

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3015

Appeals MA12-441, MA12-442 and MA12-448

City of Ottawa

February 21, 2014

Summary: The city received three separate requests from the same requester for access to various records, including building plans, relating to three model homes at three identified addresses. After notifying a third party and receiving the third party's objection to the disclosure of the records, the city issued three decisions stating that it was disclosing the records to the requester.

The third party appealed the city's decisions to disclose the records, and argued that portions of the records qualified for exemption under sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*. This order determines that one page of the records is not responsive to the request, but that the remaining records do not qualify for exemption under either section 10(1) or 14(1) of the *Act*. The city's decisions to disclose the remaining records to the requester are upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 2(1) (definition of "personal information") and 10(1).

Orders Considered: Orders PO-2225 and MO-2735.

OVERVIEW:

[1] The City of Ottawa (the city) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from the same requester for access to "copies of records for building plans, permits, inspection documents, etc." relating to three model homes at three identified addresses.

[2] After receiving the requests, the city notified a third party (the company that designed and built the homes) of the requests pursuant to the notification requirements in section 21 of the *Act*. In response, the third party advised the city that it objected to the disclosure of the information on the basis that the records were exempt from disclosure under section 10(1) (third party information) of the *Act*.

[3] The city then issued three decisions, granting the requester full access to the requested records.

[4] The third party (hereafter the "third party appellant" or "the appellant") appealed the city's decisions to grant access to the records, and these three appeal files were opened.

[5] During mediation, the third party appellant maintained that the responsive records are technical and proprietary in nature and qualify for exemption under section 10(1) of the *Act*. The city confirmed its position that section 10(1) of the *Act* does not apply to the records.

[6] Mediation did not resolve these three appeals, and they were transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. Upon my review of these three appeals, I decided to join the appeals, because of the similarity in the records and issues in them.

[7] Initially, I sent a Notice of Inquiry to the third party appellant, who provided representations in response.

[8] The third party appellant provided representations in support of its position that certain records qualified for exemption under section 10(1) of the *Act*. The third party appellant also identified certain records which it consented to have disclosed, and those records are no longer at issue in these appeals. In addition, the third party took the position that certain portions of records contained the personal information of identifiable individuals, and that one page was not responsive to the request. I address these issues in this order.

[9] I then sent the Notice of Inquiry, along with a copy of the non-confidential portions of the third party appellant's representations, to the original requester, who also provided representations on the issues.

[10] After reviewing the representations, I decided to invite the city to provide representations on the issues, and sent it a Supplementary Notice of Inquiry. The city provided representations to me. I then sent the city's representations to the third party appellant, who also provided reply representations on the issues.

[11] In this order, I find that one page of the records is not responsive to the request. I find that the remaining records do not qualify for exemption under either section 10(1) and/or 14(1), and uphold the city's decisions to disclose them to the requester.

RECORDS:

[12] As noted above, during the processing of these appeals the third party appellant identified certain records which it consented to have disclosed, and those records are no longer at issue in these appeals. The records remaining at issue, and which the third party maintains ought not to be disclosed, are the following:

Appeal MA12-441: portions of pages 35-38, 44-46, 49, 50, 59 and 60, and pages 63-69 in full.

Appeal MA12-442: portions of pages 36-39, 41, 42, 45, 47, 48, 50, 59, 63-66, 69, 81, 85-87, 89 and 95, and pages 83, 84 and 96-98 in full.

Appeal MA12-448: portions of pages 11, 43-45, 48-57, 60, 61, 67, 71 and 73, and pages 76-81 in full.

[13] The withheld portions of pages include severances from building permits, building permit revisions, applications, inspection reports and other documents. The pages withheld in full include building plans and technical drawings.

ISSUES:

- A. Is page 84 of Appeal MA12-442 responsive to the request?
- B. Do the records contain "personal information" as defined in section 2(1)?
- C. Does the mandatory exemption at sections 10(1)(a) apply?

DISCUSSION:

A. Is page 84 of Appeal MA12-442 responsive to the request?

[14] As noted above, the third party appellant takes the position that one of the pages is not responsive to the request (page 84 of Appeal MA12-442).

[15] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; ...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[16] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[17] To be considered responsive to the request, records must "reasonably relate" to the request.²

[18] The third party appellant submits that page 84 of Appeal MA12-442 does not meet the requirement that the record "reasonably relate" to the request. It states:

When determining whether a record is relevant, one must look not only at the context of the record, but at the information it provides. Simply because a record forms part of a larger document or record that may contain important information, does not necessarily render the record responsive or producible. In other words, "the fact that some irrelevant information is located next to some relevant information does not make the irrelevant information relevant." (Order P-880).

