Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4218

Appeal MA20-00070

City of Stratford

June 22, 2022

Summary: The appellant made a request to the City of Stratford for access to records relating to a residential building permit. The city located responsive records and granted access to all but one on the basis that it is exempt under the mandatory third party information exemption in section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed the city's decision to deny access pursuant to section 10(1), and claimed that the city's search for responsive records was not reasonable. In this order, the adjudicator finds that the request was clear and specific and that the city's search for responsive records was reasonable. The adjudicator also finds that the record at issue is not exempt under section 10(1) and orders the city to disclose it.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1) and 17.

OVERVIEW:

[1] This appeal is about access to a report relating to the demolition of an old house on a residential street in the City of Stratford (the city) and the construction of a new house in its place. The appellant made a request for access to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the demolition and construction. He asked for:

> A copy of the report received by building and planning concerning the removal of the old leaking oil tank at [specified address]. The test results

> of the contaminated soil on and off the site. A copy of the building permit issued for [the specified address].

[2] The city conducted a search and located four responsive records. In accordance with section 21(1) of the *Act*, the city notified third parties whose interests might be affected by disclosure of the records – the homeowner, the builder, and the consultants who prepared the report - and solicited their submissions regarding disclosure. After receiving responses from the third parties, the city issued a decision granting access to three of the four responsive records. The city denied access to one record, a Designated Substance Audit Report (the report), on the basis of the mandatory exemption in section 10(1) (third party information).[1]

[3] The appellant appealed the city's decision to deny access to the report to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[4] The parties participated in mediation to explore resolution. During mediation, the appellant indicated that he seeks access to the entire withheld record, and that he believes additional responsive records exist that the city did not disclose. The appellant submits that those additional responsive records would include:

- an environmental report concerning pollution from an oil tank that was on the property
- a site plan
- a report from the building and planning departments concerning windows installed on the side yard side of the building
- information about the impact of the height of the structure on the surrounding properties, and
- the reasons why the city allowed construction access over private city lands on this project, but denies it for other projects.

[5] At the appellant's request, the mediator relayed the appellant's concerns to the city and asked it to conduct a further search for these records.

[6] The city took the position that these were newly-identified records and outside the scope of the original request. The city suggested that the appellant could submit a new request for access to these records. The appellant maintained that these records are within the scope of his request, and the scope of the request was added as an issue to this appeal.

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[1] The city also assessed fees of $8.10 to process the request. The appellant paid the fee and the city disclosed three of four responsive records. The fee is not an issue before me in this order.

[7] The appellant did subsequently submit a second request for more records associated with the construction of the same property, including site plans, drawings, various assessments and correspondence, as well as a copy of an encroachment agreement regarding construction access over city-owned lands.[2] The city processed that access request separately (and the city's decision in that request is the subject of another appeal, discussed below).

[8] The appellant also stated during mediation that additional records exist that the city had not disclosed. Because the appellant challenged the reasonableness of the city's search for responsive records, this issue was also added to the appeal.

[9] When the appeal was not resolved in mediation, it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. The adjudicator initially assigned to this appeal decided to conduct an inquiry, which she began by inviting the city and third parties to submit representations in response to a Notice of Inquiry.[3]

Second request

[10] As stated above, the city processed the appellant's second request separately from the request at issue in this appeal, and issued a decision denying access to some records responsive to it.

[11] The appellant appealed that decision to the IPC and another appeal, Appeal MA20- 00214 (the second appeal), was opened.

[12] Around the time that the adjudicator received representations from the city and third parties, the appellant's second appeal was assigned to her. At the appellant's request, the adjudicator decided to continue with a joint inquiry into both appeals. Because the appellant had raised the application of the public interest override in section 16 to the records at issue in this appeal (during mediation of the second appeal), the adjudicator also sought representations on the application of the public interest override in section 16 in this appeal.

