

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3892

Appeal MA17-229

Toronto and Region Conservation Authority

January 28, 2020

Summary: 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, and issued a decision denying access to these records pursuant to section 10(1) (third party information) of the *Act*. The requester, now the appellant, appealed the TRCA's decision to this office. In this order, the adjudicator finds that the mandatory exemption at section 10(1) of the *Act* does not apply to the records at issue, and orders the TRCA to disclose them to the appellant.

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

OVERVIEW:

[1] The Toronto and Region Conservation Authority (TRCA) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records:

...all correspondence (email, hard copy letter, planning reports, approvals, relating to official plan amendment, zoning by-law amendment, minor variance and implementing Official Plan amendment, Zoning By-law amendment, Minor Variance by-laws) relating to the Development, Engineering, Stormwater, Floodwater, Floodplain, Stormwater Storage, Stormwater Management, Special Policy Area, Floodzone, Floodproofing, Flood Levels, Natural Heritage System of the property located at [specified

address]. With specific reference to [two specified file numbers]. The period of interest from 2008 to present (February 7, 2017).

[2] The TRCA issued an initial decision letter advising that some of the requested records contain information that may affect the interests of third parties (the affected parties). Accordingly, the TRCA invited these two affected parties to review the records, and advise whether they consented to disclosure of their information. In the meantime, the TRCA granted partial access to all other records that do not contain the information of affected parties, withholding portions that contain personal information, relying on the personal privacy exemption at section 14(1) of the *Act*.

[3] After consulting with the affected parties, one of whom consented to the disclosure of their information, the TRCA issued a supplemental decision denying access to the records containing information of affected parties pursuant to section 10(1) (third party information) of the *Act*, although only one affected party, a numbered company, objected to disclosure of these records.

[4] The requester, now the appellant, appealed the TRCA's decision to this office.

[5] During mediation, the appellant confirmed that they are not pursuing access to the information that the TRCA withheld under section 14(1), so that information is not at issue in this appeal. The TRCA provided an Index of Third Party Records, which was shared with the appellant. The appellant confirmed that Documents 1, 2 and 3, as identified in the TRCA's Index, are at issue in this appeal.

[6] The TRCA notified the affected party who initially objected to the disclosure of Document 1 to seek their input on the disclosure of Documents 2 and 3. The affected party advised that they also objected to disclosure of Documents 2 and 3. Subsequently, the TRCA issued a revised decision to the appellant and affected party confirming that it was withholding all three records in full under section 10(1) of the *Act*.

[7] As a mediated resolution was not possible, the adjudicator formerly assigned to this appeal commenced an inquiry, and sought representations from the TRCA and affected party. Subsequently, the appeal was transferred to me. The TRCA declined to submit representations, and stated that it would defer to the representations of the affected party.

[8] The affected party submitted representations and, after an issue related to their confidentiality was resolved, I shared a summary of them with the appellant, who provided representations in response. The affected party was given an opportunity to reply to the appellant's representations, but they declined. Although I have considered the affected party's representations in their entirety, only the non-confidential portions (which did not meet the confidentiality criteria in the IPC's *Practice Direction 7*) are set out below.

[9] In this order, I find that the mandatory exemption at section 10(1) does not apply to the records at issue, and I order the TRCA to disclose them to the appellant.

RECORDS:

[10] The records at issue are described in the TRCA's Index of Third Party Records as follows:

Doc. No.	Date	Description	# of Pages	Release	Section(s) Applied	Comments
1	2011-06-17	Email correspondence between [two affected parties] re: meeting notes	4	no	10	Record is being withheld as it affects third party interests
2	2011-02-03	Email correspondence between TRCA and [the affected party] re: TRCA comments and meetings	20	no	10	Record is being withheld as it affects third party interests
3	2016-07-18	Email correspondence between TRCA and [the affected party] re: status of the application	2	no	10	Record is being withheld as it affects third party interests

DISCUSSION:

Does the mandatory exemption at section 10(1) apply to the records?

