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

ORDER MO-2364

Appeal MA08-312

City of Ottawa

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NATURE OF THE APPEAL:

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

> All sign permits including plans/diagrams issued for 380 Catherine Street, 191 Lees Avenue, 339 King Edward [Avenue], 245 Dalhousie [Street].
>
> Any orders against or investigations into illegal signs at these addresses.

The City located records responsive to the request including six drawings representing signage for one of the identified properties. Pursuant to section 21(1) of the *Act*, the City notified a third party, the advertising company who supplied the drawings to the City, of the request and the possible disclosure of the drawings. The third party responded to the notice and objected to the disclosure of the drawings. Subsequently, the City decided to grant partial access to the responsive records. Information was severed pursuant to section 14 (personal privacy) and the six pages of drawings that were prepared by the third party were withheld in their entirety under sections 10(1)(a), (b) and (c) (third party information) of the *Act*.

The requester appealed the City's decision to this office and Appeal MA08-63-2 was opened.

During the mediation of Appeal MA08-63-2, the requester advised that he was not appealing the severances made to the records under section 14(1), but confirmed that he was appealing the application of the exemptions at sections 10(1)(a), (b) and (c) to the six pages of drawings. As no further issues were resolved during mediation, Appeal MA08-63-2 was transferred to the adjudication stage of the appeal process.

After I sent a Notice of Inquiry to the City setting out the facts and issues on appeal, the City issued a revised decision letter to both the requester and the third party advising that it had reconsidered its decision and was now prepared to disclose the six pages of drawings. The City also advised that, in accordance with section 21(8)(b), the third party had 30 days from the date of the decision to appeal the City's revised decision letter to this office.

As a result of the City's decision, Appeal MA08-63-2 was closed. However, the third party (now the appellant), appealed the City's revised decision letter. The current appeal, Appeal MA08-312, was opened to address the appellant's appeal.

I began my inquiry into Appeal MA08-312 by sending a Notice of Inquiry to the appellant, initially. The appellant did not provide me with its own representations on the issues outlined in the Notice of Inquiry, but sent me a letter from the design firm that prepared the drawings. The appellant asked that I consider the letter from the design firm as its representations.

RECORDS:

The records at issue in this appeal are six pages of professional drawings for large scale signage or billboards.

DISCUSSION:

THIRD PARTY INFORMATION

The relevant portions of section 10(1) state:

> 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

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 party resisting disclosure must satisfy each part of the following three-part test:

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

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part I: Type of Information

The types of information listed in section 10(1) have been discussed in prior orders. "Technical information" appears to be the most relevant in the circumstances of this appeal. It has been described 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].

The appellant did not make any specific submissions regarding the type of information contained in the records at issue. However, I have reviewed the six pages of drawings and note that they were provided to the appellant by a design firm. The drawings contain the stamp of the professional engineer at the design firm who prepared them. Accordingly, I find that the drawings qualify as technical information within the meaning of that term as they consist of technical design drawings of large scale signs or "billboards" prepared by a professional engineer and describe the construction of a structure.

As a result, I find that part 1 of the section 10(1) test has been met.

Part 2: Supplied in confidence

In order to satisfy part 2 of the test, the appellant must establish that it "supplied" the information to the City "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].

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

In confidence

In order to satisfy the "in confidence" component of part 2, 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]

As noted above, in lieu of representations, the appellant provided me with a letter written by the design firm that prepared the drawings. In that letter, the design firm stated:

> Please note that [named design firm] design drawings produced on behalf of [appellant] clearly state the following:
>
> > The design and the documents remain the property of [named design firm] and are protected by law. They may not be altered, issued, or reproduced without expressed written consent from [named design firm]. All documents are to be returned to [named design firm] after completion of work. Contractor to site verify all details and dimensions and report and discrepancies to [named design firm] before commending with that related portion of the work. Only signed, sealed and stamped documents are to be used for construction purposes.
>
> As per the above, reproduction or distribution of [named design firm's] drawings without written consent is strictly prohibited.
>
> The details of [named design firm's] drawings represent valuable intellectual property that is proprietary and as a result confidential in nature.

These submissions comprise the entirety of the letter written by the design firm, submitted by the appellant as its representations.

Other then forwarding the letter written by the design firm mentioned above, the appellant did not submit representations in response to the Notice of Inquiry. However, in response to the notice given by the City under section 21(1) it provided brief submissions stating that the design company "maintains and enforces copyright". Its submissions to the City are reproduced in full in the "harms" discussion outlined below.