[13] Both appeals were then transferred to me, and I reviewed the material and issues in each.[4] Although the section 10(1) exemption is claimed in both appeals, the issues of the scope of the request and reasonable search are only raised in this appeal. Further, because the appeals arise from different requests and separate decisions, and because they involve different records and different third parties, I decided to address each in a separate order. Accordingly, this order deals only with the issues raised in this

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[2] The appellant submits that the city owns abutting property over which it permitted construction access for this project, but has denied construction access for other projects.
[3] Third parties were only asked to submit representations on the application of the section 10 exemption.
[4] I reviewed the complete files, including the parties' representations and the record at issue, and concluded that I did not need any further representations before rendering a decision.

appeal, Appeal MA20-00070. The issues in the second appeal, MA20-00214, are the subject of a separate order, Order MO-4219, which is issued concurrently with this one.

[14] In this order, I find that the scope of the appellant's request was clear and specific and I uphold the city's search for records responsive to it as reasonable. I also find that the record at issue is not exempt under section 10(1) of the *Act* and I order the city to disclose it.

RECORDS:

[15] The record is a 34-page Designated Substance Audit Report (the report). The city has denied access to the entire record.

ISSUES:

A. What is the scope of the request and what records are responsive to it?

B. Does the mandatory exemption at section 10 apply to the record?

C. Did the city conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: What is the scope of the request and what records are responsive to it?

[16] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. These include the requirement that a requester provide sufficient detail in the request to enable an experienced employee of the institution, upon a reasonable effort, to identify the records.[5]

[17] Where the requester does not sufficiently describe the records to which access is sought, section 17 requires the institution to inform the requester of the defect, and to offer assistance in reformulating the request.[6]

[18] In order to best serve the purposes of the *Act*, institutions should interpret requester liberally. Generally, if there is ambiguity in the request, it should be resolved in a requester's favour.[7] Section 17(2) addresses ambiguity in a request.

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[5] Section 17(1)(b) of the *Act*.
[6] Section 17(2) of the *Act*.
[7] Orders P-880 and PO-2661.

[19] Finally, to be considered responsive to the request, records must "reasonably relate" to the request.[8]

Representations

The appellant's representations

[20] The appellant submits that the approval process for building permits is broad and multi-faceted. He says that it ought to have been apparent to city staff that the appellant was seeking access not only to the document posted at the site, but also to relevant documents supporting the granting of the permit.

[21] The appellant says that references (in the request) to an environmental report relating to a "known oil tank" ought to have prompted the city to follow up with him "to explore what additional documents were available and would relate to the request."

[22] The appellant submits that the city took a narrow rather than expansive approach to the request in retaliation for civil proceedings that the appellant had brought against the city. The appellant says he had initiated proceedings to determine the nature of the city-owned property near the site of the new construction because he had been refused access across it to enter his own property, while the city permitted access to facilitate the project relating to which records are sought.

The city's representations

[23] The city submits that the request was clear, detailed and specific and did not require further clarification. The city submits that it responded to the request literally and located four responsive records (a residential permit, demolition permit, new residential permit and a designated substance audit report).

[24] The city submits that the appellant attempted to expand the scope of the request during mediation to include various other documents, such as a site plan, a report from its building and planning division concerning windows installed on the building's side yard, a report on the impact of the height of the structure on the surrounding properties, and the reasons why the city allowed construction access over private city land for this project, (when the appellant says it did not do so for others).

[25] The city says this is additional information that falls outside the scope of the request. The city says that, had the appellant indicated in the original request that he was seeking access to site plans, management reports and environmental reports, a broader search for responsive records would have been undertaken, but that this is additional information that was not encompassed by the original request and represents a new one.

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[8] Orders P-880 and PO-2661.

Analysis and findings

[26] Section 17(1)(b) requires a person seeking access to a record to give enough detail to enable an experienced employee, upon a reasonable effort, to identify the record. If the request does not sufficiently describe the record to which access is sought, section 17(2) requires the institution to inform the appellant of the defect and help with reformulating the request. Where the request is ambiguous, the institution should also resolve any ambiguity in the appellant's favour.

