Assistant Commissioner Irwin Glasberg in order P-454:

> Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering

> or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 10(1)(a) of the *Act*.

I adopt this definition for the purposes of the present appeal.

In Order MO-1503, referred to above, Adjudicator Hale also adopted former Assistant Commissioner Glasberg's definition of technical information and found that the information contained in three environmental site assessments qualified as technical information as it related to an evaluation of various fill materials and soil samples taken from the subject properties and an examination of them with a view to determining whether they met existing Ministry of the Environment guidelines. In the current appeal, some of the records at issue are similar to those at issue in MO-1503.

Based on my review of the contents of the records, I find that while some of them contain "technical information" within the meaning of section 10(1), others do not.

In my view, Records 1 and 2, the two environmental site assessment reports, and Record 3, the clean-up and restoration report, qualify as technical information. These records are reports that relate to an organized field of knowledge, that of environmental science, and have been prepared by professionals in the field, a firm of consulting engineers and environmental scientists. Each of these three reports, are a result of a technical evaluations of the subject property undertaken by that firm of consulting engineers who are experts in the field of environmental testing and analysis, and include such details as:

- a project description
- a review of the site history
- results from a site reconnaissance
- information about subsurface soil and ground water samples taken from the subject properties that were tested
- results of the subsequent chemical analyses performed on the samples to determine whether they comply with existing environmental standards and guidelines.

Accordingly, I find that Records 1, 2 and 3, the reports prepared by the consultant company, qualify as technical information for the purposes of section 10(1) of the *Act*. Part one of the section 10(1) test has, therefore, been satisfied for Records 1, 2, and 3.

Record 4, pages 308 to 355, consists of documentation and correspondence received or sent by the City relating to the development of the subject property. The documents contained in this record include site plan approval forms and supporting documentation, completed applications for the development of the property, zoning notices and decisions with respect to requests for zoning variances, cover memorandum referencing landscape plans, reports on the review of the application by development review staff from the Healthy Environments, Environmental Health Services department, and demolition permit applications including information related to the demolition and excavation dust control plan. Although the appellant and the consultant company oppose the disclosure of this information under section 10(1), in their representations both parties refer only to the reports prepared by the consultant company, neither party makes specific claims with respect to the disclosure of the information contained in pages 308 to 355 or provides any explanation as to how this information might qualify as technical information or any of the other types of information required by part one of the section 10(1) test.

Having reviewed the information contained in Record 4, I find that it does not qualify as technical information as contemplated by section 10(1). The information is administrative in nature and consists of records and documents required to be completed for the development of the specific property to take place. In my view, this information can not be described as information belonging to an organized field of knowledge that was prepared by a professional in the field and does not describe the construction, operation, or maintenance of a structure, process, equipment or thing as required to meet the definition of technical information.

I also find that Record 4 does not contain information that would fall within the other categories of information referred to in section 10(1). The first part of the section 10(1) test has therefore not been met for Record 4, which is made up of miscellaneous documents.

Accordingly, since the information contained in Record 4 fails to meet the first part of the section 10(1) test and as all three parts of the test must be met in order for the exemption to apply, those pages are not exempt and Record 4 should be disclosed to the appellant.

As Records 1, 2, and 3 qualify as technical information and thereby meet the first part of the section 10(1) test, I will now consider whether those records were supplied to the City in confidence.

Part two of the section 10(1) test: 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].

Although neither the appellant nor the consultant company comments in their representations as to whether the information was supplied to the City, based of my review of the record, it is clear that the records were provided to the City by the appellant and were prepared by the consultant company. Therefore, they can be described as having been "supplied" directly to the City to assist in the evaluation of whether the specified property was suitable for a residential building project.

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 of 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 appellant submits:

> The [named consultant company] Reports were provided to the City in strict confidence. They were to be used by the City's Public Health Department to evaluate the suitability of the site for residential purposes and were intended for the use of the City only. I would submit that they were explicitly given to the City in confidence and therefore the second part of the test in Section 10(1) has been met.

The consultant company submits:

> Our client understood that these reports remained our property, and that information they contained could not be copied further or divulged to any other party without our written consent.
>
> …

> As for disclosure that was made to the City of Toronto and Toronto Public Health, this was done with the implicit expectation that it was being done only to support an application for a building permit and was not to be used in any other manner, to be copied further, or to be distributed to any other party. This implicit expectation was based on the explicit limitation set out to our client who submitted the reports to the City of Toronto and Toronto Public health.

