

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4359

Appeal MA21-00425

Township of King

March 30, 2023

Summary: The Township of King received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a specified property. After notifying third parties, the township issued a decision granting full access to all of the responsive records except for one. One of the third parties appealed the township's decision claiming that section 10(1) (third party information) applies to the responsive records. The requester did not appeal the township's decision. In this order, the adjudicator upholds the township's decision, and she orders the township to disclose the records to the requester in accordance with its access decision.

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 determines the issue of access to records related to the redevelopment of a specified long-term care property.

[2] The Township of King (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

All correspondence, memorandum, emails, etc. from [the appellant] to Staff and Council regarding [the related third party] proposal for a Long

Term Care centre and related developments located at [specified address].

Furthermore, we are requesting all documentation regarding the presence and operation of a Long Term Care centre on the lands located at [specified address], prior to 2001. In addition to documentation regarding presence and operation generally, we are requesting all documentation regarding how many individuals received care, dates and type of care received.

Lastly, we are requesting all documentation regarding the location and footprint of the [specified building] on the lands located at [specified address], as well as any documentation, including drawings, that detail the proposed Long Term Care building footprint and location.

[3] After notifying third parties about the request to seek their views on disclosure of the records affecting their interests, the township issued a decision granting full access to all of the responsive records except for one (record 8).

[4] One of the third parties, now the appellant, appealed the township's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[5] During mediation, the appellant consented to the disclosure of records 27-30 and 32 to the requester. The appellant, however, opposed the township's decision to disclose the remaining records at issue to the requester and claimed that the exemption in section 10(1) (third party information) of the *Act* applied to the remaining records.

[6] Although the requester did not appeal the township's decision to partially deny access, they advised that they wish to pursue access to the records remaining at issue.

[7] As no further mediation was possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence an inquiry in which I sought and received representations from the parties about the issues in the appeal. Portions of the appellant's representations were withheld in accordance with the confidentiality criteria in IPC Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

[8] In this order, I dismiss the appeal and uphold the township's access decision that the section 10(1) exemption does not apply to the records at issue. As a result, I order the township to disclose the records to the requester in accordance with its access decision.

RECORDS:

[9] The records¹ remaining at issue in this appeal are as follows:

Record(s)	Description
1	An email attaching drawings of development options for the specified property
3	Letter to the township from the appellant re permitted uses with attachments
4	Letter to the township from the appellant re permitted uses and meeting follow-up
5	Letter to the appellant re a service provider's role
6	Letter to the township from the appellant re permitted uses and meeting follow-up
8	An email attaching a revised concept plan for the specified property
9	Email chain discussing an agenda for a meeting about the specified property
10	Letter from the Toronto and Region Conservation Authority (TRCA) about the development proposal for the specified property
11-13, 15-24, 26, 31, 33-36	Emails between the township and the appellant related to the specified property
14	An email attaching a letter from the related third party addressing the mayor and members of council
25	An email attaching a concept plan from an architect
37	Duplicate of record 9

[10] The township decided to disclose the records in full except for record 8. Since the requester did not appeal the township's decision, the portion of record 8 that the township has decided to withhold is not at issue in this appeal.

[11] The township also disclosed records other than those listed above, including the additional disclosure provided during mediation. This appeal relates only to those records that the third party appellant objects to disclosure of.

DISCUSSION:

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

[12] The appellant claims that the mandatory exemptions at sections 10(1)(a), (b), and (c) of the *Act* apply to the records at issue and that they therefore should not be

¹ Some of these records were addressed in parallel appeals involving a different request and requester.

disclosed. The township and the requester argue that these exemptions do not apply.

[13] 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;

[14] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² 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.³

[15] For section 10(1) to apply, the party resisting disclosure – in this case, the third party 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; and
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.

[16] All three parts of the three-part test must be met to establish the exemption. Because I find below that the appellant has not established part 3 of the three-part test, it is not necessary for me to consider parts 1 and 2 of the test.