[27] The appellant's request is for access to three specific records: "a copy of the report received by building and planning concerning the removal" of what he says was an old "leaking oil tank" at the property, the test results of the contaminated soil on and off the site, and a copy of the building permit issued for the property. I agree with the city that the request was detailed and specific. I find that it was clear and unambiguous and that it specifically and clearly identified the records sought. In the circumstances, I find reasonable the city's position that it was able to process the request without contacting the appellant to confirm the records sought or to ask whether the appellant sought access to additional records beyond those identified. I also accept that it was reasonable for the city not to ask the appellant about or speculate on whether there were other records that may have been submitted during the permit process or construction but that may not have formed part of, or been appended to, the building permit itself. These records were outside the scope of the request submitted.

[28] As noted above, where there is ambiguity in a request, an institution must inform a requester of any defect and offer help in reformulating the request. Having found the request to be clear and unambiguous, I am not persuaded that the request necessitated a consultative process or that, as the appellant submits, the city ought to have contacted him to "explore" what additional documents might be available. By identifying a specific report about a specific issue that was sought, as well as a building permit that was issued for the property identified in the request, I accept that the appellant's request clearly identified the particular records to which he sought access.

[29] Given the appellant's subsequent request (which is the subject of Appeal MA20-00214 and Order MO-4219), it is apparent that he also sought access to a broader range of records than those identified in this request. In response to that request, the city located additional records (which included the record at issue in this appeal). As for the request in this appeal, however, I find that it was clear and specific and that it was not unreasonable for the city to have proceeded to search for the records identified in the request without contacting the appellant to verify whether he wanted access to a broader set of records, or to confirm whether the request was indeed limited to the records described in it.

[30] For the above reasons, I find that the request was sufficiently clear that the city was not obliged to contact the appellant to explore whether he intended for the request to be broader, or to help reformulate the request pursuant to section 17(2) of the *Act*.

Issue B: Does the mandatory exemption at section 10(1) for third party information apply to the records?

[31] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[9] where specific harms can reasonably be expected to result from its disclosure.[10]

[32] 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…[11]

[33] For section 10(1) to apply, the party arguing against disclosure 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;

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.

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[9] *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.*).
[10] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[11] 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 officer or other person appointed to resolve a labour relations dispute."

Part 1: type of information

[34] The types of information listed in section 10(1) have been discussed in prior IPC orders. Relevant to this appeal are the following:

> *Scientific information*, which is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.[12]
>
> *Technical information*, which means 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.[13]

Representations

[35] As part of the inquiry into this appeal, the IPC sought representations from the city, the appellant, and the three third parties described above.

The city's representations

[36] The city says the record contains scientific and technical information and was prepared about the property in question.

[37] The city says the record's author is a professional organization that was retained to conduct a Designated Substance Audit for the property. The city says that, as part of its audit, the third party completed:

- visual inspections of all accessible areas within the building and all accessible exterior finishes and elements to identify suspected designated substances and hazardous building materials
- collected bulk building material samples that it submitted to an accredited and/or qualified laboratory
- interpreted laboratory results and,
- prepared the report that is at issue, including its findings and recommendations.

[12] Order PO-2010.
[13] Order PO-2010.

The homeowner and builder

[38] The homeowner and the builder submitted brief representations regarding the application of section 10(1). The builder submits only that he had a contract with the homeowner to build a new house on the lot and that "we have not voice in this concern."

[39] The homeowner submits that he is contractually unable to consent to disclosure of the record because it was authored by a consultant who retains "sole title and ownership of the report as their work product."

[40] Accordingly, unless specified otherwise, I have only summarized the remaining third party's representations in this order; that is, the third party who inspected the property and prepared the report at issue.

The third party's representations

[41] The third party submits that the record is a pre-demolition report of the building and its material in respect to designated substances and that it contains both scientific and technical information. The third party submits that the record only deals with pre-demolition conditions (of the old house) and does not deal with or address anything related to soil contamination, oil tanks or leaks, or environmental pollution of the site.