Addressing the application of the second part of the section 10(1) three-part test, the City provides no specific explanation but submits generally that "the second part of the test, i.e. whether the information was supplied to the City in confidence, has not been met."

As explained by the consultant company in their representations, the environmental assessment reports were filed with the City for the purpose of supporting an application for a building permit. Based on the submissions of the consultant company, the appellant, and on the contents of the records themselves, I am satisfied that the parties had a reasonably held expectation that the records would be held in confidence.

On my review of Records 1, 2, and 3, I noted that most pages in those reports contain the statement "Privileged and Confidential" in bold at the top of the page. Although I do not accept that such a confidentiality statement on the records, in and of itself, conclusively demonstrates a reasonably held expectation of confidentiality, it nevertheless provides some support for finding such an expectation and at minimum, demonstrates that the consulting company had expressed a concern about unauthorized use. The use of this expression is also consistent with a reasonably held implicit expectation of confidentiality by the appellant and the consultant company at the time the records were submitted to the City. In my view, it is reasonable to conclude that parties who submit documents required to support an application for a building permit do so with the implicit expectation that the documents will not be disclosed for purposes unrelated to the application and will be treated confidentially (see Orders: MO-1225 and MO-1823). Accordingly, I find that the appellant and the consultant company had a reasonably held expectation of confidentiality when they submitted Records 1 and 2, the environmental assessment reports, and Record 3, the clean-up and restoration report, to the City and therefore, that the second part of the section 10(1) test has been met.

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 three of the section 10(1) test: harms

To meet the burden of proof under the third part of the test, the appellant and the consultant company, the parties resisting disclosure, must present evidence that is "detailed and convincing", and must describe a set of facts and circumstances that could lead to a "reasonable expectation" that one or more of the harms described in section 10(1) would occur if the information was disclosed. 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].

With respect to the third part of the test, the appellant submits:

> [R]elease of these documents, if misconstrued and taken out of the context, could have a significant negative financial impact on my client in its relationship with its mortgagees and tenants. I submit that the third test is clearly met.

At the outset of their representations, the consultant company submits generally that the harms outlined in sections 10(1)(a) (prejudice to competitive position) and 10(1)(c) (undue loss or gain) might occur were the information is disclosed. They submit:

> We are of the opinion that the information in these reports is exempt under section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following reasons:
>
> - It will prejudice the competitive position of [named consultant company]; and
>
> - Result in undue loss of revenue to our firm in the future.

As previously mentioned, the consultant company's representations specifically state that the "the reports describe an approach to quickly and very economically remediate volatile organic compound (VOC) contamination in soil and ground water" and goes to describe in further detail what they were retained to do and the approach taken to accomplish that task. The consultant company describes the approach as one which, at the time, was not commonly put into practice in the industry.

Further in its representations the consultant company provides more detail to support their claims that the harms contemplated in sections 10(1)(a) and (c) might reasonably be expected to occur were the information disclosed:

> [W]e would submit that the information pertaining to the [specific approach or process to remediate VOC] is useful in the work of any environmental engineering consultant but is not generally known throughout this industry. Consequently, the information has great economic value, and as such we contend that our efforts in this regard to maintain its secrecy are reasonable.
>
> We believe deeply that the disclosure of the information pertaining to the [specific approach or process to remediate VOC] employed at the subject property to our competitors will be exploited by our competitors and diminish [named consultant

> company's] competitive viability. This is especially true of consulting firms that have much greater resources than does [named consultant company].

The consultant company further submits as follows:

> The requisite data and supporting information was made available by [named consultant company] to a restoration contractor retained to perform the clean up and a C of A was obtained by the MOE [Ministry of the Environment].
>
> The information pertaining to [the specific approach or process to remediate VOC was provided to individuals] retained by financial institutions that were offering mortgages to the developer in order to allay their concerns regarding the viability of the process. A condition of this disclosure was that the information not be divulged otherwise. Nevertheless, it was understood that these firms would now be able to employ this process on their projects if similar contaminants were present.
>
> …
>
> At the subject property, an approach was designed that produced no waste, required virtually no excavation work, and permitted construction to proceed while the remediation of the VOCs in the soil and groundwater continued.
>
> It was not necessary for us to divulge the details of the installed system to the peer review firms, and therefore we have retained this information as proprietary. However, it was described in detail in the reports that were submitted to our client.

