

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4219

Appeal MA20-00214

City of Stratford

June 22, 2022

Summary: The City of Stratford received a request for access to a specific building permit for, and records related to, the construction of a residential dwelling. After notifying third parties, the city granted partial access to responsive records. The city denied access to some responsive records on the basis that they are exempt under the mandatory third party information exemption in section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the records at issue are not exempt under section 10(1) 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 order deals with access to site plans submitted as part of a building permit application for construction of a new home in the City of Stratford (the city). The request, submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), is the second of two requests filed by the appellant about the same property. The appellant's first request is the subject of a separate appeal and Order MO-4218, issued contemporaneously with this one. The request resulting in this appeal was for access to the following records relating to the building permit:

1. Application for building permit for [a specified address], including all plans and sketches.

2. Building permit for [the specified address].
3. All plans and sketches of [a specified street] adjacent to [the specified address].
4. All plans and sketches of City owned property adjacent to [the specified address].
5. Encroachment Agreement relating to City owned property adjacent to [the specified address] with [a named person] and City of Stratford.
6. All correspondence between [the named person] and City of Stratford relating to construction at [the specified address].
7. Environmental Assessment Reports relating to [the specified address].
8. All reports and/or correspondence between City of Stratford and [a named company] relating to the construction at [the specified address]. Reference to City of Stratford includes its councillors, employees, agents and contractors.

[2] The city conducted a search and located responsive records. Pursuant to section 21(1) of the *Act*, the city notified third parties whose interests might be affected by disclosure of the records to give them an opportunity to comment. Following third party notification, the city issued a decision granting partial access to the records. The city withheld some information on the basis of the mandatory exemptions in sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*.

[3] The appellant appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). This appeal was opened, and a mediator was assigned to explore resolution.

[4] During mediation, the appellant indicated that he was seeking access to records numbered 1, 7 and 11 in the city's index of records, all of which were withheld under section 10(1). However, because record 7 is at issue in the related IPC appeal (MA20-00070), only access to records 1 and 11 is at issue in this appeal.¹

[5] At the appellant's request, the mediator notified the third party for consent to disclose the requested records. The third party did not consent. Also during mediation, the appellant took the position that there is a compelling public interest in the disclosure of the records, as described in section 16 of the *Act*. The issue of the public interest override in section 16 was added as an issue to the appeal.

[6] When a mediated resolution could not be reached, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator may decide to conduct a written inquiry. The adjudicator assigned to the appeal decided to conduct an inquiry

¹ As noted, access to record 7, a 34-page report, is determined in Order MO-4218.

under the *Act*. She began inquiries into this appeal and the appellant's related appeal (MA20-00070) separately by inviting the city and an affected third party to submit representations addressing the facts and issues set out in Notices of Inquiry. The adjudicator received representations from the city and the third party, and shared the non-confidential portions of those representations with the appellant in accordance with the IPC's *Code of Procedure and Practice Direction 7*.

[7] At the appellant's request, the adjudicator decided to continue with a joint inquiry into both appeals, and the appellant submitted his own representations responding to a joint Notice of Inquiry and the other parties' submissions (in both appeals).

[8] The appeals were then transferred to me and I reviewed the material in each of them.² Although the section 10(1) exemption is claimed in both appeals, because the appeals involve different third parties, different requests and different records (with the exception of one),³ and because the appellant's first appeal involves other issues in addition to section 10(1), I decided to address each in a separate order. Accordingly, this order deals only with the issues raised in this appeal, Appeal MA20-00214. The issues in the appellant's first appeal, Appeal MA20-00070, are the subject of Order MO-4218.

[9] In this order, I find that the records are not exempt under section 10 of the *Act*.

RECORDS:

[10] There are two records at issue in this appeal. They are two site plans, numbered as records 1 and 11 in the city's index of records, and described as follows:

Record 1: Site Plan of [the specified address] prepared by [the third party] dated June 21, 2017

Record 11: Site Plan and Foundation/Basement Plan for [the specified address] prepared by [the third party] dated June 21, 2017.

DISCUSSION:

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

[11] The purpose of section 10(1) is to protect certain confidential information that

² I reviewed the complete files, including the parties' representations and the records, and concluded that I did not need any further information before rendering a decision.

³ With the exception of record 7, access to which is determined in Order MO-4218 and which is not considered in this order.

businesses or other organizations provide to government institutions,⁴ where specific harms can reasonably be expected to result from its disclosure.⁵

[12] 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...⁶

[13] 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.

Part 1: type of information

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

⁴ *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.*).

⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁶ 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."

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.⁷

Commercial information, which is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.⁸ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁹

Representations

Third party's representations

[15] The third party submits that the new house design is an original architectural work of technical and creative expertise that was created for commercial purposes. He submits that record 11 is a proprietary technical building plan that contains unique and creative design work.

The city's representations

[16] The city submits that the records contain technical information "as they were prepared by a professional in the field" and describe the construction of a structure.

The appellant's representations

[17] 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 says that the site plan is simply a record of observations and measurements taken that do not fall under the category of technical information.

Analysis and findings

[18] I find that the records contain information that relates directly to the construction and design of a residential dwelling. The records are technical drawings associated with the construction of a home. I find that they meet the definition of technical information for the purpose of section 10(1) of the *Act* and that part one of the three-part test for exemption under section 10(1) has therefore been met.

⁷ Order PO-2010.

⁸ Order PO-2010.

⁹ Order P-1621.

