

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3777

Appeal MA17-656

City of Hamilton

May 31, 2019

Summary: An individual property owner appealed an access decision by the City of Hamilton under the *Municipal Freedom of Information and Protection of Privacy Act* to disclose a report relating to a retaining wall on his property prepared by an engineer to satisfy a property standards investigation. In this order, the adjudicator finds that the report is not exempt from disclosure under section 10(1) of the *Act*, and she orders it disclosed to the requester.

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] This appeal involves a request for access to a structural engineer's report about a retaining wall on private property. The wall abuts three other residential properties.

[2] The City of Hamilton (the city) received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

All records pertaining to retaining wall at [a specified address]. (Inspection occurred approx. June 6, 2017 – [a named individual] from property standards).

Search time period: June 7, 2017 to present.

[3] The city located a responsive record, the report in question. Before it issued a decision, it notified an affected party (the owner of the property on which the retaining

wall is situated) that the request had been made and sought his representations regarding the proposed disclosure.¹

[4] The property owner made representations to the city resisting disclosure of the record. The city then identified a second, related, record and issued a decision in which it granted the requester partial access to both records. Citing the personal privacy exemptions in section 14(1) of the *Act*, the city wrote that it would withhold personal information from the record, including the owner's name and address.

[5] The property owner, now the appellant, appealed the city's decision to this office. The requester did not appeal the city's decision to withhold the personal information in the record.

[6] A mediator was appointed to explore the possibility of resolution.

[7] The requester informed the mediator that he was not seeking access to the second, related, record located by the city, so that access to that record is not at issue in this appeal.

[8] Also during mediation, the appellant gave his consent to disclose portions of the record at issue to the requester. The city did so.

[9] However, despite the appellant's consent to disclose additional portions of the record, the requester advised that he wished to pursue access to the entire report (except personal information), including the information that the appellant did not consent to disclose. As further mediation was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. The mediator's report identified the issue as the application of the mandatory third party information exemption at section 10(1) of the *Act*. As part of my inquiry, I sought representations from the city, the appellant, and the author of the engineering report. I did not seek representations from the requester, concluding that it was not necessary to do so.

[10] In this order, I find that the section 10(1) exemption does not apply to the record and I uphold the city's decision to disclose the record with personal information removed.

RECORD:

[11] The record is a Site Investigation Report, identified as "Site Investigation Report No. 01." The information at issue consists of the severed portions of pages 4 and 5 of

¹ In accordance with section 21(1) of the *Act*.

the record, located under the subheadings "Discussion & Recommendations" and "Report Limitations."

DISCUSSION:

[12] The only issue in this appeal is whether the mandatory exemption for third party information at section 10(1) applies to the record. More particularly, the issue is access to the withheld portions at pages 4 and 5 of the report, which include the engineer's recommendations. As noted above, the city's decision to withhold personal information, including the address and owner's name is not an issue in this appeal.

[13] Section 10(1) states that:

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...²

[14] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.³ 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.⁴

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

² Section 10(1)(d), which is not relevant and therefore not addressed in this order, is intended to protect "information supplied to or the report of a conciliation officer, mediator, labour relations office or other person appointed to resolve a labour relations dispute."

³ *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.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

- the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
- 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

[16] I find that the record contains information that qualifies as technical information under section 10(1).

[17] There is no dispute that the report is a structural engineering report. The parties describe the report as an engineer's report and the report is signed and stamped by a licensed engineer on the letterhead of a structural engineering firm. There is no dispute that it contains technical information relating to the structural integrity of a retaining wall.

[18] 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.⁵

[19] Adopting this definition, I find that the record contains information that qualifies as technical information for the purposes of section 10(1) of the *Act*, so that the first part of the three-part test for the application of section 10(1) is met.

[20] I must therefore consider whether the next two parts of the three-part test are also met.

Part 2: supplied in confidence

[21] Part two of the three-part test itself has two parts: the appellant must have "supplied" the information to the city, and must have done so "in confidence," either

⁵ Order PO-2010.

implicitly or explicitly.

[22] The requirement that information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁶

[23] 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.⁷

[24] In order to satisfy the “in confidence” component of part two, the party resisting disclosure – in this case, 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.⁸

[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
- prepared for a purpose that would not entail disclosure.⁹

Representations

[26] Although I sent a Notice of Inquiry to the appellant and his representative inviting his representations in this inquiry, the appellant declined to submit representations. By his representative, the appellant advised that he had no further submissions to make beyond what he had already provided to the city and mediator. I have therefore treated the appellant’s previous correspondence to the city that has been submitted to this office, as well as his representations to the mediator during mediation, as his submissions for the purpose of this inquiry. However, because the appellant chose not to submit representations in response to a Notice of Inquiry during the course of the adjudication stage of this appeal, his representations made during

⁶ Order MO-1706.

