Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3250

Appeal MA14-529

Town of Amherstburg

October 7, 2015

Summary: The appellant sought access to two archeological assessment reports prepared in 1994 and 1997 relating to a specified location. The town and the landowner claimed the application of the third party information exemption in section 10(1) to the reports. In this order, the adjudicator does not uphold the application of section 10(1) to the records on the basis that the third part of the test under that exemption has not been met. The town was ordered to disclose the records to the appellant.

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

OVERVIEW:

[1] The appellant submitted a six-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* to the Town of Amherstburg (the town) for access to the following information:

1. Environmental Impact Assessment….May 28, 2014

2. Draft Stormwater Management Reports…Dec. 12, 2012

3. Stage 2 Archeological Assessment, Final Report…Dec. 1994

4. Archeological Assessment Stage 3…Jan. 1997

5. MNR Report re Bois Blanc received on or about 8/8 2014…

6. Traffic Report re Bois Blanc Island received by Town of Amherstburg on or about 11/8/14…

[2] The town initially issued a decision advising that records relating to part 5 of the request were denied pursuant to section 9 of the *Act* (relations with other governments). With respect to part 6 of the request, the town advised that it could not locate any responsive records. With respect to parts 1 through 4 of the request, the town advised that third party notification was required and issued a time extension decision pursuant to section 20 of the *Act.*

[3] The town subsequently issued an access decision advising that, following consideration of representations received from an affected party, access to records responsive to parts 1, 3, and 4 was denied on the basis that the information they contain is exempt under the mandatory third party information exemption in section 10(1) of the *Act*. The town granted access to the records relating to part 2 of the request.

[4] The appellant appealed the town's decision to this office. During the course of mediation, the affected party, which is the current owner of the land that was the subject of the assessment reports, agreed to participate in a teleconference with the appellant, the mediator and the town's Freedom of Information Co-ordinator. At the conclusion of the teleconference, the appellant advised that he was now only seeking access to the reports responsive to parts 3 and 4 of the request. The appellant also advised the mediator that he believes there is a public interest in the disclosure of the records remaining at issue. As a result, the application of section 16 of the *Act* was added as an issue in this appeal.

[5] I initially sought and received representations from the parties who are opposing disclosure of the two records at issue, in this case the town and the affected party. The complete representations of both these parties were shared with the appellant, who also submitted representations. Finally, the appellant's submissions were shared with the town and the affected party, who then provided me with reply representations.

[6] In this order, I do not uphold the town's decision to deny access to the responsive records. I conclude that they do not qualify for exemption under section 10(1). As a result, I order that they be disclosed to the appellant.

RECORDS:

[7] The records remaining at issue are two Archeological Assessments dated 1994 and 1997 that are responsive to parts 3 and 4 of the request.

DISCUSSION:

[8] The sole issue for determination in this appeal is whether the responsive records are exempt from disclosure under the mandatory third party information exemption in section 10(1), which reads, 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, 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

[9] Section 10(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 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[2]

[10] 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, 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.

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[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 Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: Type of Information

[11] Some of the types of information listed in section 10(1) have been discussed in prior orders. The affected party argues that the records contain information that qualifies as scientific information for the purposes of section 10(1). That term has been defined in previous orders of this office as:

> *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.[3]

[12] The town argues that the records contain information that qualifies as technical information, which has been defined as:

> *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]

[13] I have reviewed the contents of both of the reports at issue and agree that they contain information that qualifies as scientific and technical information relating to the archeological history of the property in question. They were prepared by an expert in the field of archeology and include the results of their painstaking work to locate and assess the archeological record of this particular place. As a result, I have no difficulty in finding that the first part of the test under section 10(1) has been satisfied.

Part 2: Supplied in Confidence

Supplied

[14] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[5] 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]

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[3] Order PO-2010.
[4] Order PO-2010.
[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.

[15] The affected party, who is the current owner of the land, was not the owner at the time the assessments reports were prepared in 1994 and 1997. Rather, these assessments were commissioned by its predecessor in title, which is no longer in business, and submitted to the Ministry of Citizenship, Culture and Recreation, as it was then known, now the Ministry of Tourism, Culture and Sport. The town's predecessor, the Township of Malden, came into possession of the records at some time prior to 1999 as part of the planning and zoning process for the property in question, which is located in the former township and is now part of the town.

[16] I agree that the records were supplied by the affected party's predecessor in title to the town within the meaning of the second part of the test under section 10(1).

