

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3770

Appeals MA16-279 & MA16-617

Toronto and Region Conservation Authority

May 23, 2019

**Summary:** The Toronto and Region Conservation Authority (the TRCA) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a particular property. After notifying affected parties, the TRCA issued two decisions granting full access to these records. The affected parties appealed the TRCA's decisions objecting to the release of these records. In this order, the adjudicator finds that the mandatory exemption at section 10(1) of the *Act* does not apply, and she upholds the TRCA's decisions to disclose the records.

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

### OVERVIEW:

#### Appeal MA16-279

[1] The Toronto and Region Conservation Authority (the TRCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a particular property. The TRCA notified individuals whose interests may be affected by disclosure of the records under section 21(1)(a) of the *Act* to seek their views regarding the disclosure of certain records. Upon receipt of the affected parties' views, the TRCA issued a decision granting full access to these records.

[2] In response, one of the affected parties appealed the TRCA's decision to this office, because they object to disclosure of the records at issue to the requester. During mediation, the requester raised the possible application of the public interest override at

section 16 of the *Act* to the records at issue.

[3] As no further mediation was possible, the appeal was transferred to the adjudication stage where an adjudicator may conduct an inquiry under the *Act*.

### **Appeal MA16-617**

[4] A second access request was submitted for additional records related to the same property. The TRCA notified the relevant affected parties under section 21(1)(a) of the *Act*, and subsequently issued a decision to grant full access to the responsive records. The appellants also appealed the TRCA's second access decision to this office. During mediation, the requester again raised the application of section 16 of the *Act* to the records at issue in this appeal.

[5] The adjudicator formerly assigned to this appeal commenced a single inquiry for both appeals, and sought representations from all parties. The appellants responded to the Notice of Inquiry (NOI) with representations that the adjudicator found to be confidential under this office's *Practice Direction 7: Sharing of Representations*. A summary of the appellant's representations was provided to the TRCA and original requester.

[6] The requester made representations in response to the NOI and the summary of the appellant's representations. The TRCA declined to submit representations, because its view was that the section 10(1) exemption does not apply to the records, and it was not persuaded that the rationale provided by the appellants to withhold the records meets the three-part test outlined in section 10(1).

[7] Subsequently, the appeal was transferred to me to continue the adjudication of the appeal. In this order, I find that the mandatory exemption at section 10(1) does not apply, and dismiss the appeals. Since I find that the section 10(1) exemption does not apply, I do not need to decide if there is a compelling public interest in favour of disclosure under section 16.

[8] I have reviewed and considered all of the representations made by the parties in this appeal. However, I have only summarized those portions I found relevant to my determination below.

### **RECORDS:**

[9] The records at issue in Appeal MA16-279 are the Arborist Report, Storm Drainage Analysis, and Geotechnical Investigation and Slope Stability Assessment, for a particular address.

[10] The records at issue in Appeal MA16-617 are Addendums No. 1 and No. 2 to the original Geotechnical Investigation and Slope Stability Assessment Report at issue in

Appeal MA16-279.

## **DISCUSSION:**

### **Does the mandatory exemption at section 10 apply to the records?**

[11] The appellants claim that the mandatory exemption at section 10(1) of the *Act* applies to the records at issue in this appeal, because the records contain technical information as that term is understood in section 10(1) of the *Act*.

[12] Section 10(1) states, 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;

[13] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>1</sup> 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.<sup>2</sup>

[14] 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

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<sup>1</sup> *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.*).

<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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***

[15] The types of information listed in section 10(1) have been discussed in prior orders. The one that is relevant in this appeal is:

*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.<sup>3</sup>

[16] The appellants argue that the records contain technical information.

[17] As noted above, the TRCA did not make any representations. The TRCA only made a blanket statement that it finds section 10(1) does not apply to the records at issue.

[18] The requester did not make any representations specifically on the type of information the record contains.

[19] After reviewing the records at issue, which include the Arborist Report, Storm Drainage Analysis, Geotechnical Investigation and Slope Stability Assessment, and appendices for a particular address, I am satisfied that they contain technical information as defined above, and I find that part of the test under section 10(1) has been met.

***Part 2: supplied in confidence***

*Supplied*

[20] The requirement that the information was "supplied" to the institution reflects

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<sup>3</sup> Order PO-2010.