Part 2: supplied in confidence

[19] Part two of the three-part test itself has two parts: the third party must have “supplied” the information to the city, and must have done so “in confidence,” either implicitly or explicitly.

[20] 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.¹⁰

[21] 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.¹¹

[22] In order to satisfy the “in confidence” component of part two, the party resisting 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 expectation must have an objective basis.¹²

[23] 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 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.¹³

Representations

The third party's representations

[24] The third party submits that the records contain proprietary information over which he holds copyright. He submits that record 11 is subject to copyright protection because it contains unique and creative design work, and that the completed drawings “form an instrument of service” over which he has copyright.

¹⁰ Order MO-1706.

¹¹ Orders PO-2020 and PO-2043.

¹² Order PO-2020.

¹³ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

[25] He submits that he had an expectation that his copyright would be protected.

The city's representations

[26] Regarding the second part of the three-part test, the city says that, "With respect to confidentiality, the Records were supplied to the City."

[27] The city submits that the third party supplied the drawings as part of an application for a building permit. Referring to the third party's submissions to the city in response to the section 21 notification, the city says that the third party "advises that when submitting these records he believed they would be kept confidential in order to protect the copyright on his original works" and that he has maintained "[t]hroughout the appeal process" that he does not consent to their disclosure.

The appellant's representations

[28] The appellant submits that the owner of the property retained the services of professionals to provide reports to meet the city's requirements for the construction. The appellant says that there could have been no reasonable expectation of confidentiality and that there was "no indicia of confidentiality." The appellant submits that both the owner and the professionals the owner retained knew at the time the records were submitted that they were engaged in a public rather than a private process.

Analysis and findings

[29] Based on the city's and third party's representations, I am satisfied that the records were supplied to the city, but I find that they were not supplied in confidence. I therefore find that part two of the three-part test in section 10(1) has not been met.

[30] The only representations before me regarding confidentiality are the third party's representations, in which the third party says that, "I had the expectation that my copyright would be protected." The city simply refers to the third party's position in its representations, stating that, in supplying the records, the third party "believed they would be kept confidential."

[31] While the city says that the third party submitted that he had an expectation of confidentiality, there is no persuasive evidence before me from the city, the third party or on the face of the records themselves, that the records were supplied on the basis that they were confidential and were to be kept confidential, or that they were treated consistently by the third party in a manner that indicated a concern for confidentiality. Neither the city nor the third party have provided me with a basis on which I could conclude that they had a mutual reasonable expectation that the residential building or the site plans associated with the permit application were to be treated confidentially, were prepared for a purpose that would not entail disclosure, or that there was an objective basis for such an expectation.

[32] As noted above, the party opposing the disclosure must show that both the individual supplying the information (the third party in this case) and the recipient (the city) had a reasonable expectation that the information would be treated confidentially, and that this expectation has an objective basis. The only evidence before me is the third party's submission that he expected the drawings would be confidential because they are copyrighted, and the city's statement that the third party "believed" they would not be disclosed.

[33] The fact that information contained in the records may be subject to copyright, while it may suggest some measure of ownership, it does not, in and of itself, provide a basis to deny access to the information under the provisions of the *Act*, or oust the *Act's* application.¹⁴

[34] The parties have provided no information about the circumstances surrounding the submission of the site plans to the city from which any implied assurance of confidentiality could be inferred, that any express assurances were given, or that the third party's expectation was reasonable in the circumstances.

[35] Accordingly, while I accept that the third party supplied the records to the city, I have insufficient evidence on which to conclude that it did so in confidence. I therefore 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*.

Part 3: harms

[36] Because I have found that part two of the test for exemption under section 10(1) has not been met, it is not necessary for me to consider part three. In any event, there is insufficient evidence for me to find, based on the third party's and city's representations and review of the record itself, that disclosure could reasonably be expected to result in any of the harms listed under paragraphs (a) to (c) of section 10(1). The city says only that, once disclosed, there is no assurance that the appellant will not provide the records to others. The third party submits that disclosure of his architectural drawings "has potential to interfere with the commercial value of my services and infringes on the copyright of my original works."

[37] 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*.¹⁵

¹⁴ Order MO-2635.

¹⁵ Orders MO-2363 and PO-2435.

[38] Parties resisting disclosure must show that the risk of harm is real and not just a possibility,¹⁶ although they do not have to prove that disclosure will in fact result in harm.

[39] The third party has not provided details about the risk of harm, beyond stating that there may be “potential” interference with his work’s commercial value and copyright infringement. As noted above, the third party must show that the risk of harm is real, and not just a possibility.

[40] In the circumstances, I find that there is insufficient evidence before me of any harms that can reasonably be expected to result from disclosure. For all of the above reasons, I find that section 10(1) does not apply to records 1 or 11, and I will order them to be disclosed.

Public interest override in section 16

[41] Given my finding that the records are not exempt under section 10(1) of the *Act*, it is not necessary for me to consider whether there is a compelling public interest in their disclosure that outweighs the purpose of section 10(1) pursuant to section 16 of the *Act*, as the appellant submits.

ORDER:

1. I order the city to disclose the records to the appellant by **July 29, 2022** but not before **July 25, 2022**.
2. In order to verify compliance with order provision 1, I reserve the right to require the city to provide me with a copy of the records which it disclosed to the appellant.

Original signed by: _____
Jessica Kowalski
Adjudicator

_____ June 22, 2022

¹⁶ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.