



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2106

Appeal MA-050337-1

Municipality of Marmora and Lake



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Municipality of Marmora and Lake (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for a copy of the “lease between [the Municipality] and [named company] covering the property off [an identified location] intended to be used as a truck stop.”

The Municipality issued a decision stating:

The lease and offer to purchase agreement was prepared by our solicitor in conjunction with the solicitor for [the named company] and is not available at this time for the following reasons: it contains third party information (section 10(1)), economic and other interests (section 11), solicitor-client privilege (section 12) and is soon to be published (section 15(b)).

The Municipality also informed the requester that municipal council would be considering the passing of a by-law at an upcoming meeting, which would “contain all the information you require and will be public information...” However, although municipal council did subsequently pass a by-law related to the transaction, the by-law did not contain the specific leasing information sought by him. Consequently, the requester, now the appellant, appealed the Municipality’s decision to this office.

During the mediation stage of the appeal process, the appellant conveyed to the mediator his belief that more records exist. Accordingly, the issue of reasonable search was included in the appeal. The Municipality also advised the mediator that it was no longer relying on the exemption in section 15(b) for soon-to-be-published information, but on section 15(a) instead, which may apply to information already published or otherwise currently available to the public. No further mediation was possible, and the file was moved to the adjudication stage.

Initially, I sent a Notice of Inquiry to the Municipality and to the named company as an organization whose interests may be affected by the outcome of this appeal (the affected party), outlining the tests considered by this office in making determinations on the application of the various exemptions claimed by the Municipality, some of which are discretionary in nature.

The Municipality subsequently informed this office that it would not be submitting representations in response to the Notice of Inquiry. The affected party did not respond to the Notice of Inquiry mailed to it, or to several attempts by staff from this office to make contact by telephone.

Next, I sent a modified Notice of Inquiry to the appellant, in which I sought representations on the reasonable search issue and the application of the mandatory third party information exemption at section 10(1) only. The appellant also advised this office in writing that he would not be providing representations.

I am writing this order without the benefit of representations from any of the parties to the appeal. Accordingly, I will dispose of the issues based on my review of the contents of the record at issue and information made available to me by the parties from earlier in the appeal process.

RECORD:

The record at issue is a three-page document titled, "Discussion Proposal for Future Agreement". Two different versions were provided to this office during the appeal. The first copy provided was not signed by the parties. This order deals with the most recent version provided, which is the version executed by the Municipality and the affected party on May 6, 2005.

DISCUSSION:

REASONABLE SEARCH

In the Notice of Inquiry sent to both the Municipality and the appellant in this appeal, I outlined the factors which are relevant to the determination of a requester's claim that additional records exist beyond those identified by an institution. Section 17 of the *Act* places certain obligations upon the requester in advancing, and the institution in responding to, an access request; the issue to be decided by an adjudicator is whether the institution has conducted a reasonable search for records as required by that section of the *Act* [Orders P-85, P-221, PO-1954-I].

The standard to which the institution is held on appeal is not one of absolute certainty. In other words, the Municipality need not prove with absolute certainty that further records do not exist; however, it must proffer sufficient evidence to demonstrate that it made reasonable efforts to identify and locate responsive records [Order P-624]. Similarly, this office has acknowledged that requesters will rarely be in a position to indicate precisely which records the institution has not identified, but expects a requester to provide a reasonable basis for concluding that such records exist.

The appellant contended during the mediation stage of this appeal that additional records existed which were responsive to the request, but subsequently provided no additional information to particularize or support this claim. The Municipality was similarly silent on the issue and has not provided representations to describe either its attempts to identify or to locate records responsive to the request.

Although I do not have representations from the Municipality on this issue, I have carefully reviewed the one record identified by the Municipality as responsive to the appellant's request in the context of the phrasing of that request. The wording of the request specifically conveys that what is being sought is a copy of the lease between the Municipality and the affected party for property situate at an identified location. I note, furthermore, that the specific focus of the request on the lease was subsequently confirmed by the appellant in responding to the release of certain other information contained in the by-law passed by the Municipality's Council. However, the appellant provided no support during this inquiry for the position that additional records should exist.

