

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3576

Appeal MA17-10

Town of Fort Frances

March 19, 2018

Summary: The town received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*, for access to specific design drawings and plans. After notifying an affected party, the town decided to deny access to the record, relying upon section 10(1) (third party information) of the *Act*. In this order, the adjudicator finds that the record at issue is not exempt under section 10(1) as the third part of the three-part test to establish the exemption has not been met. As a result, she orders the town to disclose the record.

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-1957, PO-3782, MO-1769, and MO-2193.

BACKGROUND:

[1] The Town of Fort Frances (the town) received a request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

I am requesting copies of drawings submitted for Building Permit for the Five (5) Unit Townhome being constructed on [a specified street] in Fort Frances...I confirmed that the design was originally done by my firm and

the reuse of the design is copyright infringement. I am seeking to obtain a copy in regards to an upcoming court case against [name of company].

[2] The town identified a record responsive to the request. After notifying an affected party, in accordance with section 21 of the *Act*, and considering the affected party's submissions, the town denied access to the record pursuant to the mandatory third party exemption at section 10(1) of the *Act*.

[3] The requester, now the appellant, appealed the town's decision.

[4] During the course of mediation, the affected party advised the mediator that it was not consenting to the release of the record at issue.

[5] As no further mediation was possible, the appeal was moved to the next stage, where an adjudicator conducts an inquiry under the *Act*.

[6] I sought and received representations from the town, the appellant and the affected party. In accordance with this office's *Code of Procedure and Practice Direction Number 7*, non-confidential copies of the parties' representations were shared.

[7] In this order, I find that the record at issue is not exempt under section 10(1) as the third part of the three-part test to establish the exemption has not been met. Accordingly, I order the town to disclose the record.

RECORDS:

[8] The record at issue consists of nine pages of design drawings and plans.

DISCUSSION:

[9] 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 record at issue.

[10] 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.

[11] 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

[12] 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

[13] 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

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.

prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.³

[14] Adopting this definition, from my review of the record, I find that it contains information that qualifies as technical information for the purposes of section 10(1) of the *Act*. I note that the parties agree that the record contains technical information. Accordingly, I accept that the record contains technical information, and thus the first part of the test for the application of section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[15] 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.⁴

[16] 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

[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.⁶

[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

³ Order PO-2010.

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

⁶ Order PO-2020.

- prepared for a purpose that would not entail disclosure⁷

Representations

[19] In its representations, the town submits that the record was supplied in confidence. It states that the affected party submitted the record through the process of applying for a building permit. It also states that the record was supplied with a reasonable expectation of confidentiality. The town further states:

...The [affected party] would expect that [the] technical information contained in said [record] would be treated in a confidential manner by the [town]. The [town] does not release any design drawings and plans submitted as part of the building permit process to anyone save the property owner.

[20] In its representations, the affected party submits that the record was supplied in confidence. It states that it directly supplied the record to the town. It also submits that it has an expectation of privacy on reasonable and objective grounds. The affected party explains further:

... The [record] requested has not been otherwise disclosed or made available to the general public, it was prepared for a purpose that would not entitle disclosure (i.e. persons who apply for a building permit are under the impression that it is implied that all documents relating to the permit will be kept confidential), and the information is currently in dispute concerning the authorship and copyright ...

[21] In his representations, the appellant submits that the record was not supplied in confidence. He understands that there is a reasonable expectation of confidentiality in the record, but it cannot be for the purpose of using copyrighted materials. He submits that the record is still considered public in nature as long as the individual personal information has not been compromised. The appellant also submits that, based on his previous examination of the record, no personal information was conveyed in the record that was not already known to the public. He further submits that the record was presented to the public at a Chamber of Commerce event with handouts given to potential buyers, and the same presentation drawings are posted online with Remax.

[22] In its reply representations, the affected party states that it has made available promotional materials to potential buyers but they are not the record at issue, and that this disclosure should not defeat its claims.

⁷Orders 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.

Analysis and findings

[23] With respect to the “supplied” component, I am satisfied that the record was supplied to the town during the process of obtaining a building permit.

[24] With respect to the “in confidence” component, I note that the appellant is arguing that the record has been disclosed or available from sources to which the public has access, specifically at a Chamber of Commerce event and online with Remax. I have carefully examined the copies of the drawings provided by the appellant. Although these drawings are similar to the record at issue, they are not identical to it. The drawings lack numerous details contained in the record. As well, I accept the affected party’s submission that these drawings are promotional materials, which it has made available to potential buyers. As such, I reject this argument of the appellant.

