Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3660

Appeal MA16-573

Town of the Blue Mountains

September 18, 2018

Summary: The appellant submitted a request to the town under the *Act* for records relating to a proposed residential development. After notifying the third party, the town granted the appellant partial access to the records claiming that the withheld information qualifies for exemption under the third party information exemption under section 10(1). The appellant appealed the town's decision and the adjudicator finds that the exemption does not apply. The appeal is allowed and the town is 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, s. 10(1).

OVERVIEW:

[1] The appellant submitted a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of the Blue Mountains (the town) for records relating to a proposed residential development.

[2] The town issued a fee estimate letter requesting partial payment of $2520.00 to process the request. The appellant responded by narrowing her search to the part of her request which sought access to:

> [a]ny documentation/ [handwritten] notes, etc arising from the meeting held on January 6, 2016 where [the town's Senior Policy Planner] was present with [a named consultant].

[3] The town notified the land use planning and project management consultant retained by the landowner to obtain the town's approval for the proposed subdivision project as required under section 21(1). The consultant (the third party) objected to the release of the records and the town granted the appellant partial access to the responsive records. The town claimed that the remaining records qualify for the third party information exemption under section 10(1).

[4] The appellant appealed the town's decision to this office and a mediator was assigned to the appeal.

[5] During mediation, the appellant confirmed that she continues to seek access to the withheld records. In addition, the appellant raised concerns about the length of time it took the town to issue a decision in response to her request.

[6] The file was transferred to adjudication for an inquiry. During the inquiry, the town, the third party[1] and the appellant were given an opportunity to provide written representations to this office. The appellant's representations did not specifically address the issue of whether the records qualify for the third party information exemption. Instead, her representations focused on concerns relating to the town's processing of her request, including the apology it provided during mediation and timelines communicated during the request stage. The appellant's representations also question why the town identified more responsive records than she anticipated. The appellant argues that the town "elected to waste valuable time regarding the release of documents that were not even requested to justify the initial delay and ongoing denial".

[7] Given that the town issued an access decision, the only issue left to determine is whether or not the town properly applied the third party information exemption under section 10(1) to withhold the records at issue from the appellant. Accordingly, the appellant's concerns about the manner the town processed her request including her complaint that it identified too many records as responsive will not be mentioned further in this order.

[8] In this order, I find that the third party information exemption under section 10(1) does not apply to the records at issue and order the town to disclose the records to the appellant.

RECORDS:

The records at issue in this appeal are described in the index below:

Page No.	Description of Record
3-4	Transmittal Memo and Pre Consultation Form

[1] The landowner who retained the services of the third party was also given an opportunity to make representations. The landowner's legal representative confirmed that the landowner adopts the representations of the third party.

5, 11-13	Draft plans of condominium and land
6	Email chain, dated March 6-7, 2016
7	Email chain, dated March 29, 2016
8-10	Letter from third party to town, dated April 26, 2016
14-15	3 Photographs
16-17	Email chain, dated May 1, 2016
18	Email, dated May 2, 2016
19	Email, dated May 13, 2016
20-21	Email, dated May 24, 2016
22	Email chain, dated May 25, 2016

DISCUSSION:

[9] The sole issue in this appeal is whether the records qualify for exemption under the third party information exemption under section 10(1). The submissions of the town and the third party give rise to the possible application of sections 10(1)(a) and (b). These sections state:

> 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;

[10] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] Although one of the central purposes of the *Act* is to shed light on the operations of

[2] *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.*).

government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[3]

[11] 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

[12] The town and the third party submit that the records contain technical information relating to the third party's proposed residential development application. In its representations, the town states:

> It is respectfully submitted that the submission of plans and drawing, and all communications related to the submission describing the process and design of the proposed development, made by a Registered Professional Planner, qualifies as technical information.
>
> In particular, the records detail a number of possible scenarios revealing the number, shape, dimensions and configuration of residential lots; the proposed location, width and length of a proposed road; the relationship of the proposed lots and road to adjoining properties; and site planning matters, such as buffering and screening.

[13] The appellant's representations did not address this part of the test under section 10(1).

[14] Based on my review of the records, I am satisfied that they contain technical information.[4] Accordingly, I find that the first part of the three-part test in section 10(1) has been met.

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[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[4] Technical information has been defined in previous orders as 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 [Order PO-2010].