In Confidence

[17] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[7]

[18] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure[8]

[19] The town argues that the records were provided to the Township of Malden with the implicit understanding that they were to be treated confidentially "because they contained information relevant to the commercial interests of the property owner, the residential development of Boblo [Bois Blanc] Island."

[20] The affected party submits that the assessment reports were provided to the regulatory bodies in existence at the time, including the Government of Ontario and the Township of Malden "under the various applicable planning and development

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[7] Order PO-2020.

[8] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

legislation." The affected party also submits that the records contain information that is critical to the proper conservation of the natural heritage and historical importance of the lands described therein. It argues that it would be reasonable to assume that the records were provided with an expectation of confidentiality given "that the release of such information could endanger the very cultural sites [the affected party] and provincial legislation are trying to protect."

[21] Based on my review of the contents of the records and their sensitivity, I agree that it is reasonable to assume that at the time of their creation and dissemination, they were treated in a confidential manner by the Ministry, the landowner and the township which was also provided with a copy sometime prior to 1999. The records describe in great detail the findings of the archeological researchers who applied their expertise and knowledge to an examination of the subject property. In my view, it is not surprising that the results of their research would have been treated confidentially, in order to protect the historically significant sites which are described therein.

[22] As a result, I am satisfied that the records were submitted by the affected party's predecessor in title to the Ministry and the Township with a reasonably-held expectation that they would be treated confidentially. The second part of the test under section 10(1) has, therefore, been met.

Part 3: Harms

General Principles

[23] The parties resisting disclosure, in this case the town and the affected party, must provide detailed and convincing evidence about the potential for harm. They must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[9]

[24] 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 the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[10]

[25] Both the town and the affected party oppose the release of the assessment reports because their disclosure to the appellant is tantamount to disclosure to the world. They submit that the release of the records could reasonably be expected to

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[9] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[10] Order PO-2435.

result in harm to the archeological sites which are described in the records. The town and affected party are concerned for the safety and security of the archeological sites which are identified and located on the land. The affected party argues, persuasively, that "while there is no economic or other harm to [it], there is potential harm to the cultural site itself and, if such site and/or its artifacts are lost, damaged or destroyed, to our society as a whole."

[26] Section 10(1) is designed to protect the informational assets of third parties from the harms contemplated by this exemption. Potential harm to an archeological site is not one of the enumerated harms set out in section 10(1). Neither the town nor the affected party cast any aspersions as to the bona fides of the appellant or his motives for seeking these assessment reports. Their concerns lie with the fact that once the reports are made available to the appellant, control over the information they contain is lost and it may end up in the hands of less-scrupulous individuals who may seek to damage the site or gain financially from the information in the records.

[27] The appellant clearly indicates that he will not "release any of this information to any person who may seek to deface the archeological history of this unique property." Rather, he states that it is his intention to help to preserve it, as confirmed in a letter written to the County of Essex with respect to the planned development of portions of the land described in the records.

[28] In my view, the disclosure of the scientific and technical information contained in the records cannot reasonably be expected to result in any of the harms contemplated by sections 10(1). Specifically, I find that disclosure cannot reasonably be expected to give rise to prejudice to the affected party's competitive position or result in interference with its contractual or other negotiations, within the meaning of section 10(1)(a).

[29] Similarly, I have not been provided with any evidence to enable me to conclude that disclosure of the assessment reports will result in similar information no longer being made available to the town, as described in section 10(1)(b).

[30] Finally, I find that the disclosure of the records cannot reasonably be expected to result in any undue loss or gain to any person, including the affected party, as set out in section 10(1)(c). Non-economic loss from possible harm to the site is not contemplated by section 10(1)(c). Rather, the purpose of this exemption is to prevent disclosure of information that could be exploited by a competitor, to the detriment of the owner of the information. In the present case, the affected party concedes that it would suffer no economic harm as a result of the disclosure of the records.

[31] Because I have found that the third part of the test under section 10(1) has not been satisfied, I conclude that the records are not exempt under that exemption. As no other exemptions have been claimed for the records, and no mandatory exemptions apply to them, I will order that they be disclosed to the appellant. As I have found that

the records are not exempt under section 10(1), it is not necessary for me to determine if there exists a public interest in their disclosure under section 16.

ORDER:

1. I order the town to disclose the records to the appellant by providing him with a copy by **November 12, 2015** but not before **November 6, 2015**.

2. In order to verify compliance with Order Provision 1, I reserve the right to require the town to provide me with a copy of the records which are disclosed to the appellant.

Original Signed by: October 7, 2015

Donald Hale
Adjudicator