[25] I am satisfied that the record meets the “in confidence” component as it was prepared for a purpose that would not entail disclosure. It was also communicated to the town on the basis that it was confidential and that it was to be kept confidential. I accept the affected party’s submission that it expected all the documents relating to the building permit would be kept confidential by the town. This expectation is reflected in the town’s submission when it states that it treats the technical information contained in the record in a confidential manner. Accordingly, I find that the second part of the test has been met for the application of section 10(1) of the *Act*.

Part 3: harms

[26] 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 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

Representations

[27] In its representations, the town submits that the affected party will likely suffer harms from the disclosure. It submits that the record could reasonably be expected to result in harm to the affected party’s competitive position as the technical information contained within the record may disclose specific methodologies and detail about the structure being constructed. The town also states:

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.

It is critical that [the record is] supplied to the institution so that our Chief Building Official has necessary information to consider prior to issuing a building permit, as well as referring to said [record] throughout the construction process. The project being constructed is required to adhere to specifics outlined in the Ontario Building Code, the Town of Fort Frances Zoning By-law and the Town of Fort Frances Official Plan. The Town of Fort Frances cannot ensure the safety of its residents if the Chief Building Official is not able to view [the record] to determine that all predetermined specifics are adhered to.

[28] In its representations, the affected party submits that it will likely suffer harms if the record was disclosed. It points out that the parties are currently engaged in a dispute concerning the authorship and copyright to the record. As such, the affected party submits that the appellant wants the record in anticipation of litigation. It also submits that the record requested is used for the purpose of its business and has economic value to it. As such, the disclosure of the record would significantly prejudice its competitive position, interfere significantly with any present or future negotiations, and the value of its assets would be impacted by its disclosure.

[29] In his representations, the appellant submits that the affected party will not suffer any harms from the disclosure of the record. He submits that it is not possible that the disclosure would hurt the affected party's competitive position or interfere with its contractual or other negotiations, but actually hurts his competitive position as the affected party is using the record without compensating him. The appellant also submits that contractual or other negotiations do not come into play since the release of the record does not have any affect on the existing contracts. He further submits that disclosure of the record will not effect new and/or potential contracts or negotiations.

Analysis and findings

[30] I have reviewed the parties' representations and the record at issue. For the following reasons, I find that the third part of the test has not been satisfied. As a result, I find that section 10(1) does not apply and I order disclosure of the record at issue.

[31] The town argues that, if disclosed, similar information contained in the record at issue would no longer be supplied to its Chief Building Official. The information at issue is the design drawings and plans. Builders are required to provide this information to obtain a building permit and builders have no choice but to provide similar information contained in the record, if they wish to obtain a building permit from the town. As such, I am not satisfied that it is reasonable to expect that disclosure of the information in the record will have the effect that builders will no longer supply similar information to the town. As a result, I find that the requirements for section 10(1)(b) have not been met.

[32] One of the affected party's arguments is that, if disclosed, the appellant will use the record against it in litigation as the parties are in dispute about who owns the copyright to the record. However, this is merely speculation on the part of the affected party as the appellant has not commenced legal action. Regardless, the affected party's concern relating to possible litigation is not the type of harm covered by sections 10(1)(a) or (c).¹⁰

[33] In the alternative, if legal action has commenced, I find the following comments of Senior Adjudicator John Higgins in Order PO-2490 to be persuasive:

In my opinion, the reference to "competitive position" in section 17(1)(a) of the [*Freedom of Information and Protection of Privacy Act*, which is the equivalent of section 10(1) of the *Act*,] was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "information assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts.

[34] I agree with the reasoning set out in the above order.

[35] In addition, the affected party argues that the record is being used for the purpose of its business and has economic value to it. Regardless of whether or not the record has any economic value to the affected party, the affected party has not provided me with sufficient evidence that the disclosure of the record could reasonably be expected to prejudice significantly its competitive position, or interfere significantly with its contractual or other negotiations. Accordingly, I find that the third part of the test has not been made out. As a result, the record at issue is not exempt under section 10(1) of the *Act*.

ORDER:

1. I order the town to disclose the record at issue to the appellant. This disclosure is to take place by **April 23, 2018** but not before **April 16, 2018**.

Original Signed by: _____

Lan An
Adjudicator

March 19, 2018

¹⁰ See Order PO-3141.