Part 2: supplied in confidence

[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.[5]

[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.[6]

[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] The parties resisting disclosure take the position that the third party supplied in confidence the information contained in the records to the town. The town submits that its review and approval process for planning applications require applicants to attend mandatory pre-consultation meetings with town staff before an application is refined and submitted for approval.[8] The town states:

> The requirement to pre-consult arose from a series of amendments to the *Planning Act* 2006, designed to encourage the free flow of information between applicants and municipal planners, at an early stage of the application process.
>
> The knowledge that technical information supplied during the pre-consultation exercise will be held in confidence encourages unfettered sharing of the details of a planning proposal with Town planning staff, allowing staff to encourage development that confirms with the Town's plans and good planning principles. At the same time, applicants are provided with substantive feedback, without fear that the plans or drawing or the communications will be revealed.
>
> Moreover, part of the pre-consultation discussions in this matter involved the disposal of land by the Town.

[19] The third party argues that the information at issue was supplied to the town during a mandatory pre-consultation process and that the information was not "part of a public meeting or council agenda".

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[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.
[7] Order PO-2020.
[8] The town's website contains a page entitled "Development Application Review and Approval Process for Planning Applications". This webpage describes a mandatory process which identifies the following three stages to obtain approval: The Pre-Application Stage which takes approximately 1 month; The Application Refinement Stage which takes approximately 1-3 months; and The Application Approval and After Planning Approvals Stage. The town's website also indicates that it takes a maximum of 180 days for a decision to be reached in a planning application.

[20] 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[9]

[21] The appellant's representations did not address this part of the test.

[22] I have reviewed the records along with the submissions of the parties and it appears that records 3, 4 and 5 constitute the third party's request for a pre-consultation meeting. However, it is not clear whether the remaining records (records 6-22) relate to the pre-consultation process. I note that the remaining records were created several months after the third party submitted its pre-consultation request. The town's representations indicate that the subdivision application would require a by-law amendment and disposition of land which would be subject to a public process. Most of the remaining records consist of emails or correspondence between the town and the third party which address these issues. I also note that records 20 and 21 cannot be said to have been supplied in confidence by the third party to the town as they consist of emails circulated exclusively between town staff and the information in them does not appear to reveal any information provided by the third party.

[23] The pre-consultation process described by the town and third party requires permit applicants to consult with the town before submitting their applications. I note that various sections of the *Planning Act* provide that municipalities may, through by-laws, require applicants to consult with it before submitting applications.[10] Given the mandatory nature of this process, I am satisfied that the third party had a reasonable expectation of confidentiality, implicit or explicit, at the time it supplied records 3, 4 and 5 to the town in support of its request for a pre-consultation meeting. Accordingly, I

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[9] 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.

[10] For instance section 51(16) and (16.1) of the *Planning Act* which sets out the rules relating to subdivision approvals states:

> (16) An owner of land or the owner's agent duly authorized in writing may apply to the approval authority for approval of a plan of subdivision of the land or part of it.
>
> (16.1) The approval authority,
>
> (a) shall permit applicants to consult with it before submitting applications under subsection (16); and
>
> (b) in the case of an approval authority that is a municipality, may, by by-law, require applicants to consult with it as described in clause (a).

find that the second part of the section 10(1) test has been met for these records.

[24] Records 6-22 consist of emails, correspondence, plans and photographs that were exchanged between the parties relating to issues that would ultimately be subject to a public process. These records were created months after the third party submitted its pre-consultation meeting request and around the same time a Committee of the Whole meeting was scheduled. I am not persuaded by the third party's submission that the subject-matter of the records was not disclosed in a public meeting or placed on council's agenda. The town has not asserted this and there is no evidence before me suggesting that the third party withdrew its application. In my view, the circumstances of the appeal suggest that the information at issue describing the proposed development, including any required by-law amendment or disposition of land, would be otherwise disclosed or available from sources to which the public has access. In fact, based on my review of the records it appears that the town met with neighbours to obtain their feedback, and the third party was aware of these consultations. In addition, there is no evidence before me suggesting that the scheduled council meeting did not occur or that the anticipated staff report was not presented at the meeting. Finally, the records contain no markings which indicate that the information was being communicated to the institution on the basis that its subject-matter was confidential and that it was to be kept confidential.

[25] Having regard to the above, I find that the parties resisting disclosure have failed to establish a reasonable basis to conclude that the third party supplied in confidence the information contained in records 6-22 to the town.

[26] Though I found that only records 3, 4, 5 met the second-part of the section 10(1) test, for the sake of completeness I will go on to determine whether the third part of the section 10(1) test also applies to any of the records including records 6-22.