[Page 84] represents a floor plan of the pre-existing sales office and is not reflective of the current structure.

[19] The appellant does not address this issue in his representations.

[20] I have carefully considered the request resulting in Appeal MA12-442. I note that it is for "All copies of records for building plans, permits, inspection documents, etc." The request also specifies that it is for a particular address, however, in brackets after the address, the request specifically identifies the design type of model home at that address.

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

[21] In these circumstances, because the request is clearly for a specific model of home at the identified address, and in light of the third party appellant's statement that page 84 does not relate to this model of home, but to a pre-existing sales office, I find that page 84 is not responsive to the appellant's request.

B. Do the records contain "personal information" as defined in section 2(1)?

[22] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[23] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.³

[24] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[25] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.⁴

[26] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁵

[27] The third party appellant takes the position that certain information contained in the records constitutes the personal information of identifiable individuals. The third party appellant specifically refers to certain severed information on the following pages:

Appeal MA12-441: pages 35-38, 44-46, 49, 50, 59 and 60.

Appeal MA12-442: pages 36-39, 41, 42, 45, 47, 48, 50, 59, 63-66, 69, 81, 85-87, 89 and 95.

Appeal MA12-448: pages 11, 43-45, 48-57, 60, 61, 67, 71 and 73.

³ Order 11.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

[28] The information severed from these pages which the third party appellant argues constitutes personal information consists of identified individual's names, signatures, email addresses and telephone extensions, an individual's BCIN (Building Code Identification Number) and, in some cases, the identification of the involvement of these individuals in the application processes (ie: whether a particular document was issued to them or received by them).

Analysis and findings

[29] Previous orders have established that, to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.⁶ Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁷

[30] In Order PO-2225, former Assistant Commissioner Tom Mitchinson articulated this analysis for determining the personal information/business information distinction as follows:

Based on the principles expressed in these [previously discussed] orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? ...

The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[31] I adopt this approach for the purposes of these appeals.

[32] In these appeals, the third party appellant is a corporation that applied for the building permits and submitted the building plans and other documents at issue in this appeal.

[33] The third party appellant takes the position that the information severed from the records identified above constitutes the personal information of the identified individuals. It states that, according to section 2(1) of the *Act*, personal information

⁶ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁷ Orders P-1409, R-980015, PO-2225 and MO-2344.

includes "any information about an identifiable individual including names, signatures, phone numbers and email addresses."

[34] On my review of the information the third party appellant has severed, based on its view that it is "personal information," I find that all of the information identified by the third party appellant is information about the named individuals in their business or professional capacity. These individuals are clearly identified as representatives of the corporate third party appellant, or professionals involved in the matter in a professional, rather than a personal, capacity. The email addresses are all corporate addresses, and the telephone numbers and extensions appear to be business numbers. Furthermore, the communications all relate to the third party appellant's permit applications and other processes with the city, relating to the construction of the homes which are the subject of the applications.

[35] I have also considered whether the BCIN number of a named individual constitutes that individual's personal information under paragraph (c) of the definition of "personal information." I note that the BCIN number is a publicly available identifying number assigned to an individual by the Ministry of Municipal Affairs and Housing (the MMAH) when an individual successfully completes the requirements to obtain a number. I also note that the MMAH maintains a public database of the individuals who have been assigned a number, and that the number can be ascertained by a simple search of an individual's name in this public database. Because this number is publicly connected to a named individual, and relates to their professional designation, I find that it does not constitute "personal information" under section 2(1) of the definition in the *Act*.

[36] As a result, in response to the first part of the test articulated by former Assistant Commissioner Mitchinson in Order PO-2225, I find that the names and other information of the individuals all appear in a business or professional context.

[37] With respect to the second part of the test articulated by former Assistant Commissioner Mitchinson in Order PO-2225, in the absence of representations on this part of the test, and on my review of the records, I find that there nothing about the particular information severed from the records that, if disclosed, would reveal something of a personal nature about the individuals.

[38] As a result, I find that the information contained in the records does not qualify as the personal information of the named individuals within the meaning of the definition of that term in section 2(1). The information relates to these individuals solely in their professional or business capacity, and not in their personal capacity.