Addressing the third part of the section 10(1) test, the appellant's lawyer submits:

> With respect to the third test of section 10(1), I would submit that the release of these documents, if misconstrued and taken out of the context, could have significant negative financial impact on my client (the consultant company) in its relationship with its mortgagees and tenants. I submit that the third test is clearly met.

I am not convinced that the disclosure of the information contained in Records 1 and 2, the two environmental assessment reports, and Record 3, the clean-up and restoration report can reasonably be expected to prejudice significantly the competitive position of the consultant company or the appellant as contemplated by section 10(1)(a), to result in undue loss of revenue to the consultant company or the appellant as contemplated by section 10(1)(c), or to lead to any of the other harms specified in section 10(1).

Apart from the brief submissions referred to above, I have received no more detailed representations in this appeal. As I will explain in greater detail below, to the extent that a

general concern has been expressed about the disclosure of the records by the consultant company and the appellant, in the circumstances of this appeal, the appellant's and consultant company's explanation of their concerns does not constitute the detailed and convincing evidence required to substantiate an allegation of harm under section 10(1).

With respect to the appellant's representations, I have not received sufficient evidence or explanation to demonstrate how the documents, "if misconstrued and taken out of the context, could have significant negative financial impact on [the appellant] in its relationship with its mortgagees and tenants." From my review of the records and representations, it is not clear to me that disclosure of the information could reasonably be expected to result in this or any of the other types of harms listed in section 10(1).

In its representations, the consultant company explains that Records 1, 2, and 3 describe what it submits to be a unique and novel approach or process by which to remediate possible contamination issues of the specified property. The consultant company fears that disclosure of the information related to the process to remediate volatile organic compounds is sufficiently novel that it would be exploited by its competitors and ultimately diminish the consultant company's competitive viability.

While, on their face, the arguments presented by the consultant company may appear to have some merit, I have reviewed the three reports and none of them describe the specific process about which the consultant company is concerned at all, let alone in any detail.

It is clear from the consultant company's representations that their concerns and arguments are focussed on this specific process. The representations do not address how the disclosure of any other information contained in Records 1, 2, or 3 could reasonably be expected to result in any of the harms listed in 10(1). In the absence of detailed and convincing evidence from the consultant company or the appellant, and after a careful review of the records, I have concluded that there is nothing that would substantiate any of the harms listed in section 10(1). Accordingly, I find that the third part of the section 10(1) test has not been met for Records 1, 2, and 3.

In reaching this conclusion, I do not dismiss the prospect that disclosure of a process such as the one described by the consultant company in their representations might have an effect on the competitive position of the company to whom it belongs within the meaning of section 10(1)(a) or perhaps even an undue loss as contemplated by section 10(1)(c). Given the contents of Records 1, 2, and 3, however, I have concluded that this potential harm is not relevant in this appeal.

In summary, I have found that Record 4 does not meet part 1 of the test under section 10(1), and although Records 1, 2, and 3 meet the first two parts of the test, they do not meet part 3. As all three parts of the section 10(1) test must be met in order for the exemption to apply, I find that the records at issue are not exempt under section 10(1) and should be disclosed.

PERSONAL INFORMATION

As previously mentioned, in its decision letter, the City advised the requester and the affected parties that it had decided to grant access to the records with personal information severed. The original requester did not appeal the denial of personal information. As the current appeal is an appeal initiated by a third party, the sole issue before me is the potential application of the third party exemption in section 10(1). Accordingly I have not addressed the issue of personal information in the present order.

It should be noted that it has been well established in previous orders of this office that 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]. On my review of the records it is not clear as to which portions of the records at issue might contain personal information and might be subject to severance by the City.

Nevertheless, as the issue of personal information was not before me in this appeal and the parties have not had the opportunity to made submissions on whether the records contain personal information, I make no finding on the issue and will reserve to the original requester the right to appeal to this office, the denial of access to any personal information severed by the City, within 30 days of receiving access to the records.

ORDER:

1. I uphold the City's decision to disclose the records to the original requester, with personal information severed, and order it to do so by **November 7, 2005** but not before **October 31, 2005.**

2. I reserve to the original requester the right to appeal from the denial of access to the personal information within 30 days of receiving access to the records.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the record which is disclosed to the original requester pursuant to Provision 1.

Original Signed by: September 30, 2005
Catherine Corban
Adjudicator