



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2182**

**Appeal MA-050164-1**

**Town of Carleton Place**



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/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Town of Carleton Place (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. Any and all environmental studies and reports that the Town has obtained itself or received from third parties relating to the Town's property located in the McNeely/Coleman and McNeely/Lake Avenue area.
2. Disclosure and copies of environmental studies and reports that the Town has obtained itself or received from third parties relating to properties located south of Highway 7 in the vicinity of its intersection with McNeely;
3. Disclosure and copies of all appraisals that the Town has obtained with respect to its land holdings in McNeely/Coleman and McNeely/Lake Avenue areas.

The Town issued an initial decision letter that provided the following response to the three-part request:

- Part 1 – The Town stated that responsive records do not exist.
- Part 2 – The Town located a Storm Management Report that was submitted to the Town by a supermarket chain. The Town stated that it would notify the supermarket chain as an affected party pursuant to section 21 of the *Act* and ask it whether it consented or objected to the disclosure of this record pursuant to the mandatory exemption in section 10(1) (third party information) of the *Act*.
- Part 3 – The Town located a Summary Appraisal Report but denied the requester access to this record pursuant to the discretionary exemptions in sections 11(c) and (d) (economic and other interests) of the *Act*.

Subsequently, the Town issued a second decision letter, stating that the supermarket chain had asked that the Storm Management Report not be released to the requester. As a result, the Town denied the requester access to this record. The Town did not identify the specific exemption that it was relying on to refuse disclosure of this record, but had indicated in its initial decision letter that the mandatory exemption in section 10(1) of the *Act* might apply.

The requester (now the appellant) appealed the Town's decisions. The Town provided copies of the two records at issue to this office, including an index of records which confirmed that it was relying on the exemption in section 10(1) of the *Act* to deny the appellant access to the Storm Management Report.

This appeal was not resolved in mediation and was moved to adjudication. Initially, this office issued a Notice of Inquiry, setting out the facts and issues, to the Town, which submitted representations in response. The same Notice of Inquiry was then issued to the supermarket

chain, along with the complete representations of the Town. The supermarket chain did not submit any representations in response. This office followed up with the supermarket chain by telephone, and a company representative stated that they agreed with the Town's position and would not be submitting any representations.

This office then issued a Notice of Inquiry to the appellant, along with the complete representations of the Town. The appellant did not submit any representations in response.

## RECORDS

I have summarized the two records at issue in this appeal in the following chart:

Record Number	Title/Description of record	Town's decision	Exemption claimed
1	Stormwater Management Report (Revised July 2004)  Includes 15-page main report, plus nine tables and seven appendices	Withheld in full	Section 10(1)
2	Summary Appraisal Report (August 2002)  Includes cover letter (one page), appraisal scope (one page) and 18-page main report	Withheld in full	Sections 11(c) and (d)

## DISCUSSION:

### THIRD PARTY INFORMATION

The Town and the supermarket chain claim that the mandatory exemption in section 10(1) of the *Act* applies to the Storm Management Report.

### General principles

Section 10(1) states:

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

Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Affected parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

For section 10(1) to apply, the parties resisting disclosure (in this case, the Town and the supermarket chain) 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 paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

### **Part 1: type of information**

In order to satisfy part 1 of the test, the parties resisting disclosure must show that a record contains one or more of the types of information listed in section 10(1).

In its representations, the Town submits that the Storm Management Report “contains both scientific and technical information relevant to the property in question. The information has a commercial value of direct interest to the property owner.”

The types of information listed 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].

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

I have reviewed the Stormwater Management Report, which was prepared for the supermarket chain by a firm that provides engineering, architectural and planning services. “Stormwater” is a term that is used to describe water that originates during precipitation events, such as rain. The Stormwater Management Report examines issues relating to drainage associated with the proposed development of a supermarket on a piece of land in the Town.

In my view, the information in the Storm Management Report clearly contains “technical information,” within the meaning of that term in section 10(1) of the *Act*. The information in this record belongs to an organized field of knowledge that would fall under the general categories of applied sciences and more specifically, the field of engineering (particularly environmental or water resources engineering).

In order to satisfy part 1 of the section 10(1) test, the parties resisting disclosure must simply show that the records contain at least one of the types of information listed in section 10(1). Consequently, given that I have found that the Stormwater Management Report contains “technical information,” part 1 of the three-part test has been satisfied.

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

For section 10(1) to apply, the parties resisting disclosure must also satisfy the second part of the three-part test, which is that the information must have been supplied to the institution in confidence, either implicitly or explicitly.

### ***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].

In the circumstances of this appeal, it appears that the Stormwater Management Report was provided directly to the Town by the supermarket chain. I find, therefore, that for the purposes of part 2 of the section 10(1) test, the supermarket chain “supplied” the information in this record to the Town.

### ***In confidence***

In order to satisfy the “in confidence” component of part 2 of the section 10(1) test, 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 Town submits that the supermarket chain supplied the Stormwater Management Report to it “with an implied confidence.”