² *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.*).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

The third party appellant has not established that disclosure gives rise to a reasonable expectation that one of the section 10(1) harms will occur (Part 3)

[17] 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 disclosure will in fact result in such harm.⁴

[18] 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.⁵ 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*.⁶

Representations of the parties

[19] The appellant submits that part 3 of the section 10(1) test has been met because disclosure of the records could reasonably be expected to cause harm to another (related) third party.⁷ The appellant submits that disclosure could reasonably be expected to:

- “prejudice significantly the competitive position and interfere significantly with the contractual or other negotiations engaged by [the other third party] with respect to the [specified property] redevelopment;”
- “result in similar information no longer being supplied to the township where it is in the public interest that similar information continue to be so supplied;” and
- “result in undue loss or gain to [the other third party]” because the specified redevelopment is ongoing.

[20] The appellant further submits that they and the other third party do not consent to the disclosure of the withheld information.

[21] The township submits that many of the records were requested from the appellant by the township for the purpose of using the information to prepare an

⁴ *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.

⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

⁶ Order PO-2435.

⁷ Although this party did not appeal the township’s decision, I have considered the appellant’s claims on its behalf.

"opinion letter" describing the potential development and the permitted uses of the specified property. The township further submits that part of this "opinion letter" is quoted in a staff report, and that two public staff reports and a memorandum also include summarized information from the records.

[22] The township generally submits that the appellant was aware that information provided to the township could be made public and that most of the information at issue has already been disclosed in public records, such as the two staff reports and memorandum. The township states that record 10 originated with the TRCA and the township provided an email between it and the appellant wherein the appellant states that it was "assumed" that the TRCA letter would be "referenced" or "attached" to a public report.

[23] The requester argues that the withheld information does not meet the three-part test in section 10(1). The requester submits that disclosure of the information at issue could not reasonably be expected to cause any harm to the third party appellant. The requester further submits that the appellant must be very specific as to the harms that may be experienced by them if the information were disclosed and citing harms alone is not enough.

[24] The requester states that the harm in section 10(1)(b) is unlikely given that the information in the records needs to be submitted to the township as part of the planning approval process and will be available as part of the public record. The requester states that it is "impossible to see" how disclosure could result in competitive harm when the proposed development of the specified property would be a not-for-profit centre.

Analysis and findings

[25] To find that any of the section 10(1) harms could reasonably be expected to result from disclosure, I must be satisfied that there is a reasonable expectation of the specified harm. I can reach this conclusion either based on my review of the information at issue, the circumstances of this appeal, including the records as a whole, and/or the representations made by the appellant.

[26] Based on my review of the records and the representations of the parties, I find that the appellant has not established that disclosure of the information at issue could reasonably be expected to result in the harms enumerated in sections 10(1)(a), (b), or (c) of the *Act*.

[27] The appellant's arguments, summarized above, merely repeat the wording of the claimed exemptions without providing detailed evidence to support these assertions. These arguments are insufficient to establish the harms in section 10(1). As noted above, parties should not assume that the harms under section 10(1) can be proven

simply by repeating the description of harms in the *Act*.⁸

[28] Without detailed evidence, I then reviewed the information itself to determine whether it is evident that disclosure could reasonably be expected to result or cause any of the stated harms. From my review of the records and the circumstances of this appeal, I am unable to conclude that disclosure of the information could reasonably be expected to cause or result in any of the stated harms in section 10(1). The information at issue relates to the proposed redevelopment of the specified property, which is known to the public. As the township has explained, most of the withheld information has already been disclosed in public records, such as the two public staff reports and memorandum. I agree with the township's argument that this fact undermines the appellant's position that any of the stated harms could reasonably be expected to occur.

[29] In sum, in the absence of any detailed evidence from the appellant and based on my review of the records, I am unable to conclude that the disclosure of the information at issue could be reasonably expected to result in the harms set out in sections 10(1)(a), (b), or (c) of the *Act*.

[30] All parts of the three-part test must be met for the mandatory exemption at section 10(1) to apply. Since the appellant has not established part 3 of the section 10(1) test, I find that section 10(1) does not apply to exempt the information at issue in this appeal from disclosure. I will therefore order the information at issue to be disclosed to the requester.

ORDER:

1. I uphold the township's access decision and dismiss the appeal.
2. I order the township to disclose the records in accordance with its access decision by **May 5, 2023** but not before **May 1, 2023**.
3. In order to verify compliance with this order, I reserve the right to require the township to provide me with a copy of the records disclosed to the requester upon request.

Original signed by: _____

Anna Truong
Adjudicator

March 30, 2023

⁸ Order PO-2435.