⁷ Orders PO-2020 and PO-2043.

⁸ Order PO-2020.

⁹ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

mediation or in response to the city's notification were not shared with all of the parties. I have therefore not summarized those representations, beyond setting out the appellant's general position, below. However, I have reviewed and considered all of the appellant's correspondence, submissions and materials submitted to the city and provided to this office.

[27] The appellant's position is that he provided the report to the city with the expectation that it would be kept confidential, and that he should not be required to make this record public through a freedom of information request, especially when it relates to a structure on his property that is not in violation of any municipal property standards code or by-law.

[28] The city did not address part two of the three-part test in its representations. The city merely submits that section 10(1) does not apply to the record and that it should be disclosed, subject only to the removal of personal information (which is not at issue in this appeal).

[29] The engineer who authored the report also does not directly address part two of the test in his representations, stating simply that his firm has "no confidential material interest in the Site Investigation Report No. 01, and do[es] not object to the release of the contents of the engineering report to third parties...".

Analysis and finding

[30] The appellant has not provided evidence of an objective basis for his belief that the city would treat the report in confidence. He claims that city staff told him that the record would not be disclosed to anyone. However, the record was supplied to the city as part of a by-law enforcement matter in which the city had issued an order to comply, suggesting the public nature of the process.

[31] I find nothing in the record or in the city's treatment of it that indicates a concern for confidentiality nor am I satisfied that it was prepared for a purpose that would not entail disclosure. In this context, therefore, I find that the record does not satisfy the second part of the test for exemption under section 10(1).

[32] In any event, even if the appellant had supplied the record to the city in confidence, I find that he has not provided sufficient evidence to satisfy the third part of the three-part test set out in section 10(1) of the *Act*, a conclusion I discuss below.

Part 3: harms

[33] A party relying on section 10(1) to resist disclosure must demonstrate a risk of harm from the disclosure that is well beyond the merely possible or speculative, but

need not prove that disclosure will in fact result in such harm.¹⁰

[34] 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.¹¹ 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*.¹²

Representations

[35] The appellant provided no representations during the inquiry on any harms that might occur if the information contained in the record is disclosed. His previous submissions do not address the question of harms.

[36] The engineer makes no representations regarding harms and set out no objection to the release of the contents of the record.

[37] The city addresses only part three of the test. It submits that the onus is on the appellant to substantiate the harms that would occur if the information contained in the record is disclosed and that the appellant has not done so.

Analysis and findings

[38] 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 in accordance with the city's decision.

[39] As the party objecting to disclosure, the appellant bears the onus of demonstrating what harms might reasonably be expected to occur if the withheld information is disclosed. As I noted above, the appellant was expressly invited to make representations on the harms set out in section 10(1) but chose not to submit anything beyond what he had previously provided to the city and this office during mediation. I have reviewed those submissions and they are silent on the question of harms. The appellant's position, as noted above, is that, as a private citizen who commissioned and paid for it, he should be able to keep the record confidential. He has given me no basis

¹⁰ *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.

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹² Order PO-2435.

on which to make a finding that any of the harms contemplated in section 10(1) would reasonably be expected to occur.

[40] Having reviewed the record and considered the circumstances of this appeal, and in the absence of evidence to the contrary, I make the following findings:

- Given that the information was submitted by the appellant in what appears to be his personal capacity, and considering that the author of the report does not oppose its disclosure, I find that there is no reasonable expectation of prejudice to a competitive position or significant interference with a contractual position for the purpose of section 10(1)(a);
- Given that the information at issue was provided to address a property standards order, I find that there is no reasonable expectation its disclosure would result in similar information no longer being supplied to the city, as contemplated by section 10(1)(b); and,
- I have not been provided with evidence to support a reasonable expectation that disclosure of the record could result in any undue loss to the appellant or gain to the requester or any other person (such as the requester), group, or other entity listed in section 10(1)(c).

[41] Because the appellant has not tendered persuasive evidence to demonstrate what harm, if any, would reasonably be expected to occur if the record were disclosed, I find that the third part of the three-part test in section 10(1) has not been satisfied and that the record does not qualify for exemption under section 10(1) of the *Act*.

ORDER:

I uphold the city's decision to disclose the information at issue (the severed portions of pages 4 and 5 under the subheadings "Discussion and Recommendations" and "Report Limitations") to the requester and order the city to send a copy of it to him. This disclosure is to take place by **July 8, 2019** but not before **July 2, 2019**.

Original Signed By: _____

Jessica Kowalski
Adjudicator

_____ May 31, 2019