

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4458

Appeal MA22-00664

Kawartha Conservation

November 3, 2023

Summary: This order upholds the decision of Kawartha Conservation to release redacted copies of permit application records and related correspondence in response to a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator finds that the information at issue is not “personal information,” as that term is defined in section 2(1) of the *Act*, so it cannot be withheld under a personal privacy exemption. She also finds that it is not exempt under the mandatory exemption at section 10(1) (third party information) of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of “personal information”) and 10(1).

Orders Considered: MO-2081, MO-2695, MO-2792, MO-3066, MO-3125, and MO-4108.

OVERVIEW:

[1] This order discusses access to permit application records, and related correspondence, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). This order explains why I uphold a decision to release (redacted)¹ copies of such records in response to an access to information request for them.

[2] Kawartha Conservation received a request under the *Act* for access to all records

¹ Kawartha Conservation decided to withhold portions of the records, and those portions are not at issue in this appeal.

relating to a particular address, including environmental impact studies and correspondence.

[3] Before issuing a decision, Kawartha Conservation notified several parties whose interests may be affected by disclosure (affected parties) about the request seeking their views on disclosure of the responsive records, canvassing their views on whether the records qualify for the mandatory exemption at section 10(1) (third party information) of the *Act*. After notice was given, and Kawartha Conservation considered the views expressed, it issued a decision granting access, in part, to the responsive records.

[4] The requester did not submit an appeal, so Kawartha Conservation's decision to withhold portions of the records is not the subject of this appeal.

[5] One of the affected parties objected to Kawartha Conservation's decision to disclose the remaining portions of the responsive records. That affected party (now the appellant) appealed Kawartha Conservation's decision to the Information and Privacy Commissioner of Ontario (IPC).

[6] The IPC appointed a mediator to explore resolution. The mediator communicated about the appeal with the requester and the appellant (separately),² and with Kawartha Conservation.³ No consent could be obtained from the appellant for release of the records. The requester informed the mediator of their wish to pursue the records at the adjudication stage. Accordingly, the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[7] As the adjudicator of this appeal, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to Kawartha Conservation and to the appellant. I received written representations from them in response, and provided the appellant with a chance to respond to Kawartha Conservation's representations and to my correspondence addressing certain concerns raised by the appellant (and citing past IPC orders engaging with such issues).

[8] For the reasons that follow, I uphold Kawartha Conservation's decision, and dismiss the appeal.

RECORDS:

[9] The records at issue are 170 pages in total, as set out in Kawartha

² The original requester did not wish to consent to the sharing of their identity with the appellant. Accordingly, the original requester's identity was not disclosed to the appellant at mediation, nor was the appellant's identity shared with the original requester.

³ The mediator asked Kawartha Conservation about its reference to section 4(1) in its notice and decision letter. Kawartha Conservation clarified that it was relying on the exemption at section 10(1) and that its reference to section 4(1) in its correspondence with affected parties was inadvertent.

Conservation's index of records. Most of the records consist of permit application documentation, including environmental impact studies. Some of the records are email correspondence with Kawartha Conservation.

[10] This appeal only relates to the portions of the records that Kawartha Conservation decided not to withhold. Since the requester did not appeal Kawartha Conservation's decision to withhold certain information in the records, that information is to remain withheld and I will not be discussing access to it in this order.

ISSUES:

Preliminary issue: Should the permit application records and related correspondence be withheld under the mandatory personal privacy exemption in section 14(1)?

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

DISCUSSION:

[11] In this order, I explain why I uphold Kawartha Conservation's decision to disclose the information in the records that the appellant opposes the disclosure of.

Preliminary issue: Should the permit application records and related correspondence be withheld under the mandatory personal privacy exemption in section 14(1)?

[12] The appellant's representations in this appeal were not shared with the requester due to confidentiality concerns,⁴ so I will refer to them in a general way.

[13] Kawartha Conservation's decision was to disclose the responsive records – but without the names, telephone numbers, email addresses, or signatures of certain identifiable individuals. Although access to that withheld information is not before me, it is clearly information that qualifies as the "personal information" of these individuals, under section 2(1) of the *Act*.⁵

⁴ Having reviewed the appellant's initial and reply representations, I determined that I did not need to hear from the original requester. Due to confidentiality concerns, I am summarizing the appellant's general position and not setting it out in this public order, under *Practice Direction 7* of the IPC's *Code of Procedure*.

