

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2735

Appeal MA11-313

The Corporation of the City of London

May 18, 2012

Summary: The city received a request from a member of the public for building plans that were prepared by the appellant. The city's Building Division disclosed the building plans to the third party upon payment of a fee. The appellant claims that the city should have notified it in accordance with section 21(1)(a) of the *Act* because the city knew or ought to have known that the disclosure of the plans would cause harm to the appellant under the third party information exemption in section 10(1) of the *Act*. This order upholds the city's disclosure of the building plans, as the records were not supplied to the institution in confidence, either explicitly or implicitly, as required by section 10(1) of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 10(1), s. 21(1) and s. 50(2).

Orders and Investigation Reports Considered: M-169, MO-2695, MO-2353, PO-1694-I, PO-2172

OVERVIEW:

[1] An architectural firm (the firm) was retained by a property owner to prepare building plans. The plans were then submitted by the property owner to the City of London (the city) for a building that was eventually constructed on the property. The

city's Building Division disclosed the building plans to a third party who requested them upon payment of a fee.

[2] The firm then filed an appeal with this office on the basis that the city should have notified it in accordance with section 21(1)(a) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) based on its contention that the city knew or ought to have known that disclosure of the plans would cause harm to the firm as contemplated by the third party information exemption in section 10(1) of the *Act*.

[3] During the intake stage of the appeal process, the city advised that the disclosure of the plans was made outside the ambit of the *Act*, as the request was not formally made under the *Act*. Consequently, the city took the position that Part 2 of the *Act*, which governs requests for general records, did not apply to the request.

[4] The firm, now the appellant, takes the position that the city should have advised the third party requester to make a formal request under the *Act*. In addition, the appellant continued to raise the issue of the city's failure to provide notice under section 21(1)(a) of the *Act*.

[5] The appeal was not resolved at intake and was moved directly to the adjudication stage of the process.

[6] During my inquiry into this appeal, I sought and received representations from the appellant and the city. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[7] In the discussion that follows, I uphold the city's disclosure of the building plans, as the records were not supplied in confidence, either explicitly or implicitly, as required by section 10(1) of the *Act*. I will also address related issues concerning notice to third parties that were raised during the inquiry process.

RECORDS:

[8] The record at issue is the building plans created by the appellant that were filed by the property owner with the city.

PRELIMINARY ISSUE

The Application of Section 21(1)(a) of the *Act*

[9] Section 21(1) of the *Act* states, in part:

A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,

- (a) that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information ...

[10] In Order PO-1694-I, former Assistant Commissioner Tom Mitchinson commented as follows on the application of section 28, the equivalent to section 21(1), in the provincial *Freedom of Information and Protection of Privacy Act*:

In my view, use of the word might in section 28(1)(a) creates a low threshold in determining whether notification is required.

In order to trigger the notification requirements under section 28(1)(a), a head must first have reason to believe that a record might contain one of the types of information listed in section 17(1) [section 10(1) in the *Act*] (ie. a trade secret or scientific, technical, commercial, financial or labour relations information). If it does, the head must then consider whether disclosure of this information might affect the interest of a person other than the person requesting the information. In addressing this second requirement, the head should be guided by the provisions of section 17(1). For example, if the head has reason to believe that the information might have been supplied implicitly or explicitly in confidence, then notification is required. Similarly, if the head has reason to believe that disclosure of the record might result in one or more of the harms identified in section 17(1), then notification must also be given.

If a head concludes that a record might contain section 17(1)-type information, and that this information might have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1)(a). The potential for harm is a determination that must be made in the individual circumstances of a particular request and, in my view, the notification requirements of section 28 were designed to allow affected persons an opportunity to provide input on this issue before a decision is made regarding disclosure.¹

¹ Order PO-1694-I, paras 30-32. This analysis was adopted in Orders PO-2879-R and PO-2969-I.

[11] Adopting the analysis in Order PO-1694-I for the purposes of this appeal, I will now consider whether the test for the application for the third party information exemption in section 10(1) applies to the records at issue.

ISSUES:

- A. Does the mandatory exemption at section 10(1) apply to the records?
- B. Should the city provide notice under section 21 to a property owner when a third party requests access to the building plans for their property?

DISCUSSION:

A. Does the mandatory exemption at section 10(1) apply to the records?

[12] In its representations, the appellant argues that the city had, or ought to have had, reason to believe that the building plans might contain information which qualifies as third party information within the meaning of section 10(1) of the *Act*. As such, the appellant argues that it should have been notified of the request under section 21(1)(a) of the *Act* before disclosing the plans to the requester.

[13] Section 10(1) states, 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; or

[14] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit the disclosure of confidential information of third parties that could be exploited by a competitor in the market place.³

[15] For section 10(1) to apply, the institution and/or affected 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, 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 1: Type of Information

[16] Past orders of this office have defined technical information 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.⁴

[17] Adopting this definition, I find that the building plans created by the appellant contain information that qualifies as technical information for the purposes of section 10(1) of the *Act*.

[18] Accordingly, the first part of the test for the application of section 10(1) has been met.

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2581 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

³ Orders PO-1805, PO-2018, PO-2184, MO-1706.

⁴ Order PO-2010.

Part 2: Supplied in Confidence

Supplied

[19] 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.⁵

[20] 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.⁶

[21] In their representations, both the city and the appellant state that the plans were supplied to the city by the property owner, not the appellant. Nonetheless, the parties agree that the building plans were supplied to the institution, as required by section 10(1).

