

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-4208

Appeal MA21-00467

Town of Aurora

June 8, 2022

**Summary:** The Town of Aurora (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a survey and a grading plan for a specified property. After notifying a party whose interests may be affected by disclosure (the appellant) the town issued its decision granting full access to the responsive records. The appellant appealed the town's access decision taking the position that the responsive records qualified for exemption under section 10(1) (third party information) of the *Act*. In this order the adjudicator upholds the town's decision to disclose the records to the original requester.

**Statute Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, sections 2(1) ("definition of personal information"), 10(1)(a), (b) and (c), 14(1).

### OVERVIEW:

[1] The Town of Aurora (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to specified property grading plans.

[2] After notifying a party whose interests may be affected by disclosure (the appellant) the town issued its decision granting full access to two responsive records.

[3] The appellant appealed the town's access decision to the Information and Privacy Commissioner of Ontario (the IPC) taking the position that the responsive records qualified for exemption under section 10(1) (third party information) of the *Act*.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage

of the appeals process where an adjudicator may decide to conduct an inquiry under the *Act*.

[5] I have decided to conduct an inquiry. I commenced my inquiry by seeking representations from the town. I then sent the appellant a Notice of Inquiry along with the town's representations. Representations were shared in accordance with the IPC's Code of Procedure. The appellant provided brief representations in response.

[6] In this order I uphold the town's decision to disclose the records to the original requester.

## **RECORDS:**

[7] The records at issue are a survey and grading plan for a property.

## **DISCUSSION:**

### **Preliminary Matters**

#### ***Personal information***

[8] In her brief representations the appellant submits that the records are private and should not be disclosed. This raises the potential application of the mandatory exemption at section 14(1) of the *Act*, which exempts personal information from disclosure. However, in my view, the information contained in the records is not "personal information" as defined by section 2(1) of the *Act* but rather it is information about a property. A long line of past IPC Orders have found that building plans, including residential plans, do not qualify as personal information as defined by section 2(1) of the *Act*, because they reveal only information about a property, and do not represent recorded information *about* an identifiable individual,<sup>1</sup> unless there is personal information in them such as the property owner's name and telephone number. There is no such information in the records at issue.

[9] As a result, and based on my review of the records, I find that they do not contain recorded personal information about an identifiable individual, including the appellant. The records are a survey and grading plan for a property and thus relate solely to that property. Accordingly, I find that the records do not contain *personal information* within the meaning of section 2(1) of the *Act*, and therefore cannot be exempt under the personal privacy exemption in section 14(1).

#### ***Discretionary exemptions***

[10] In addition, the appellant says that the records should not be disclosed because the requester would use the information against her, but provided no evidence to

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<sup>1</sup> See in this regard Orders MO-2081, MO-2695, MO-2792, MO-3066, MO-3125 and MO-4108.

substantiate her claims. While I considered whether her arguments raised the possible application of other exemptions under the *Act*, I find that the appellant did not establish that this is a case where I should permit her to raise a discretionary exemption.

[11] Some exemptions in the *Act* are mandatory, such as the section 14(1) discussed above; if a record qualifies for exemption under a mandatory exemption, the head of an institution *shall* refuse to disclose it. However, a discretionary exemption uses the word *may* and in choosing that language, the Legislature expressly contemplated that the head of the institution retains the discretion to claim such an exemption to support its decision to deny access to a record. The town did not claim that any discretionary exemptions apply to the records.

[12] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.<sup>2</sup> Generally, where a party other than the institution raises the possible application of a discretionary exemption, the adjudicator must consider the situation before them in the context of the purposes of the *Act* to decide whether the appeal might constitute the “most unusual of circumstances” in which such a claim should be allowed.

[13] Having reviewed the appellant’s representations and the records at issue, I am not satisfied that this qualifies as one of those unusual of cases where the appellant could raise the application of an exemption which has not been claimed by the head of an institution. Discretionary exemptions all indicate that the head “may refuse to disclose....” In other words, the Legislature expressly contemplated that the head of the institution is given the discretion to claim, or not claim, these exemptions. The town did not claim any discretionary exemptions nor did the town raise any of the harms the appellant suggests may occur if I order disclosure of the records.

[14] In my view, the appellant has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary measure of permitting them to claim discretionary exemptions when the head has elected not to do so.

