

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3416

Appeal MA16-303

Township of Puslinch

February 28, 2017

Summary: An affected party appealed the Township of Puslinch's decision to disclose four records responsive to an access request regarding a proposed addition to an equestrian facility. The affected party argued the records should be withheld under section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act*. As there is no evidence that the records were supplied in confidence to the Township, section 10(1) does not apply to the records, and they must be disclosed in full.

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 Township of Puslinch (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a proposed addition to an equestrian facility in the township and identified thirteen records responsive to the request.

[2] To comply with section 21 of the *Act*, before granting access to the responsive records the town invited parties potentially affected by disclosure of the records to provide representations about why the records or parts of the records should not be disclosed. After considering the affected party's representations, the township issued a decision to the requester granting partial access to the records, withholding information in some records on the basis that it was personal information. The requestor did not

appeal the township's decision to deny access to portions of some records, so this information is not at issue in this appeal.

[3] One affected party (the third party appellant) appealed the township's decision to disclose in full four records, comprising three drawings and an inspection report. The third party appellant claimed section 10(1) of the *Act* required that the four records be withheld. As no further mediation was possible, this appeal proceeded to adjudication, where an inquiry is conducted.

[4] During the inquiry, I invited and received representations from the third party appellant and the township on the issues set out in a Notice of Inquiry. After reviewing those representations, I decided not to invite representations from the original requestor.

[5] This order finds that the section 10(1) exemption does not apply to the four records the third party appellant objected to disclosure of. The records are ordered disclosed.

RECORDS:

[6] The records remaining at issue comprise an engineer's inspection report and three drawings relating to an addition to an equestrian facility. These are records 4, 7, 8 and 9 in the index of records created by the township in response to the request for records.

ISSUE:

[7] The issue in this appeal is whether the mandatory exemption at section 10(1) applies to the four records at issue.

DISCUSSION:

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

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

[9] For section 10(1) to apply, the institution and/or the affected party must satisfy each part of the following three-part test:

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

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.

[10] The township's only representation was to restate its position that section 10(1) does not apply to the four records at issue. Accordingly, it falls to the third party appellant to satisfy the three-part test. I will now consider whether the records meet the three-part test for section 10(1) to apply.

Part 1: type of information

[11] The appellant submits that the records contain technical information or information related to technical documents.

[12] 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.²

[13] I accept that the information in issue is technical information. Records 4, 7 and 8 comprise technical drawings prepared by land surveyors and/or engineers related to a proposed addition to an equestrian facility. Record 9 is an inspection report prepared by an engineer arising from a site inspection. Record 9 contains technical information related to construction of the proposed addition.

Part 2: supplied in confidence

[14] To satisfy this part of the test, the appellant must establish that the records at issue were "supplied" to the township "in confidence," either implicitly or explicitly.

Supplied

[15] Information may qualify as "supplied" if it was supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate

² Order PO-2010.

inferences with respect to information supplied by a third party.³

[16] The appellant's representations do not address part two of the test. However, it is clear from my review of the records that they were "supplied" to the township by the appellant or by a third party on behalf of the appellant. The drawings and inspection report were created by third parties. For the township to have the records they must have been provided to the town by the appellant or their agent.

In confidence

[17] To satisfy the "in confidence" component of part two of the test, the appellant 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.⁴

[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 disclosure⁵

[19] As noted above, the township's submission is that section 10(1) does not apply, and the appellant did not address whether the records were supplied in confidence.

[20] Turning to the records themselves, there is no explicit assertion of confidentiality in the records or any evidence of an explicit assertion of confidentiality accompanying their supply to the township.

[21] From my review of the records, there is nothing in the records or the circumstances of their preparation that supports the conclusion that the records were supplied implicitly in confidence. The records appear to have been supplied in relation to an application for a building permit for a proposed addition to an equestrian facility. In this regard, I note that the appellant's representations state that the application for

³ Orders PO-2020 and PO-2043.

⁴ Order PO-2020.

⁵ 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.

permission for the addition is publically available on the township's website, and the appellant attached to his representations a report of a public meeting relating to an aspect of the proposed addition.

[22] Having reviewed the parties' representations and the records, I am not satisfied that the records were supplied to the township in confidence, either explicitly or implicitly. As a result, I find that part two of the three-part test in section 10(1) has not been met.

[23] I therefore do not need to proceed to consider the final part of the three-part test, namely whether disclosure of the records would give rise to a reasonable expectation that one of the harms specified in section 10(1) will occur.

[24] I find that section 10(1) of the *Act* does not apply to the four records at issue.

ORDER:

I order the township to disclose records 4, 7, 8 and 9 to the appellant not earlier than **April 4, 2017** and not later than **March 30, 2017**.

Original Signed by: _____
Hamish Flanagan
Adjudicator

February 28, 2017 _____