[22] In Order PO-2172, this office considered the application of the second part of the section 10(1) test [section 17(1) in the *Freedom of Information and Protection of Privacy Act*] where some of the information in the records at issue was not directly supplied to the institution by the third party claiming the exemption. After reviewing the records at issue, this office found that even though the records contained information that was not directly supplied to the ministry by the third party, “the fact that information may have been supplied to the Ministry indirectly does not negate the application of section 17.”⁷ Therefore, even though the records were not directly supplied by the third party, this office found that the “supplied” part of the section 17(1) test was met. Adopting this approach, I find that the records at issue in this appeal were supplied to the institution by the appellant as required by section 10(1).

In Confidence

[23] 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.⁸

[24] 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,

⁵ Order MO-1706.

⁶ Orders PO-2020, PO-2043.

⁷ Order PO-2172, page 14.

⁸ Order PO-2020.

- 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; and
- prepared for a purpose that would not entail disclosure.⁹

[25] In its representations, the city argues that the plans were not submitted in confidence. Referring to Order M-169, the city states that there was no indication on the application form or on the building plans that the property owner held any expectation of confidentiality towards the third party information contained in the plans. The city states that the plans were not stamped "Confidential" or otherwise noted as having been provided in confidence. Further, the city states that because the building plans were not directly submitted to the city by the appellant, it had no knowledge of the appellant's expectations in this regard.

[26] In response, the appellant argues that by entrusting the city with the building plans as part of the building permit application process, the property owners and the appellant had an objectively reasonable expectation that the city would only use the plans for the permit application process. The appellant notes that the contract between itself and the property owner states, in part, that the copyright belongs to the appellant and that the plans "are instruments of the [appellant's] service and shall remain the property of the [appellant] whether the Project for which they are made is executed or not." As such, by supplying the plans to the property owners, who in turn supplied the plans to the city, the appellant argues that the property owners and the architectural firm had a shared, reasonably-held expectation that the plans would be treated in a manner consistent with, and limited to, the regulatory requirements related to the building permit application process.

[27] In Order M-169, Inquiry Office Holly Big Canoe stated that,

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation

⁹ Orders PO-2043, PO-2371, PO-2497.

must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

[28] Adopting Inquiry Officer Big Canoe's interpretation of the confidentiality requirement, I find that the appellant's expectation of confidentiality was neither reasonable nor objective.

[29] While I appreciate that the building plans were submitted as part of the building permit application process, the expectation that the plans would be used for this purpose alone is not equivalent to a reasonable expectation of confidentiality. In addition, the city provided evidence that it is its practice to make building plans available to the public upon request, for a fee. Such a practice is contrary to a reasonable and objective expectation of confidentiality on the part of the appellant. Had the appellant or property owner made inquiries of the city, they would have been informed that building plans are routinely disclosed to third parties on request. Furthermore, as the plans were not submitted directly by the appellant, the city could not reasonably have known that the appellant expected that the plans would be kept confidential. Finally, the building plans were not stamped "Confidential" or otherwise noted as having been provided in confidence. Instead, the notation on the building plans only states that the "Copyright Act applies to use and production" of the plans. While the lack of a "Confidential" stamp or notation is not necessarily determinative, in my view, the circumstances of this appeal, the city's routine practices and the plans themselves lead me to conclude that they were not supplied with a reasonable expectation of confidentiality.

[30] Therefore, I find that the appellant failed to meet part two of the test for the application of section 10(1) to the records at issue. As all parts of the test for the exemption under section 10(1) must be met, I conclude that section 10(1) does not apply to the information in the building plans.

B. Should the city provide notice when a third party requests access to the building plans for their property?

[31] In its representations, the city asked the IPC to provide some clarification on the right of access by the public to building plans filed with a municipality.

[32] Generally, where a property owner seeks access to building plans relating to their own property, a municipality may provide the property owner with these plans as part of its routine disclosure, outside of the *Act's* access to information process.

[33] In the case where a third party requests access to building plans, the general practice of seeking the permission of the property owner or the property owner's agent prior to granting access to the building plans seems a prudent one. Where the owner

consents to the disclosure, a municipality may disclose the building plans to the third party as part of its routine disclosure outside of *Act's* access to information process.

[34] However, where the property owner does not consent to the disclosure of the building plans to a third party, the municipality could consider processing the request as a formal request for access under the *Act*. This would involve a determination of whether any of the exemptions in the *Act* apply to the requested building plans.

[35] An access request for the disclosure of building plans does not automatically trigger a right to notice to all potentially interested third parties. Where the municipality is considering the possible disclosure of building plans to a requester, the property owner may have the right to be notified of the request to enable him/her to make submissions on this request, and the corresponding right to appeal the decision to this office. On the other hand, if the municipality determined that it would not disclose the building plans because it was clear that an exemption in the *Act* applies, the requester would also have the right to appeal the municipality's decision to this office. I note that previous orders of this office have rejected the application of the personal privacy exemption at section 14(1)¹⁰ and the law enforcement exemption at section 8(1)(i)¹¹ to exempt building plans from disclosure.

[36] It may be the case that, in some circumstances, a person other than the property owner is entitled to notice of a request under section 21. However, in many of these cases, building plans would not have been supplied in a manner that would attract the statutory notice required by section 21. In the event that a person or organization believes its intellectual property rights are affected by a municipality's disclosure of building plans, or more precisely the use of the building plans following disclosure, it may pursue any remedies that are available to it under applicable statutes and at common law.

ORDER:

1. I uphold the City of London's decision to disclose the records at issue to the requester. The exemption provided under section 10(1) of the *Act* does not apply to the building plans.

Original Signed by: _____
Brian Beamish
Assistant Commissioner

_____ May 18, 2012

¹⁰ Order MO-2695.

¹¹ Order MO-2353.