

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-3971

Appeal MA18-00850

The Corporation of the City of North Bay

October 30, 2020

**Summary:** The Corporation of the City of North Bay (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the construction of a new subdivision access road. The city issued a decision denying access to the records pursuant to section 10(1) (third party information) of the *Act*. The requester appealed the city's decision to this office. In this order, the adjudicator finds that the mandatory exemption at section 10(1) does not apply to the records at issue and orders the city to disclose them.

**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 is about access to a surveyor's drawings of a road leading into a new subdivision approved by the Corporation of the City of North Bay (the city). Expressing concern about the location of the new road, an existing resident made a two-part request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records about the road. According to the request:

We require design elevations and basic dimensions for the new access road now under construction for [a named development]. We require basic dimensions showing the proximity of the paved portion of the roadway and the retaining wall as they relate to our north property line. They would [be] shown on a sectional view taken near or about "X-X" on

the attached sketch. Further to this, we require the proposed ground slope data showing the relationship of contours on our property and the paved portion of the new access road to [a named development]. This would be shown on a sectional view similar to "Y-Y" on the attached sketch.<sup>1</sup>

[2] The city identified two drawings prepared by a surveyor that were responsive to the first part of the request. Before issuing an access decision, however, the city contacted the surveyor, as a third party whose interests might be affected by disclosure, to seek his position regarding disclosure of the drawings. The surveyor objected to disclosure, but also informed the city that the drawings were the property of the developer, who also opposed their disclosure.

[3] Based on the opposition of both the surveyor and the developer, the city issued a decision in which it denied access to the first part of the request, namely the drawings showing "design elevations and basic dimensions for the new access road," pursuant to sections 10(1)(a) and (c) (third party information) of the *Act*. With respect to the second part of the request, for "ground slope data," the city wrote that it was not in a position to provide access to this information because this information was not in the city's possession.

[4] The requester, now the appellant, appealed the city's decision to this office. The parties participated in mediation to explore the possibility of resolution.

[5] During mediation, the city conducted another search and located records responsive to the second part of the appellant's request. However, the city took the position that those records were outside the scope of the appellant's request because they had come into the city's possession after it processed the request. The appellant agreed to file a new request for those records. As a result, the reasonableness of the city's search for responsive records and the scope of the request were removed as issues in this appeal.

[6] The appellant confirmed that he wished to proceed to adjudication with respect to the city's application of section 10(1) to the records responsive to the first part of his request. When a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an inquiry. As part of my inquiry, I received representations from the appellant and the developer. Neither the city nor the surveyor chose to submit representations. Non-confidential portions of the parties' representations were shared among them in accordance with the IPC's *Practice Direction 7*.

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<sup>1</sup> A sketch was attached to the request.

[7] 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 city to disclose them to the appellant.

## **RECORDS:**

[8] The records at issue are two drawings (drawings or plans) that show design elevations for a new access road.

## **DISCUSSION:**

[9] The only issue in this appeal is whether the mandatory exemption at section 10(1) applies to the records. The developer claims that the mandatory exemption at section 10(1) applies to the records because the records contain scientific and technical information.

[10] 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...<sup>2</sup>

[11] Section 10(1) is designed to protect the confidential "informational assets" of business or other organizations that provide information to government institutions.<sup>3</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

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<sup>2</sup> 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."

<sup>3</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.*).

parties that could be exploited by a competitor in the marketplace.<sup>4</sup>

[12] For section 10(1) to apply, each part of the following three-part test must be satisfied:

1. the records must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the records must give rise to a reasonable expectation that one of the harms specified in paragraphs (a) through (d) of section 10(1) will occur.

### **Part 1: type of information**

[13] The types of information listed in section 10(1) have been discussed in prior orders. The ones that are relevant in this appeal are scientific and technical information.

[14] “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.<sup>5</sup>

[15] “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>6</sup>

[16] The appellant does not dispute the developer’s submission that the records are engineering designs for street services or that they contain scientific and technical information. I have reviewed the records and while they contain information about the topography surrounding the road, I have insufficient information from the parties to find that they contain scientific information, as that term is defined above. However, I am satisfied that the drawings are survey plans prepared by a surveyor that contain information relating to the engineering and design of a road. As such, I find that they

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<sup>4</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>5</sup> Order PO-2010.

<sup>6</sup> Order PO-2010.

contain technical information, so that part one of the test for exemption under section 10(1) is met.

[17] Since the records contain technical information, I must consider whether the next two parts of the above-noted three-part test are met: that the information was supplied to the city in confidence, and, if so, that there was a reasonable expectation that the specified harms could result from disclosure.

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

### ***Supplied***

[18] Part two of the three-part test itself has two parts: the developer must have “supplied” the information to the city, and must have done so “in confidence”, either implicitly or explicitly. Where information was not supplied to the city by the developer, section 10(1) does not apply, and there is no need for me to decide whether the “in confidence” element of part two of the test is met.