Having reviewed the drawings themselves and having considered the letter written by the design firm as well as the submissions of the appellant in response to the section 21(1) notice, I am satisfied that the drawings were provided to the City by the appellant. In my view, it is clear that the drawings were prepared by the design firm on behalf of the appellant, who, in turn supplied them to the City. I have not been provided with any evidence to suggest that they were mutually generated or the product of any negotiation. Accordingly, I find that they were "supplied" within the meaning of part 2 of the section 17(1) test.

As for whether they were supplied "in confidence" to the City, although I accept that the drawings at issue are protected by copyright law, such protection does not automatically lead to the conclusion that there was an implicit assumption that they were to be kept in confidence by the City. However, in light of the brief comments made by the appellant and the design company that prepared the drawings, I am prepared to accept that their proprietary interest in the drawings led them to expect that the detailed technical work outlined therein was to be kept in confidence. I am satisfied that this expectation was reasonable in the circumstances.

Accordingly, I find that the drawings at issue were supplied in confidence within the meaning of part 2 of the section 10(1) test.

Harms

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.)].

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].

The appellant appealed the City's decision to disclose the drawings on the basis that disclosure of the six design drawings would cause prejudice to their competitive position (section 10(1)(a)), would result in similar information no longer being supplied to the City (section 10(1)(b)), and would cause undue loss or gain (section 10(1)(c)).

In its representations to the City in response to the notice under section 21(1), the appellant submits:

> [The appellant] feels strongly that the request you've received as it pertains to our plans and schematic diagrams must be refused. Clearly, the sign permit application as they pertain to these addresses are public information, but we stress that the drawings and diagrams of our sign structures <u>are not to be released.</u>
>
> The drawings and plans of the sign structure in question were designed specifically for [the appellant] and are proprietary to both [appellant] and [named design firm]. Furthermore, [named design firm] maintains and enforces copyright and public release of this information could compromise their ability to protect their copyright and intellectual rights. Any release of our drawings and schematics to the requester runs a high risk to us of compromising the competitive nature of our business, when it comes to preparing future submissions for a Request for Proposal (RFP) whereby municipalities are looking to the industry for new and innovative designs of sign structures. These drawings should be treated no differently than plans and proposals prepared and stamped by a Registered Architect or Professional Engineer, licensed to do business in the Province of Ontario.
>
> It is therefore our opinion that the release of this information to potential competitors in our business is unwarranted. In addition, this could compromise our competitive position in future proposal submissions of this nature.

Based on these representations and my review of the records, I am not persuaded that disclosing the six drawings could reasonably be expected to significantly prejudice the competitive position of the appellant, result in similar information not being supplied to the City, or interfere significantly with any future contractual or other negotiations the appellant may be involved in. In my view, the evidence and arguments put forward by the appellant, including the arguments put forward in the letter from the design firm, are broad, generalized and speculative in nature and provide no explanation or persuasive evidence as to how disclosure of these drawings could reasonably be expected to result in the harms contemplated in sections 10(1)(a), (b) or (c). I find that a reasonable expectation of any of the harms contemplated by these sections is not apparent from my review of the records and I have been provided with only very general submissions without any detailed explanation as to how disclosure of the drawings would result in any of the harms. Accordingly, I am not satisfied that I have been provided with the necessary detailed and convincing evidence required to support the harms component of section 10(1).

In Order PO-2435, Assistant Commissioner Brian Beamish commented on the need for "detailed and convincing" evidence and the burden of proof which falls on the parties claiming the application of section 17(1) (the provincial equivalent of section 10(1)):

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

In the circumstances of this appeal, I find that I have not been provided with "detailed and convincing" evidence to establish a "reasonable expectation" of the identified harms in sections 10(1)(a),(b), or (c) in the event the drawings are disclosed.

To conclude, I find that part 3 of the section 10(1) test has not been met. As all three parts of the test must be established, I find that the records at issue in this appeal do not qualify for exemption under section 10(1).

ORDER:

1. I order the City to disclose the responsive records, in their entirety, to the requester by **December 31, 2008** but not before **December 22, 2008**.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Region to provide me with a copy of the records disclosed to the requester pursuant to Provision 1.

November 5, 2008

Catherine Corban
Adjudicator