

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3251

Appeal PA12-581

Ministry of Transportation

September 10, 2013

Summary: The ministry received a request for access to information about a particular property, including any correspondence, documentation, and permit applications, approvals and/or denials. After notifying two affected parties, the ministry disclosed certain responsive records to the appellant, but denied access to other records on the basis of the exemption at section 17(1) (third party information) of the *Act*. This order determines that the records remaining at issue do not qualify for exemption under section 17(1) and orders that they be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 17(1).

Orders and Investigation Reports Considered: Orders PO-3032 and PO-3185.

OVERVIEW:

[1] The Ministry of Transportation (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information about a particular property, including any correspondence, permit applications, approvals and/or denials (including related documentation). The request covered a defined period of time.

[2] The ministry identified responsive records, and notified two parties whose interests might be affected by disclosure. One of the parties notified by the ministry did not object to the disclosure of the records. The other party (the third party) objected to the disclosure of the records on the basis that they contained confidential third party information.

[3] After considering the representations of the parties, the ministry issued a decision granting access to certain records, and denying access to other records on the basis of the mandatory exemption in section 17(1) (third party information).

[4] The appellant appealed the ministry's decision.

[5] During mediation, certain additional responsive records were located and provided to the appellant.

[6] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the ministry and the third party, initially. The ministry provided representations in response. The third party advised this office that it was relying on its earlier objection to the disclosure of the records, and did not provide any additional representations.

[7] In the circumstances, and because of my finding below, I decided that it was not necessary to seek representations from the appellant.

[8] In this order I find that the records do not qualify for exemption under section 17(1), and I order that they be disclosed.

Preliminary matter

[9] In the Notice of Inquiry I sent to the ministry and the third party, I asked the parties to confirm exactly which records remained at issue. In particular, I noted that the Mediator's Report identified the records remaining at issue as "three architectural drawings and a lot drawing," but that it appeared that some additional drawings also remained at issue. I therefore asked the parties to confirm that the records, as described in the "Records" section, below, remained at issue in this appeal.

[10] In its representations the ministry confirmed that the records identified in the "Records" section below are the ones at issue in this appeal. It also advised that the records identified in the first bullet point are "permit records," submitted to the ministry for the purpose of obtaining an entrance permit, and that the remaining records are "zoning records," involving the local municipality. The third party did not address this issue.

[11] In light of the above, I will consider all of the records identified in the "Records" section below as responsive records in this appeal.

RECORDS:

[12] The records remaining at issue are the following:

- three large architectural drawings (A1, A2 and A3) and a large lot drawing,
- a floor plan (including dockleveler notes, foundation notes and concrete specs) and the attached upper level plan and a lot plan,
- two pages of drawings which include front elevation, rear elevation and two side elevation drawings, and
- two pages of drawings relating to an identified Public Meeting Notice, which include floor plans for the main floor, the second floor and a site plan.

DISCUSSION:

[13] The sole issue for determination in this appeal is whether the records remaining at issue qualify for exemption under the mandatory exemption in section 17(1) of the *Act*, which 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, 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
- (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.

[14] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²

[15] For section 17(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 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) and/or (c) of section 17(1) will occur.

Parts 1 and 2: "type of Information" and "supplied in confidence"

[16] The ministry provides representations in support of its position that the information in the records remaining at issue is “technical” information for the purpose of section 17(1). It also submits that some of the records were supplied to it in confidence by the third party. However, because of my finding under the third part of the test, below, it is not necessary for me to determine whether the first two parts of the test have or have not been met.

Part 3: Harms

[17] 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.³

[18] 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

¹ *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.) (“*Boeing*”).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.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.⁴

[19] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 17(1).⁵

[20] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁶

[21] In its representations, the ministry indicates that the third party had objected to the disclosure of the records, and states that the third party is in the best position to assess the harms that might reasonably be expected to result from disclosure of the records. Therefore, it states that it defers to the third party’s view on this part of the test, and the ministry does not provide representations regarding this aspect of section 17(1).

[22] As indicated above, the third party did not provide representations in response to the Notice of Inquiry; however, it did advise this office that it was relying on its earlier objection to the disclosure of the records. This earlier objection is contained in a letter sent by the third party to the ministry after the ministry notified it of the request under section 28(1) of the *Act*. In that letter, the third party states that it does not consent to the disclosure of the records. It states that it “meets or exceeds” the three-part test under section 17(1), and that disclosing “all and any” records to a party in direct competition with the third party would “bring harm” to the third party’s business. The third party does not elaborate further on the harms test under section 17(1).

[23] In the circumstances, I find that I have not been provided with sufficiently “detailed and convincing” evidence that disclosure of the records remaining at issue could reasonably be expected to give rise to the harms outlined in sections 17(1) of the *Act*. The third party provides no support for its assertions that the three parts of the test have been met, nor has it provided evidence to support its claim that disclosure of the records would result in any of the harms set out in sections 17(1)(a) to (c). In previous orders,⁷ this office has rejected similar “bald assertions” of harm without specific explanation or evidence as being insufficient to meet part three of the section 17(1) test. I find that the statements made by the third party in its earlier objection to disclosure, without any additional information, do not support a finding of reasonable expectation of harm. Furthermore, I find that the harms described in section 17(1) are not self-evident from the records.

⁴ Order PO-2020.

⁵ Order PO-2435.

⁶ Order PO-2435.

⁷ See, for example, Orders PO-3032 and PO-3185.

[24] As a result, I find that part three of the test for the application of section 17(1) has not been met.

[25] Having found that part three of the test has not been met, I find that the information at issue is not exempt under section 17(1) and will order that it be disclosed to the appellant.

ORDER:

I order the ministry to disclose the records at issue to the appellant by **October 16, 2013** but not before **October 10, 2013**.

Original signed by: _____
Frank DeVries
Adjudicator

_____ September 10, 2013