[19] 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.<sup>7</sup>

[20] 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>8</sup>

### ***In confidence***

[21] In order to satisfy the “in confidence” component of part two, the party resisting disclosure must establish that, as the supplier of the information, it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>9</sup>

[22] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case must be 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

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<sup>7</sup> Order PO-2010.

<sup>8</sup> Orders PO-2020 and PO-2043.

<sup>9</sup> Order PO-2020.

- 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.<sup>10</sup>

[23] The developer submits only that it supplied the records to the city “in an implicitly confidential manner,” and that the records were not provided to the city through a public process, but were provided “under the premise that they would undergo an internal review process.”

[24] The appellant submits that the records could not have been submitted to the city in confidence, since a number of outside agencies would have to have been involved in their review and approval.

[25] The developer has provided no details in his representations regarding the circumstances under which the records were supplied to the city. For example, the developer has included with his representations other drawings by the same surveyor that were appended to the city’s approval of the zoning and subdivision. He has not, however, provided any information to explain why the records at issue were supplied to the city with any greater expectation of confidentiality than any of the other survey plans authored by the same surveyor relating to the subdivision. There is no indication on the records themselves to suggest that they were submitted with an expectation of confidentiality or that the city was to treat them in a way that demonstrated a concern for confidentiality.

[26] In the circumstances, I have no objective basis to find that a reasonable expectation of confidentiality exists in the road drawings.

[27] In any event, 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 set out below, the developer has not met the third part of the section 10(1) test.

### **Part 3: harms**

[28] Parties resisting disclosure must establish a risk of harm from disclosure of the records that is well beyond the merely possible or speculative, but they need not prove

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<sup>10</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4<sup>th</sup>) 134; 88 Admin LR (4<sup>th</sup>) 68; 241 OAC 346.

that the disclosure will in fact result in such harm.<sup>11</sup>

[29] 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>12</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>13</sup>

### ***Representations***

[30] The developer states that the appellant's intentions of seeking the drawings are malicious and intended to bring him harm. He says that the appellant does not have a good faith reason for seeking the records and that his continued tactics are "simply an inexpensive method to try to destroy our business."

[31] The bulk of the developer's representations give background to his history with the appellant, which includes litigation and the appellant's appeal of the city's decision to approve the subdivision into which the roadway is intended to give access.

[32] The appellant submits that he is concerned with the finished elevation of the roadway as it relates to his own property. He says he is concerned that the road will have a negative impact on the safety, security and privacy of his own property, and that the purpose of his request is to compare the drawings against his own engineering sketches that he previously submitted to the city's engineering staff.

### ***Analysis and findings***

[33] While the developer argues that the appellant's request is intended to cause harm, he has not specified any harms that could reasonably be expected to result from disclosure. Nor has he provided any detailed evidence in support of his argument, which is required to establish part three of the test. He argues that, in light of the parties' past disputes, the appellant's intentions are "for a malicious nature, in an attempt to cause harm" and destroy his business.

[34] The developer has not provided details about the destruction of his business that

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<sup>11</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>12</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>13</sup> Order PO-2435.

could reasonably be expected to result from disclosure of the records at issue, except to describe the background between the parties, including that the developer brought a claim against the appellant, and that the appellant, opposed to the subdivision from the outset, appealed its approval by the city, resulting in the developer incurring additional costs.

[35] I recognize that the parties' legal entanglements may have been costly and time consuming. However, the developer's representations do not describe how disclosure of these specific records could reasonably be expected to lead to the harms listed in section 10(1)(a) or (c), namely, significant prejudice to his competitive position or contractual negotiations, or undue loss to him or undue gain to others. I am not persuaded that a reasonable expectation of harm for the purposes of section 10(1)(a) or (c) can be inferred simply because of the parties' past legal issues.

[36] Past orders of this office have rejected "bald assertions" of harm without specific explanation or evidence as being insufficient to meet part three of the section 10(1) test.<sup>14</sup> I find that the statements made by the developer, without sufficient information to describe how the disclosure of the records at issue could reasonably be expected to result in harm for the purpose of section 10(1)(a) or (c), do not support a finding of reasonable expectation of harm. I further find that the claimed harms are not self-evident from the records.

[37] Since the reasonable expectation of harm in the third part of the section 10(1) test has not been established, I find that the section 10(1) exemption does not apply to the records at issue. I therefore order the city to disclose the records to the appellant.

## **ORDER:**

1. I do not uphold the city's decision to deny access to the records under section 10(1) of the *Act*.
2. I order the city to disclose the records in their entirety to the appellant by **December 7, 2020**, but not before **November 30, 2020**.
3. In order to verify compliance with this order, I reserve the right to require the city to provide this office with copies of the records it discloses to the appellant.
4. The timeline in order provision 2 may be extended if the city is unable to comply as a result of the current COVID-19 situation. I remain seized of the appeal to address any requests for extension.

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<sup>14</sup> See, for example, Orders PO-3032 and PO-3185.



Original signed by: \_\_\_\_\_  
Jessica Kowalski  
Adjudicator

October 30, 2020 \_\_\_\_\_