[11] The affected party claims that the mandatory exemption at section 10(1) of the *Act* applies to the records at issue in this appeal, because the records contain scientific and 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; 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.

[13] 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

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

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

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.

orders. The ones that are relevant in this appeal are:

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.³

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.⁴

[16] The affected party argues that the records contain scientific and technical information, while the appellant argues that the records do not contain any such information. As noted above, the TRCA did not submit any representations.

[17] After reviewing the records at issue and the representations of the parties, I am satisfied that the records at issue 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

[18] 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

[19] 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

In confidence

[20] 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

³ Order PO-2010.

⁴ Order PO-2010.

⁵ Order MO-1706.

⁶ Orders PO-2020 and PO-2043.

expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[21] 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.⁸

[22] Neither party addressed whether or not the records were supplied to the TRCA in their representations. As noted above, the TRCA did not make any representations.

[23] The affected party submits that they had an expectation that the records would be held in confidence, and that they contacted the TRCA requesting that all records pertaining to the permit application be withheld pursuant to section 10(1) of the *Act*.

[24] The appellant submits that the information at issue relates to the initial construction approvals granted by TRCA with respect to the property and, as such, would not have been subject to any expectations of confidentiality.

[25] Ultimately, I do not need to make a 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 affected party has not met the third part of the test.

Part 3: harms

[26] 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

⁷ Order PO-2020.

⁸ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

disclosure will in fact result in such harm.⁹

[27] 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.¹⁰ 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*.¹¹

Representations

[28] As noted above, the TRCA declined to submit any representations.

[29] With respect to the application of section 10(1) of the *Act* to the records at issue, the affected party submits:

- The records contain scientific and technical information. The information consists of a description of the conditions, plans, technical aspects, status and outcome of their site application filed with the City of Toronto and the TRCA as well as the preconditions of an agreement.
- There was an expectation that the records would be held in confidence because the information could be used or exploited by a competitor in the marketplace.
- Disclosure of any information could significantly prejudice their legal position in ongoing litigation.
- They contacted the TRCA requesting that all records pertaining to the permit application be withheld pursuant to section 10(1) of the *Act*.

[30] The appellant submits that the records at issue are not covered by the exemption in section 10(1) of the *Act* for the following reasons:

⁹ *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.

¹⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹¹ Order PO-2435.

- The matters in dispute relate to an office building that is similar to numerous other office buildings in the GTA.
- The information does not in any way affect the competitive position of the affected party as the office building is constructed and is occupied in part by existing tenants, and does not affect the ability of the affected party to secure any additional tenants for the property.
- The information relates to the initial construction approvals granted by TRCA with respect to the property.

Analysis and findings

[31] While the affected party argues 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, which is required to establish part three of the test. Instead, I find their representations amount to speculation of possible harms. For example, the affected party argues that disclosure of the records could significantly prejudice their legal position in ongoing litigation, but does not explain how or why it would. The representations of the affected party are vague, and do not establish that disclosure of the records at issue could reasonably be expected to lead to the harms listed in section 10(1), namely:

- a. significant prejudice of a competitive position or contractual negotiations of the affected party;
- b. similar information no longer being supplied to the institution;
- c. undue loss to the affected party, or undue gain to the appellant; or
- d. reveal information supplied to or the report of a person appointed to resolve a labour relations dispute.

[32] Further, from my review of the records at issue, I am not persuaded that the harms in section 10(1) are inferable from the records themselves. Accordingly, I find that the affected party has 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.

[33] All parts of the three-part test must be met for the mandatory exemption at section 10(1) to apply. Since the reasonable expectation of harm 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. Accordingly, I order that the records at issue be disclosed to the appellant.

ORDER:

1. I do not uphold the TRCA's decision to deny access to the records under section 10(1) of the *Act*.
2. I order the TRCA to disclose the records in their entirety to the appellant by March 4, 2020, but not before February 28, 2020.
3. I reserve the right to require the TRCA to provide this office copies of the records it discloses to the appellant.

Original Signed by _____

Anna Truong
Adjudicator

_____ January 28, 2020