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

[21] 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.<sup>5</sup>

[22] The appellants submit that the records were supplied to the TRCA. The requester does not comment specifically on this part of the test. However, in their representations, the requester acknowledges that these records were submitted by the appellants as part of their permit application to the TRCA.

[23] From my review of the records at issue and the representations of the parties, I am satisfied that they were supplied to the TRCA by the appellants, and I find that part of the test under section 10(1) has been met.

*In confidence*

[24] 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.<sup>6</sup>

[25] 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; and
- prepared for a purpose that would not entail disclosure.<sup>7</sup>

[26] The appellants argue that the records were supplied to the TRCA with the expectation that they would be held in confidence. The appellants argue that they

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<sup>4</sup> Order MO-1706.

<sup>5</sup> Orders PO-2020 and PO-2043.

<sup>6</sup> Order PO-2020.

<sup>7</sup> Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

expected the records would be kept in confidence as the TRCA gave no indication otherwise. Furthermore, the appellants argue that since the reports deal with assessments done on their private property, the requester would not customarily have access to them.

[27] The requester submits that the appellants agreed to the terms of the TRCA application, which clearly states on page 4 that personal information contained on the form may be disclosed to government and municipal agencies, or to members of the public through the freedom of information process.

### *Analysis and findings*

[28] The records at issue were supplied by the appellants to the TRCA. I do not have any representations from the TRCA on whether or not the records at issue were supplied in confidence. However, the appellants argue that they were. While the requester was not a party to the exchange of the records at issue, they do correctly highlight that the TRCA's application did include a notice of collection informing the appellants that the information provided may be disclosed to members of the public.

[29] Ultimately, I do not need to make a final determination on whether the records at issue were supplied "in confidence" as required by the second part of the test, because as explained below, the appellants have not met the third part of the test.

### ***Part 3: harms***

[30] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.<sup>8</sup>

[31] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>9</sup> 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 records themselves and/or 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*.<sup>10</sup>

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<sup>8</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>9</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>10</sup> Order PO-2435.

[32] As noted above, the appellants' representations were withheld for confidentiality reasons, and only a summary was shared with the other parties in the appeal. With respect to the harms part of the test, the appellants submit that there is potential harm from the misuse of the records at issue if they are disclosed.

[33] The requester argues that the records at issue should be disclosed, because there is a clear public safety risk due to drainage issues and slope instability of the particular address causing mud slides and flooding in the surrounding area. The requester submits that the appellants do not specify how they could be harmed by the disclosure of the records at issue. The requester further submits that disclosure of the records at issue is not intended to harm the appellants, or for economic gain, but for the preservation of life and property.

### *Analysis and findings*

[34] While the appellants argue that they could suffer harm if the records at issue are disclosed, their representations, including the confidential portions, do not provide any detailed evidence in support of their arguments as required to establish part three of the test. Instead, I find their representations amount to speculation of possible harms. The representations of the appellants do not establish that disclosure of the the Arborist Report, Storm Drainage Analysis, Geotechnical Investigation and Slope Stability Assessment, and appendices for a particular address could reasonably be expected to lead to:

- a. significant prejudice of a competitive position or contractual negotiations of the appellants;
- b. similar information no longer being supplied to the TRCA; or
- c. undue loss to the appellants, or undue gain to the requester or another party.

[35] From my review of the records at issue, I do not find that these harms are inferable from the records themselves. Accordingly, I find that the appellants have not established that any of the harms outlined in section 10(1) could reasonably be expected to result from disclosure of the records at issue.

[36] All parts of the three-part test must be met for the mandatory exemption at section 10(1) to apply. Since the harms in the third part of the test has not been established, I find that the section 10(1) exemption does not apply to the records at issue. Given that the TRCA did not claim any exemptions and no mandatory exemptions<sup>11</sup> apply, I uphold the TRCA's decision and will order that the records at issue be disclosed to the requester.

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<sup>11</sup> The records do not contain personal information.

[37] Since I find that the mandatory exemption at section 10(1) does not apply to the records at issue, I do not need to decide whether or not there is a compelling public interest in disclosure of the records.

**ORDER:**

I uphold the TRCA's decision to disclose the records at issue, and dismiss the appeals.

Original signed by \_\_\_\_\_  
Anna Truong  
Adjudicator

\_\_\_\_\_ May 23, 2019