

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3438

Appeal MA16-558

City of Toronto

May 15, 2017

Summary: The city received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specified property. After notifying a third party, the city decided to disclose the records. The third party appealed the city's decision on the basis that the records fall under the mandatory third party information exemption at section 10(1) of the *Act*. In this order, the adjudicator finds the records at issue are not exempt under section 10(1) as the second and third parts of the test have not been met. As a result, she upholds the city's decision to disclose the records.

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

Orders and Investigation Reports Considered: Orders MO-2735, PO-2490, and PO-3663.

BACKGROUND:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specified property.

[2] The city identified the responsive records relating to the request and notified an affected party to obtain its views regarding disclosure of the records. After considering the affected party's representations, the city issued a decision granting access to the records in full.

[3] The affected party, now the third party appellant, appealed the city's decision.

[4] During the course of mediation, the mediator attempted to contact the third party appellant to discuss the appeal but was unable to reach the appellant via telephone, e-mail or letter.

[5] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process in which an adjudicator conducts a written inquiry under the *Act*. I invited the third party appellant to submit representations but I did not receive any from him.

RECORDS:

[6] The records at issue are building plan drawings, consisting of 94 pages.

DISCUSSION:

[7] The only issue in this appeal is whether the mandatory exemption for third party information at section 10(1) of the *Act* applies to the records at issue.

[8] Section 10(1) 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, 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

(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.

[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.

Part 1: type of information

[11] 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.³

[12] Adopting this definition, I find that the records contain information that qualifies as technical information for the purposes of section 10(1) of the *Act*. I note that the third party appellant did not provide any representations on the type of information contained in the records at issue. Accordingly, the first part of the test for the application of section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[13] The requirement that the information was “supplied” to the institution reflects

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.

³ Order PO-2010.

the purpose in section 10(1) of protecting the informational assets of third parties.⁴

[14] 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.⁵

In confidence

[15] 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.⁶

[16] 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 disclosure⁷

[17] Although the third party appellant has not submitted any representations, it appears that the information was supplied to the city during the process of obtaining a building permit. However, I am unable to find that the information was supplied with a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. Furthermore, on the basis of the records, I am unable to discern whether the information would have been supplied in confidence. Accordingly, I find that the second part of the test has not been met for the application of section 10(1) of the *Act*. As *all* three parts of the test must be made out, I find the records are not exempt.

Part 3: harms

[18] Parties relying on section 10(1) to resist disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative, although they need not

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

⁶ Order PO-2020.

⁷ 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.

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.⁸ 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*.⁹

[19] Although it is unnecessary for me to discuss part 3 of the test, I find that there is no evidence on the basis of the records themselves that disclosure would result in any of the harms listed under sections 10(1)(a) to (d). As noted above, the third party appellant did not provide any representations to substantiate the harm in disclosure of the records. As such, I find there is no evidence of any harms that may occur due to disclosure, and will order the records disclosed.

ORDER:

I uphold the city's decision to disclose the records at issue to the requester and order the city to send a copy of the records to him. This disclosure is to take place by **June 20, 2017** but not before **June 15, 2017**.

Original Signed by: _____

Lan An
Adjudicator

_____ May 15, 2017

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

⁹ Order PO-2435.