[39] Having found that the portions of the records which the appellant claims contain "personal information" do not contain the personal information of the named individuals, and because the mandatory personal privacy exemption in section 14(1)

can only apply to information that qualifies as “personal information”, this exemption cannot apply to this information. Accordingly, I find that the withheld portions of the records which the appellant claims contains personal information do not qualify for exemption under section 14(1) of the *Act* and, as no other exemptions are claimed for these portions of records, I will order that they be disclosed.

C. Does the mandatory exemption at section 10(1)(a) apply?

[40] The third party appellant takes the position that certain records or portions of records are exempt from disclosure on the basis of the exemption in section 10(1)(a). That 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, 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;

[41] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁸

[42] 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.⁹

[43] For section 10(1) to apply, 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 10(1) will occur.

⁸ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

⁹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[44] For section 10(1) to apply, each part of the three-part test set out above must be satisfied.

[45] The third party appellant identifies two categories of records which it claims fit within this exemption. They are:

Category 1: records containing project value amounts

The third party appellant identifies six records which contain information setting out specific project value amounts. These six records are six separate documents entitled "Application for a Permit to Construct or Demolish." The withheld information in these six records are the dollar amounts filled in in the box entitled "Project value est. \$." Three of these amounts relate to the initial permit, and three relate to revisions to the permit. The records containing this information are the following:

- (a) Appeal No. MA12-441: Records 36 and 45.
- (b) Appeal No. MA 12-442: Records 36 and 65.
- (c) Appeal No. MA 12-448: Records 44 and 48.

Category 2: building plans or other drawings relating to the properties

The third party appellant identifies 17 records which consist of building plans or other drawings relating to the properties. These records are the following:

- (a) Appeal No. MA12-441: Records 63-69 (Appendix 1).
- (b) Appeal No. MA12-442: Records 83 and 96-98 (Appendix 2).
- (c) Appeal No. MA12-448: Records 76-81 (Appendix 3).

[46] I will review each category of record under the three parts of the test set out above.

Part 1: type of information

[47] In order for a record to fit within this part of the three-part test, its disclosure must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

[48] The third party appellant takes the position that the category 2 records identified above constitute technical information, and that the category 1 records consist of commercial information. These terms have been defined in prior orders 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.¹⁰

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.¹¹

[49] With respect to the commercial information, the third party appellant states that the category 1 records identify certain monetary amounts contained in the applications, and these reflect the values of the projects referenced in the permit application material. It states:

The project value set out in the documentation was prepared by professionals employed by the appellant, and comprises commercial information.

[50] In addition, the appellant refers to the category 2 records, and states that these plans and drawings constitute technical information. It states that these records were prepared by professionals employed by the appellant, and comprise technical information. It states:

The technical information in these records are detailed drawings and plans to the construction of the design of three of the appellant's homes. These records are the result of the appellant's experience, expertise and the investment of a significant amount of time, research, money and effort.

[51] On my review of the records and the third party appellant's representations, I agree with the position taken by the appellant, and find that the category 1 records constitute commercial information for the purpose section 10(1). I also find that the building plans and other drawings constitute technical information for the purpose of that section.¹²

¹⁰ Order PO-2010.

¹¹ Order PO-1621.

¹² See Order MO-2735.

Part 2: supplied in confidence

Supplied

[52] 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.¹³

[53] 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.¹⁴

[54] The third party appellant states that its business includes the construction of residential homes and that, to conduct its business, it is legally obligated to obtain building permits from the city. It then states that all records that it claims fit within section 10(1)(a) were supplied to the city for the purpose of obtaining the legally required building permits and the necessary corollary documentation and inspections.

[55] The category 1 records are all applications filled in by the third party appellant and submitted to the city. The category 2 records are building plans and drawings prepared by the third party appellant or its agents and submitted to the city.

[56] In the circumstances, I am satisfied all of the records in these two categories were supplied to the city by the third party appellant.

In confidence

[57] 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.¹⁵

[58] 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;

¹³ Order MO-1706.

¹⁴ Orders PO-2020 and PO-2043.

¹⁵ Order PO-2020.

- 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.¹⁶

The appellant's representations

[59] In support of its position that both category 1 and category 2 records were supplied by the third party appellant to the city in confidence, the appellant states:

The Appellant's business includes the construction of residential homes. To conduct its business, the Appellant is legally obligated to obtain building permits from the City. Without these permits, the Appellant, and all other builders, would be unable to conduct their business. Specifically, section 8 of the *Building Code Act* mandates that "No person shall construct or demolish a building or cause a building to be constructed or demolished unless a permit has been issued therefore by the chief building official".