Part 3: harms

[27] The party resisting disclosure 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.[11]

[28] The failure of a party resisting disclosure to provide detailed 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*.[12]

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

Representations of the parties

[29] The town and the third party take the position that disclosure of the records would give rise to the harms contemplated in section 10(1)(a) and (b). In support of its position that disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with negotiations, the town states:

> … given the potential for the debate about the subject applications to become adversarial, the disclosure of technical information supplied to the Town planner would give rise to a reasonable expectation that the applicant's ability to successfully negotiate an amendment to the Town's zoning by-law would be compromised, or that its case before the Ontario Municipal Board[13] would be interfered with.

[30] The third party submits that disclosure of the records would "prejudice significantly the landowner related to competitive market decisions and potential real estate transactions and/or contractual negotiations with builders/developers".

[31] The town and the third party also submit that disclosure of the records could reasonably be expected to result in similar information no longer being supplied to it as contemplated in section 10(1)(b). In support of its position, the town states:

> … if required to disclose these preliminary plans and drawings, planners, engineers, architects and other professionals will be less likely to supply the Town with full disclosure of different design alternatives, development processes and other technical information. In effect, the requirement that pre-consultation submissions must be disclosed would undermine the policy objective of encouraging a free exchange of ideas before the formal (and very public) process is engaged.

[32] The third party also takes the position that the exemption at section 10(1)(b) applies and states:

> The Planning Act as well as the County and Local Official Plan's require mandatory pre-consultation prior to moving forward with development applications. These pre-consultation meetings are not public, are meetings where technical information from both sides (municipal and private) are shared and discussed. Should the Commissioner now release these confidential details, it undermines the entire process of pre-consultation, of due diligence and of open dialogue with the municipalities to which also significantly benefit from these discussions and sharing of information.

[33] The appellant's representations did not address this part of the test under section 10(1).

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[13] The Ontario Municipal Board (OMB) is now called the Local Planning Appeal Tribunal (LPAT)

Section 10(1)(a): prejudice competitive position

[34] Though the town and the third party need not prove that disclosure will in fact result in the harm contemplated under section 10(1)(a), their evidence must demonstrate a risk of harm that is well beyond the merely possible or speculative.

[35] I find that the town's and third party's evidence is speculative and not connected to the actual records at issue. Most of the records consist of documents the third party provided the town regarding its subdivision proposal. The third party provided plans and photographs with its application. The town's representations indicate that the third party's refined application would have to resolve issues requiring a by-law amendment and disposition of land. It appears that the majority of records address these issues or consist of the third party's request for an update.

[36] In my view, the parties resisting disclosure did not explain how disclosure of the records could reasonably be expected to result in the alleged harm. Instead, the parties resisting disclosure speculate negative outcomes, such as contentious tribunal proceedings, increased competition and strained negotiations in support of their claim that section 10(1)(a) applies without connecting the contemplated harm to the actual information contained in the records or circumstances of the third party's subdivision application.

[37] Having regard to the above, I find that insufficient evidence was presented to establish a risk of harm that is well beyond the merely possible or speculative. Accordingly, I find that section 10(1)(a) does not apply to any of the records.

Section 10(1)(b): similar information no longer supplied

[38] For the exemption at section 10(1)(b) to apply, the parties resisting disclosure must establish that disclosure could reasonably be expected to result in similar information no longer being supplied to the town. However, the town's evidence only goes as far to suggest that disclosure would make it "less likely" that similar information would be supplied to it. The test is whether disclosure could reasonably 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.

[39] I also find that the evidence presented does not establish a connection between the actual type of information at issue and the contemplated harm. Instead, the third party suggests that any information provided to an institution during a mandatory pre-consultation process qualifies for exemption. I find that the town's and third party's evidence that the pre-consultation process encourages "open dialogue" falls short of demonstrating that disclosure of the records could reasonably result in similar information no longer being supplied to the town where it is in the public interest that similar information continue to be supplied to it. Even if I accept that disclosure of the records could reasonably result in a less candid pre-consultation process, applicants would still have to supply its application materials to the town in accordance with the town's prescribed planning process. Any reluctance on the part of an applicant to supply

the necessary information would hamper their efforts to obtain the town's approval of their proposed project.

[40] Having regard to the records themselves, the submissions of the parties and the circumstances of this appeal, I find that I have not been provided with sufficient evidence to establish that the harm in section 10(1)(b) could reasonably be expected to occur.

Summary

[41] As stated above, all parts of the three-part test under section 10(1) must be met for the third party exemption to apply. Accordingly, I find that the records do not qualify for exemption under section 10(1).

ORDER:

1. I order the town to disclose the records at issue to the appellant by **October 24, 2018** and not before **October 19, 2018**.

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

Original Signed by: September 18, 2018

Jennifer James
Adjudicator