



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

# **ORDER MO-2476**

**Appeal MA08-23**

**Municipality of Tweed**



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## **NATURE OF THE APPEAL:**

The Municipality of Tweed (the Municipality) received a two-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of construction drawings showing, in particular, the internal dimensions and lay out relative to the building permit issued to a named individual for the construction of a hog barn on a farm. The requester also sought access to copies of the manure agreements that were issued under By-law 81-18 and/or the *Nutrient Management Act* for the disposal of the manure from the same farm.

The Municipality located records responsive to the request and notified the operator of the farm (the affected party) for its position on disclosure, pursuant to section 21 of the *Act*. The affected party responded and requested that no information be released. The Municipality then issued an access decision granting partial access to the responsive manure agreements. It also advised that it was withholding any personal information found in the agreements. The Municipality relied on the mandatory exemption at section 10(1) of the *Act* (third party information) to deny access to the responsive construction drawings, in full.

The requester (now the appellant) appealed the decision.

At mediation, the appellant advised that he was no longer pursuing access to the information severed from the manure agreements. As a result, those records are no longer at issue in this appeal. Also at mediation, the Municipality clarified that it was relying on sections 10(1)(a), (b) and (c) of the *Act* to withhold access to the responsive construction drawings. The affected party maintained its objection to the release of those records.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the Municipality and the affected party, initially. Both the Municipality and the affected party provided representations in response to the Notice. The affected party asked that portions of its representations not be shared due to confidentiality concerns. I then sent a Notice of Inquiry to the appellant, accompanied by the Town's complete representations and the non-confidential representations of the affected party. The appellant provided representations in response.

I determined that the appellant's representations raised issues to which the Municipality and the affected party should be given an opportunity to reply. Accordingly, I sent a letter to the Municipality and the affected party summarizing those portions of the appellant's representations that I wished them to address in reply. Only the affected party provided reply representations. After the matter was referred to the Order stage, the appellant sent various additional material in support of his position that the section 10(1) exemption should not apply.

## **RECORDS:**

The records at issue consist of construction drawings that the Municipality identified as responsive to the request.

## **THIRD PARTY INFORMATION**

As identified above, the Municipality relied on sections 10(1)(a), (b) and (c) of the *Act* to deny access to the responsive records. 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;
- (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; or
- (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.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. 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 institution and/or the third party 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 or financial 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) and/or (c) of section 10(1) will occur.

### *The Representations*

In the non-confidential portions of its representations, the affected party states that “there is no barn identical to this facility in Ontario.” It submits that there are very subtle differences that give the facility “an unquestionable advantage” for its use and that “the uniqueness of this facility was accomplished using a team of several different engineers with specific disciplines”. It takes the position that “the competitive advantage has been achieved by designing and building a facility specific to a specialized link in the hog production chain”. It submits that:

The release of the building plans would jeopardize the advantage of the farm. An existing facility could be retrofitted or a new facility could be constructed incorporating the designs and ideas specific to this facility, thus negating the competitive edge.

In the confidential portion of its representations, the affected party provides three specific examples of the “subtle differences” in design that give the facility its distinct advantage.

The Municipality submits that the construction drawings were supplied to it in order to obtain a construction permit for a barn to accommodate the large hog farm operation proposed by the affected party. The drawings were for “a specific barn to facilitate a certain type of farming industry.” The Municipality takes the position that “the design of the barn may be unique to this particular type of farm industry” and “the barn was designed specifically for the hog farm owner based on his proposed operations, and further that the hog farm, once operational, would be of significant size in a competitive market.” The Municipality submits that the drawings for the particular barn “may contain specific technical information and/or trade secrets which, if revealed, could adversely affect the affected party’s competitive standing.”

The Municipality goes on to state:

The construction drawings were supplied to the Municipality for the purpose of obtaining a permit for a large hog barn, which since the outset was the subject of an extremely contentious issue within the Municipality. The Municipality believes that the property owner supplied the detailed drawings with the understanding that they would remain with the Municipality only, and not be provided to the general public. The Municipality is concerned that difficulties could arise with individuals hesitant to provide similar types of information, such as detailed drawings, in future if there is the possibility that the information will be readily supplied to the public at large.