[15] I now turn to the main issue in this appeal: whether the mandatory exemption for third party information at section 10(1) for third party information applies to the records.

### **Does the Mandatory Exemption at Section 10(1) for Third Party Information Apply to the Records?**

[16] The town submits that section 10(1) does not apply. It explains that it does not presently have a policy or procedure in place to routinely disclose drawings or records relating to individuals who are not the registered property owner. It states that its Building division allows for the public to review certain records and drawings related to the submission of a building permit in person, however individuals are not permitted to

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<sup>2</sup> Most often cited are Orders P-1137 and PO-1705.

take pictures or make copies of the records, rather they are required to make an access to information request under the *Act*.

[17] The town submits that its decision to grant access to the records in keeping with several IPC orders pertaining to the disclosure of drawings related to residential properties.<sup>3</sup>

[18] The appellant makes no representations with respect to the application of section 10(1) but, as set out above, objects to the disclosure of the records and to any use of them by an identified individual.

[19] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>4</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>5</sup>

[20] Section 10(1) states:

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.

[21] For section 10(1) to apply, the party resisting disclosure, in this case the appellant, 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;

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<sup>3</sup> In support of this submission the town refers to Orders MO-2081, MO-2735 and MO-4108.

<sup>4</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>5</sup> Orders MO-1706, PO-1805, PO-2018 and PO-2184.

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 of the section 10(1) test: type of information**

[22] The types of information listed in section 10(1) have been discussed in prior orders. The only one that might be applicable in the circumstances of this appeal is technical information. Technical information has been defined in previous orders as follows:

... information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.<sup>6</sup>

[23] The records at issue are copies of a survey and grading plan of a specific property which are drawings prepared by a licenced surveyor. They relate to construction proposed to be undertaken on a building. In my view, this type of information clearly falls within the definition of technical information. Accordingly, the first part of the test has been met.

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

#### ***Supplied***

[24] The requirement that the information have been “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>7</sup>

[25] 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***

[26] The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This

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

<sup>7</sup> Order MO-1706.

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

expectation must have an **objective** basis.<sup>9</sup>

[27] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.<sup>10</sup>

[28] Based on the town's representations that the drawings are publicly available for viewing, and the appellant not providing any evidence to challenge it, I am not satisfied that the records were provided to the town with an expectation of confidentiality based on reasonable and objective grounds. Accordingly, I find that part 2 of the test is not met. All three parts must be met in order for the information to be exempt, and this finding is therefore a sufficient basis for me to find that the exemption does not apply. Nevertheless, for the sake of completeness, I will review part 3 of the test as well.

### **Part 3: harms**

#### ***Could reasonably be expected to***

[29] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide **detailed** evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.<sup>11</sup>

[30] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>12</sup> However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the

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

<sup>10</sup> Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidellis*, 2008 CanLII 45005 (ON SCDC).

<sup>11</sup> Order PO-2435.

<sup>12</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

information.<sup>13</sup>

[31] The town provided no specific representations on the harms component of the section 10(1) test, and simply took the position that the section 10(1) test was not met. The appellant's representations consist of a general concern about the use of the records by an identified individual. In my view, I have not been provided with sufficient evidence to establish that there is a reasonable expectation that any one of the harms listed in section 10(1) might occur. In that regard, I make the following findings:

- There is no evidence to support a reasonable expectation of prejudice to a competitive position (section 10(1)(a)).
- Given that the information at issue is required for a building permit to be approved, I find that there is no reasonable expectation that disclosure of the information would result in similar information no longer being supplied to the town (section 10(1)(b)).
- I have not been provided with sufficient evidence to support a reasonable expectation that disclosure of the record could result in any undue loss or gain (section 10(1)(c)).

[32] Accordingly, I find that the third part of the test has not been met. As all three parts of the test must be met for the exemption to apply, section 10(1) of the *Act* has no application in the current appeal and I uphold the decision of the town to disclose the records.

## **ORDER:**

1. I uphold the town's decision to release the records to the original requester by sending copies to him by **July 14, 2022** but not before **July 8, 2022**.
2. To verify compliance with provision 1, I reserve the right to require the town to provide me with a copy of the records disclosed to the original requester upon request.

Original signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ June 8, 2022

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<sup>13</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paragraphs 52 to 54; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.