All records the Appellant seeks to protect were supplied to the City solely for the purpose of obtaining the legally required building permits and the necessary corollary documentation and inspections.

... the City's Application to Construct or Demolish contains the following wording:

...information contained in this form and schedules is collected under the authority of subsection 8(1.1) of the Building Code Act, 1992, and will be used in the administration and enforcement of the Building Code Act ...

As the records were supplied solely for the purpose of legislative compliance, there was both an explicit and implicit expectation of confidentiality within the limits prescribed by this Act.

[60] In support of its position, the appellant refers to the following quotation from Order MO-1823, where Senior Adjudicator Liang stated:

¹⁶ Orders PO-2043, PO-2371 and PO-2497.

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.

[61] The appellant then states:

Further, the Appellant consistently treats these records as confidential and has not revealed same to anyone outside of the Appellant's organization other than the City or as required by the *Building Code Act* or other statute.

The Appellant has always acted to treat these records as a trade secret as evidenced by the fact that they are used only by the Appellant to build its own homes they are branded with the Appellant's logo.

[62] Lastly, the appellant refers to the following quotation from the decision in Order MO-2132, which dealt with whether certain engineering drawings of a hog farm facility were supplied in confidence:

I am satisfied that the detailed information contained in the engineering drawings which outline the proposed construction of each of the structures that make up the hog farm facility was supplied with an implicit expectation of confidentiality. I am also satisfied that the expectation on the part of the engineer that his detailed technical work was to be kept in confidence was reasonable in the circumstances, given his personal interest in maintaining the confidentiality of this information.

The city's representations

[63] The city was provided with a copy of the appellant's representations, and invited to provide representations on this part of the three-part test. On whether the information in the records was supplied in confidence, the city states:

... the City submits that there was no explicit or implicit reasonable expectation that the records would be held in confidence by the City. The home builder [the third party appellant] used the standard provincial Application for Permit to Construct or Demolish under the Building Code Act when applying for the building permits. Neither the City nor the Affected Third Party indicated in writing that the records were required to be held in confidence.

In addition, although the City building code services branch limits access to records to those City employees who require the documents in order to perform their job, the City does have a "View and Release" process that allows homeowners to access these records.¹⁷ ... This process allows a homeowner to access building plans for their home. An individual who subsequently purchases a home would have access to the building plans through this view and release practice. This process is frequently used by owners who require plans to renovate their home. In sum, the City submits that, similar to [the finding in Order MO-2735] ..., the City has in place a routine disclosure practice that affirms that building plans for residential homes are not considered to have been supplied in confidence.

[64] The city also provides representations regarding the nature of the information in the records as follows:

Although the request was in respect of show homes that were relatively new on the market at the time of the request, the City submits that this is not indicative of the information having been implicitly supplied to the City in confidence. All three building permits had been issued well before the access to information request was received by the City ...

[65] On this basis, the city distinguishes these circumstances from ones where reports were denied on the basis that they were related to an active inspection file.¹⁸

[66] In addition, the city submits that the general floor plans for the three homes which are the subject of these three appeals would have already been available through the third party appellant's marketing materials, and that the technical information contained in these types of residential building plans is common knowledge and not a trade-secret. In support of its position, the city provided print-outs that show that some of the models of these homes have in fact been fully constructed and have been on the market for some time.

The appellant's reply representations

[67] The third party appellant disputes the city's position, and states:

The City states that, within its own organization, it keeps these records confidential. Specifically, disclosure of the records is limited to those employees who, as part of their job function, require the records to issue

¹⁷ The city notes that its "View and Release" process, including the application to access building permit records, is available to the public on the City's website. It also provided a copy of this material along with its representations.

¹⁸ The city refers to Order M-303.

building permits. There is therefore an implicit expectation of confidentiality even amongst City staff.

The fact that disclosure of these records is "permissible" through the City's "View and Release" process is immaterial to the determination of whether the records are subject to the section 10 exemption under the *Act*.

On this issue, the Appellant has significant concerns regarding the validity of a process which purports to release confidential information thereby circumventing the safeguards of the *Act*, all in an effort to eliminate "the necessity of a formal request under the *Act*."

Notwithstanding these concerns, only the current property owner can avail him or herself of the City's "View and Release" process to obtain building plans of their residence. Otherwise, there is an implied expectation of confidentiality, and the documents will only be disclosed if written consent of the owner of the plans/copyright holder is obtained.