In the specific circumstances of this appeal, and not having any basis upon which to support a finding that additional records exist, I am satisfied that the record with which this office was provided by the Municipality is the sole record responsive to the appellant's request. Accordingly, I find that the search conducted by the Municipality was reasonable and I will, therefore, dismiss this aspect of the appeal.

EXEMPTIONS RELIED UPON TO DENY ACCESS

Sections 11, 12 and 15(a) – Economic and other interests, Solicitor-client privilege and Information soon to be published

The Municipality claimed that the discretionary exemptions at sections 11, 12 and 15(a) of the *Act* apply to the record, but did not submit representations in support of its decision to do so. During the course of this appeal, the Municipality offered little or no explanation regarding the application of these exemptions to the record. For example, the Municipality has not even taken the step of specifying which paragraphs of the section 11 exemption it is relying upon to deny access.

I have not been provided with any basis to support the position that the discretionary exemptions cited by the Municipality in its decision apply to the record. Furthermore, my review of the record itself, and other material before me, does not provide a basis for upholding the application of these exemptions. Accordingly, I find that the Municipality has failed to establish the application of the discretionary exemptions at sections 11, 12 and 15(a) of the *Act*.

Section 10(1) – Third Party Information

As with the discretionary exemptions, none of the parties, including the affected party, submitted representations addressing how the mandatory exemption at section 10(1) might apply to the record at issue.

While no representations are available to me to refer to in considering the possible application of section 10(1), it appears from my review of the history of the appeal, including information sent in by the appellant, that the Municipality's Council took the position that the record should be sought from the affected party directly, rather than from the Municipality through a request under the *Act*. In addition, information obtained earlier in the appeal process suggests that the affected party was concerned about the use to which the appellant might put the record if a copy were obtained, namely to generate adverse publicity for the affected party.

Notwithstanding there being no representations, I have reviewed the record myself, and I find that its contents do not engage or support the application of the section 10(1) exemption for the reasons set out below.

Section 10(1) reads, 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, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

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 Municipality and/or the affected party are required to satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

The record contains details of a transaction involving the sale and lease of land. In my view, the information in the record qualifies as commercial information for the purposes of section 10(1) given the definition of the term in previous orders from this office [Order P-356]. Specifically, commercial information has been found to relate to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit

organizations, and has equal application to both large and small enterprises [Order PO-2010]. I find that the first part of the test is met.

No evidence has been tendered by the Municipality or the affected party to establish any aspect of the second part of the test, including confidentiality, either implicit or explicit. However, I note that the title of the record (“Discussion Proposal for Future Agreement”) suggests a lack of finality and it could be said that a certain degree of confidentiality is implicit in ongoing discussions and negotiations of this kind. For the sake of argument, I will accept that the second part of the test has been satisfied in the circumstances.

Turning to the third part of the test, however, I note that a long line of orders from this office have established that the party or parties resisting disclosure must present detailed and convincing evidence of the harm alleged. Specifically, the resisting parties must describe a set of facts and circumstances that could lead one to conclude that there is a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed. In the present appeal, there is no such evidence before me.

I acknowledge that the affected party may wish to prevent “harm” of the nature alluded to in the reference to adverse publicity, but this is not the type of harm section 10(1) is intended to prevent. I am not persuaded by the circumstances of this appeal and my own review of the record that its disclosure could jeopardize, or lead to the exploitation of, the affected party in the marketplace as the application of section 10(1) demands. In view of the lack of supporting evidence to satisfy the requirements of the third part of the test, I find that the record at issue does not qualify for exemption under section 10(1) of the *Act* and I will order the Municipality to disclose it to the appellant.

ORDER:

1. I order the Municipality to disclose the record to the appellant by providing him with a copy by **November 28, 2006** but not before **November 21, 2006**.
2. In order to verify compliance with Order Provision 1, I reserve the right to require the Municipality to provide me with a copy of the record disclosed to the appellant.

Original signed by: _____
Daphne Loukidelis
Adjudicator

October 23, 2006 _____