The appellant's representations

[42] The appellant submits that the records contain technical information "only in the sense that they contain a report of observations made expressed in technical terms." He submits that any report relating to potential underground fuel contamination would be expected to identify any procedures undertaken, results or recommendations for remediation.

Analysis and findings

[43] I am satisfied that the record contains technical and scientific information for the purposes of section 10(1).

[44] The record was created as part of an audit to identify the presence of designated substances in advance of the demolition of the old house on the site. The record discusses the methodologies and assessment criteria used to inspect for designated substances, including substances that are not expected to be present in building use or that may be hazardous, describes findings and analytical assessments, and contains conclusions and recommendations. Although the third party has not described what portions of the record contain scientific information, based on my review of the record's contents, I am satisfied that the record contains scientific information that falls into the category of natural or biological science. I also find that the record contains technical information regarding collection and assessment of data.

[45] As a result, I find that the first part of the three-part test in section 10(1) has been met.

Part 2: supplied in confidence

[46] 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 implicitly or explicitly.

[47] 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.[14]

[48] 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.[15]

[49] In order to satisfy the "in confidence" component of part two, the party 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.[16]

[50] 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.[17]

Representations

The city's representations

[51] The city submits that the record was supplied to it in confidence. The city says

[14] Order MO-1706.
[15] Orders PO-2020 and PO-2043.
[16] Order PO-2020.
[17] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

that the record was prepared for the sole use of its author and their client in completing the project.

[52] The city submits that it has not disclosed the record, and that it has not been posted on the city's website or made public.

The third party's representations

[53] The third party submits that the record "was supplied by [the third party] to our client in confidence as outlined in the limitations section" which states that "[t]his report was completed for the sole use of [the third party] and the Client."

[54] The third party does not describe the circumstances under which the report was supplied to the city, stating only that it was prepared for the client for construction of the new home.

The appellant's representations

[55] The appellant submits that, at the time that reports were submitted to the city, the homeowner and his contractors knew that they were engaged in a public rather than a private process. The appellant submits that there could have been "no reasonable expectation of privacy" and there were "no indicia of confidentiality."

Analysis and findings

[56] Based on the parties' representations, I find that the record was supplied to the city as part of the permit process and as part of the requirements associated with demolition and construction on the site, but that it was not supplied to the city in confidence. I therefore find that part two of the three-part test in section 10 has not been met.

[57] The city and third party have not described who supplied the record to the city, or the circumstances under which the record was supplied to the city that would have led to an implied or express expectation of confidentiality. The third party says only that the report was to be used by its client for the sole purpose of the project's execution. According to the record, it was prepared for the builder retained by the homeowner, and submitted to the city as part of the permit, demolition and/or or construction process.

[58] Neither the third party nor the city has provided me with sufficient basis to conclude that the city and the third party had a mutual reasonable expectation that the record was supplied to the city on the basis that it was confidential and that it was to be kept confidential, or that it was treated consistently by the third party in a manner that indicated a concern for confidentiality. In its representations, the third party refers to a section in the record titled "Limitations," which, as the third party submits, states that the record "was completed for the sole use of the [third party] and the Client."

[59] Finally, neither the city nor the third party have provided me with sufficient evidence to conclude that the record, submitted during the permit, demolition and/or construction process, was prepared for a purpose that would not entail disclosure, or that there was an objective basis for such an expectation.

[60] As a result, I find that part two of the three-part test in section 10(1) has not been met. Since all three parts of the test must be met, I find that the record is not exempt under section 10(1) of the *Act*.

[61] Because I have found that part two of the test has not been met, it is not necessary for me to consider part three. In any event, I find that there is insufficient evidence before me to conclude that disclosure would result in any of the harms listed under paragraphs (a) through (c) of section 10(1).

Part 3: harms

[62] 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 record itself 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 harms described in the *Act*.[18]

[63] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[19] Parties should provide detailed evidence to demonstrate the harm, although they do not have to prove that disclosure will in fact result in harm.