The appellant’s submissions can be summarized as follows:

- Thirty years ago, attempts were made to get a company to manufacture these types of buildings in Tweed, Ontario.
- After thirty years and millions of square feet of this type of building being erected in Holland, North and South Carolina and Manitoba (three high areas of pork

production) the appellant doubts if there are any engineering secrets left in the design of these buildings that would improve the efficiency of production. Feed conversion would be the largest influence in production efficiency.

- The drawings at issue were “part” of the reasons for decision of the Honourable Mr. Justice Albert Roy, dated October 6, 2004, and “have been in the public view”. The appellant provided a copy of the decision and related judgment with his representations.

In reply, the affected party does not agree that “millions of square feet of this type of building” have been erected. It reiterates that the facility it operates is unique and the facilities referred to by the appellant relate to a different type of structure. It submits that the building was specifically designed for a particular purpose and there are “many engineering secrets used” in the barn. With respect to the allegation that the plans have been in public view, the affected party submits that although, as set out in the judgment, the plans were reviewed by an engineer retained by the Municipality, they were “never in the public view.”

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

The types of information listed in section 10(1) have been discussed in prior orders:

*Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

*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].

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I have reviewed the construction drawings and I am satisfied that they contain technical information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts, namely architecture and/or engineering.

Accordingly, I find that part one of the section 10(1) test has been satisfied.

## **Part 2: 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].

I find that the construction drawings were supplied to the Municipality by the affected party (or its representative). As noted above, the information was provided to the Municipality for the purpose of applying for a building permit for the construction of the barn. I am satisfied that the information in the records was “supplied” to the Municipality 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 [Orders PO-2043, PO-2371, PO-2497]

In addition to the submissions of the parties, I note that each construction drawing indicates that they were issued for Building Permit purposes only. Each one also carries a notation that there is to be no unauthorized use and that any authorized use must be by written consent, only. Furthermore, my reading of the reasons for judgement referred to by the appellant support the affected party's position that while construction drawings were reviewed by an engineer retained by the Municipality, they were never made public.

After considering the circumstances, I am satisfied that the affected party had a reasonable expectation of confidentiality when it submitted the construction drawings to the Municipality. 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, I conclude that the construction drawings 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), (b) 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.)].

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].

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

The Municipality and the affected party claim that the construction drawings for the barn 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 affected party submits that the design of the structure is, to the best of its belief, unique in the Province of Ontario. In the confidential portion of its representations, the affected party provides three examples of the “subtle differences” in design that give the facility its distinct commercial advantage. The affected party submits that revealing this information would significantly jeopardize its competitive position. The Municipality supports the affected party’s position.

The appellant disputes the affected party’s position that the disclosure of the records will result in the identified harm. He provides numerous attachments to his representations which he says relate to similar structures and doubts if there are any engineering secrets left in the design of the barn that would improve the efficiency of production.

I have carefully reviewed the material provided by the parties, as well as the records at issue in this appeal. I find that the affected party has provided sufficient evidence to satisfy me that the disclosure of the records could reasonably be expected to prejudice significantly its competitive position.

I make this finding based on the evidence provided by the affected 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 construction drawings at issue themselves. Although I understand the appellant’s scepticism regarding the harms that may result from disclosure, I find that the affected party has provided me with sufficiently detailed and convincing evidence to satisfy me that the disclosure of the detailed, technical information in the records could reasonably be expected to result in the identified harm.



As a result, I find that the records qualify for exemption under section 10(1)(a) of the *Act*. Accordingly it is not necessary to determine whether they also qualify for exemption under sections 10(1)(b) and/or (c).

**ORDER:**

I uphold the decision of the Municipality.

Original Signed By: \_\_\_\_\_ November 24, 2009  
Steven Faughnan  
Adjudicator