As the records were supplied solely for the purpose of legislative compliance, the Appellant submits that there was both an explicit and implicit expectation of confidentiality within the limits prescribed by this *Act*. Therefore, the second prong of the test has been satisfied.'

Analysis and findings

[68] The city submits that there was no explicit expectation that the records would be held in confidence by the city. It indicates that the third party appellant used the standard provincial Application for Permit to Construct or Demolish under the *Building Code Act* when applying for the building permits, and that neither the city nor the appellant indicated in writing that the records were required to be held in confidence. The appellant does not argue this point.

[69] In the circumstances, I find that there was no explicit expectation that the records were supplied to the city in confidence.

[70] The city also submits that there was no reasonable implicit expectation that the records were supplied to it in confidence. It again points out that the appellant used the standard provincial application under the *Building Code Act* when applying for the building permits. In addition, the city refers to its "View and Release" process that allows homeowners and other to view these records, and provides a copy of the standard application to access building permit records. I note that this form includes a list of the various types of records that can be requested, and the fees that are payable for each type of record. I note that the categories of records includes "Building Permit Applications" and "Plan Sheet (Rolled Plans)".

[71] I also note that the city refers to the decision of this office in Order MO-2735. In that decision, Assistant Commissioner Brian Beamish also addressed the issue of whether building plans were supplied to the municipality "in confidence." After reviewing the representations of the parties, which are somewhat similar to the representations before me in this appeal, the Assistant Commissioner reviewed the following quotation from Order M-169:

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

[72] Assistant Commissioner Beamish adopted this interpretation of the confidentiality requirement and found that, in the circumstances before him, the expectation of confidentiality was neither reasonable nor objective. He stated:

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. ... 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.

[73] Assistant Commissioner Beamish therefore found that part two of the test for the application of section 10(1) to the records at issue was not met, and that section 10(1) did not apply to the information in the building plans.

[74] I adopt the approach taken by Assistant Commissioner Beamish in Order MO-2735, and apply it to the circumstances of these appeals.

[75] In these appeals, I find that the third party appellant did not have a reasonable or objective implicit expectation of confidentiality when it supplied the records in categories 1 and 2 to the city. I make this finding for a number of reasons.

[76] To begin, I agree with the Assistant Commissioner that although the building plans and applications were submitted to the city as part of the building permit application process, the expectation that the records would be used for this purpose alone is not equivalent to a reasonable expectation of confidentiality. None of the documents are stamped "confidential" or otherwise noted as having been provided in confidence

[77] In addition, as was the case in Order MO-2735, the city in these appeals has provided evidence of its practice to make building plans and permit applications available to the public upon request, for a fee. This practice is contrary to a reasonable and objective expectation of confidentiality on the part of the third party appellant. If the appellant had asked the city, it would have been informed of the types of documents that are routinely disclosed to other parties on request.¹⁹

[78] I have considered the appellant's argument that only the current property owner can use the city's "View and Release" process to obtain copies of the building plans relating to their residence. Although I acknowledge that there are some restrictions placed on parties obtaining copies of building plans under the city's "View and Release" process, the issue before me is whether the records at issue qualify for exemption under section 10(1) of the *Act* and, specifically, if the information was supplied "in confidence." In that regard, the fact that the records at issue are available through the city's routine practices satisfies me that the records were not so provided.²⁰

[79] Accordingly, in the circumstances of these appeals, I do not find that there is a reasonable expectation of confidentiality on the part of the third party appellant for the information in the records at issue, and find that part two of the test for the application of section 10(1) to the records at issue is not met. As a result, the records do not qualify for exemption under section 10(1) of the *Act*.

ORDER:

1. I find that page 84 of Appeal MA12-442 is not responsive to the appellant's request, and ought not to be disclosed.

¹⁹ I note that, as the third party appellant's business includes the construction of residential homes, it is likely aware of this practice.

²⁰ I note that, although generally speaking, a party obtaining information under the *Act* is free to use the information as they wish, this is still subject to any other legal recourse outside the *Act* that an aggrieved party may have in connection with the use of their information.

2. I find that the remaining records do not qualify for exemption under sections 10(1) and/or 14(1), and uphold the city's decisions to disclose them to the appellant. As a result, I order the city to disclose these records to the requester by **March 28, 2014** but not before **March 24, 2014**.

Original signed by: _____
Frank DeVries
Adjudicator

_____ February 21, 2014