However, beyond this bald assertion, I have not been provided with any corroborating evidence from either the Town or the supermarket chain (which did not submit representations) that would suggest that the supermarket chain had a reasonable expectation of confidentiality that was implicit at the time it supplied the Stormwater Management Report to the Town. In addition, I have not been provided with evidence from either of the parties resisting disclosure as to whether the supermarket chain’s expectation of confidentiality was based on reasonable and objective grounds. Given the paucity of evidence before me, I find that the parties resisting disclosure have failed to satisfy the requirements of part 2 of the section 10(1) test.

For section 10(1) to apply, the parties resisting disclosure must satisfy each part of the three-part test. Given that I have found that the Town and the supermarket chain have failed to satisfy part 2 of the section 10(1) test, it is technically not necessary for me to consider whether they have also met part 3. However, in the interests of completeness, I will consider whether the last part of the section 10(1) test has been satisfied.

**Part 3: harms**

For section 10(1) to apply, the parties resisting disclosure must also satisfy the last part of the three-part test, which is that the prospect of disclosure of the record must give rise to a reasonable expectation that one or more of the harms specified in paragraphs (a), (b), (c) or (d) of section 10(1) will occur.

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 Town submits that disclosure of the Storm Management Report could reasonably be expected to result in the harms specified in section 10(1) of the *Act*:

The release of any information of the property in question could ... lead to the attraction of commercial firms and property owners that are in direct competition to the land owner. The information sought by the applicant could lead to an unfair financial gain. Section 10 of the *Act* was used to protect the confidential information assets of the property owner and engineering firm. Release of the requested information could be used by another property owner to entice an interested business or industry to locate on another property due to reduced development costs.

As noted above, the supermarket chain did not submit any representations to this office. The only evidence that I have before me with respect to the supermarket chain’s position on

disclosure of the Stormwater Management Report is a three-sentence letter that it sent to the Town after being notified of the request under section 21 of the *Act*. In this letter, the supermarket chain simply states that, “[W]e do not approve the release of any reports to the applicant and we refuse the request.” This letter does not contain any evidence as to how the harms specified in paragraphs (a) to (d) of section 10(1) could reasonably be expected to occur if the information in the Stormwater Management Report is disclosed to the appellant.

I have carefully reviewed the Stormwater Management Report and considered the representations of the Town and the position of the supermarket chain. In my view, the parties resisting disclosure have failed to establish that the harms contemplated by paragraphs (a) to (d) of section 10(1) could reasonably be expected to occur if the Stormwater Management Report is disclosed to the appellant, for the following reasons.

I am not persuaded by the Town’s submission that disclosure of this record could lead to an “unfair financial gain” (presumably for competitors of the supermarket chain) or that the information “could be used by another property owner to entice an interested business or industry to locate on another property due to reduced development costs.” In my view, this submission amounts to speculation of possible harm. The Town has not provided the type of detailed and convincing evidence required to support its submissions on this point.

In appeals involving the section 10(1) exemption, the affected party is often in the best position to provide evidence as to whether any of the harms specified in paragraphs (a) to (d) (e.g., significant prejudice to its competitive position) could reasonably be expected to occur if the information in a record is disclosed. However, the supermarket chain chose not to provide any representations in this appeal. In short, I have not been provided with detailed and convincing evidence from the affected party that would satisfy the third part of the section 10(1) test.

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].

I have reviewed the Stormwater Management Report in its entirety, including the 15-page main body, the nine tables and seven appendices. In my view, there are no other circumstances in this appeal, exceptional or otherwise, that would lead to an inference that any of the harms specified in paragraphs (a) to (d) of section 10(1) could reasonably be expected to occur if this record is disclosed to the appellant.

## **Conclusion**

The Town and the supermarket chain have failed to discharge the burden of proving that the section 10(1) exemption applies to the Stormwater Management Report. As no other exemptions have been claimed for this record, I will order that it be disclosed to the appellant.



## ECONOMIC AND OTHER INTERESTS

In its initial decision letter to the appellant, the Town denied access to the Summary Appraisal Report (August 2002) pursuant to sections 11(c) and (d) of the *Act*. This report was prepared for the Town by a private appraisal firm and contains, amongst other things, a fair market value for a piece of land owned by the Town.

Section 11 states:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

In its representations, the Town states that it was still negotiating with a developer for sale of the property. It submits that, “release of the request Appraisal at this point in time to another party could greatly prejudice the economic interests or competitive position of the municipality.”

Given that time has elapsed since the Town submitted its representations to this office, I asked an Adjudication Review Officer to contact the Town to determine if it continues to object to disclosure of the Summary Appraisal Report. In response, the Town sent a letter to this office stating that it no longer objects to disclosure of this record. Consequently, I will order that the Summary Appraisal Report be disclosed to the appellant.

## ORDER:

1. I order the Town to disclose the Stormwater Management Report and the Summary Appraisal Report to the appellant by May 22, 2007 but not before May 17, 2007.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Town to provide me with a copy of the records that it discloses to the appellant.

Original signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

April 17, 2007  
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