[64] With respect to harms, the city relies on the representations of the third party, who submits only that "[d]isclosure of the information is reasonably expected to cause an interference with our and our clients contractual rights we possess [sic]."

[65] In the circumstances, there is insufficient evidence before me of any harm that can reasonably be expected to result from disclosure, and I find that the harms contemplated in section 10(1) cannot be inferred directly from the record itself or the circumstances surrounding its creation.

[66] Accordingly, as noted above, I find that the three-part test in section 10(1) has not been met and that the record is therefore not exempt under section 10(1).

The public interest override in section 16

[67] As I noted above in the overview, the appellant stated during mediation of his second appeal (for access to additional documents relating to the construction of the

[18] Orders MO-2363 and PO-2435.
[19] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C. R. 23.

same property) that there is a compelling public interest in disclosure of the record at issue that outweighs the purpose of the section 10 exemption.

[68] Given my finding that the record is not exempt, I do not need to consider the application of section 16 to the record.

Issue C: Did the city conduct a reasonable search for responsive records?

[69] The appellant has also challenged the reasonableness of the city's search for responsive records.

[70] Where a requester claims that additional records exist beyond those found by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[20] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[71] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[21] that is, records that are "reasonably related" to the request.[22]

[72] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[23] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[24]

[73] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[25]

Representations

The city's representations

[74] The city submits that, when it received the request, the clerk's office contacted the following individuals in the building and planning division to begin a search for responsive records. These individuals were:

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[20] Orders P-85, P-221 and PO-1954-I.
[21] Orders P-624 and PO-2559.
[22] Order PO-2554.
[23] Orders M-909, PO-2469 and PO-2592.
[24] Order MO-2185.
[25] Order MO-2246.

- the former manager of development services
- the director of infrastructure and development services
- the former administrative assistant to the director of infrastructure and development services.

[75] The city submits that it interpreted the request literally, and that, as noted above, the request was clear and specific and that it did not therefore seek clarification from the appellant about what records might be responsive.

[76] With its representations, the city provided affidavits sworn by the city clerk, the former manager of development services, and the former clerk secretary for the development services division of the city's infrastructure and development services department. According to these affidavits, the clerk-secretary for the building and planning division, and the manager of development services, searched the property file for the specified address and located responsive records. According to the city, the search also resulted in the location of two additional records (relating to demolition permits) that the city deemed were not responsive to the request (and which are not at issue in this appeal).[26]

The appellant's representations

[77] The appellant submits that the city took a narrow rather than expansive approach to its search in retaliation for his claim against the city (regarding access across the city's property) and that the search for responsive records was consequently unreasonably narrow.

Analysis and findings

[78] I am satisfied that the city conducted a reasonable search for responsive records. The city's representations demonstrate that experienced employees, knowledgeable in the records related to the subject matter of the request, made reasonable efforts to locate the report identified in the request as well as the building permit.

[79] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist. I do not accept the appellant's assertion that the city interpreted the request narrowly. Although the appellant sought access to a specific report, it is apparent that the city's search resulted in the location of other records, including the report at issue.

[80] The appellant has not provided me with a reasonable basis on which I could

[26] According to the city's representations, these were a Demolition Permit Information Form Environmental Consideration and Notice of Demolition forms.

conclude that additional records exist that are responsive to the particular request that is at issue in this appeal. In these circumstances, I find that the appellant has not provided a reasonable basis for me to conclude that additional records exist in response to this particular request, but that have not been located by the city. I therefore uphold the city's search for responsive records as reasonable.

ORDER:

1. I uphold the city's search for responsive records pursuant to section 17 of the *Act* as reasonable.

2. I order the city to disclose the report to the appellant by **July 29, 2022** but not before **July 25, 2022**.

3. In order to verify compliance with order provision 2, I reserve the right to require the city to provide me with a copy of the record it disclosed to the appellant.

Original signed by: June 22, 2022

Jessica Kowalski
Adjudicator