⁵ Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." "Recorded information" is information recorded in any format, such as paper records, electronic records, digital photographs, videos, or maps (see the definition of "record" in section 2(1) of the *Act*). Section 2(1) of the *Act* gives a list of examples of personal information, including information

[14] The appellant does not see the exemption at section 10(1) as the appropriate framework for considering access to the requested information and, rather, opposes disclosure of the remaining portions of the records based on factors that would be considered in determining whether a personal privacy exemption (section 14(1) or 38(b)) applies to those portions of the records.

[15] During the inquiry, I expressed my preliminary view that the remaining information at issue is not "personal information" as defined by section 2(1) of the *Act* but rather it is information about a property. I noted that 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, unless there is personal information in them such as the property owner's name and telephone number. Specifically, I invited the appellant to see in regard Orders MO-2081, MO-2695, MO-2792, MO-3066, MO-3125, and MO-4108.⁶

[16] I asked the appellant to provide written representations explaining any disagreement with that preliminary view, and specifically asked if there is a reason to depart from the approach of the long line of IPC Orders which I referenced in my letter.

[17] In response, the appellant reiterated considerations already made, and questioned whether the IPC orders that I cited involved circumstances such as the ones described in the appellant's representations and attachments. The appellant maintained their objection to disclosure and expressed a hope that the IPC would recognize the limitations of the law, and become a source of change.

[18] While I appreciate that the appellant objects to disclosure on the basis of considerations related to personal privacy, such considerations can only be relevant when considering a right of access to records under the *Act* if the information in the records is "personal information," as that term is defined in section 2(1) of the *Act*. If the information in the requested records does not qualify as "personal information," it cannot be withheld under a personal privacy exemption. I must apply the *Act* as it is to the records that were requested. It is for the Legislature to change the wording of the *Act* if it sees fit.

[19] I agree with the reasoning in the long line of IPC orders such as the ones I cited to the appellant, in which the IPC held that records relating to permit applications are records about a property not a person. Adopting that reasoning, and based on my review of the records at issue (that is, the redacted records), I find that the records do

relating to address and telephone number [paragraph (d)], and an individual's name, if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)]. The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information" (see Order 11).

⁶ I provided the appellant with online links to these orders in my letter, for ease of reference.

not contain recorded personal information about an identifiable individual, including the appellant, within the meaning of section 2(1) of the *Act*. As a result, the information at issue cannot be withheld under either the mandatory or discretionary personal privacy exemptions in the *Act*.

[20] 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.

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

[21] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,⁷ where specific harms can reasonably be expected to result from its disclosure.⁸

[22] For section 10(1) to apply, the party arguing against disclosure (the appellant, in this case) 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.⁹

[23] The appellant's representations do not sufficiently address this test, taking the position that section 10(1) is not the right framework of consideration to start with.

⁷ *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.*).

⁸ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁹ Here, the appellant states that Kawartha Conservation advised that an appeal of its decision can only be made if it is established that sections 10(1)(a), (b), or (c) apply. Although I do not discuss harms (part three) in this order because of my findings about other parts of test, for reference, sections 10(1)(a) and 10(1)(c) say:

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[.]

[24] Although I do not have substantive representations about section 10(1) from the party opposing disclosure, I will nevertheless consider whether section 10(1) applies, based on the records themselves because section 10(1) is a mandatory exemption.

[25] Since all three parts of the test must be met for section 10(1) to apply, and because I find, below, that part two does not apply to the permit application and supporting documents, and that part one does not apply to the related correspondence, I do not need to discuss the other parts of the test.

Permit application records

Part 2: supplied in confidence

[26] The remaining records at issue are permit application documents, including environmental impact studies. As documents that formed an application to Kawartha Conservation, I accept that they were “supplied” to Kawartha Conservation.

[27] However, I do not accept, on the evidence before me that this supply was made “in confidence.”

[28] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an *objective* basis.¹⁰

[29] 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.¹¹

[30] The appellant does not directly address part two of the test in their representations, but Kawartha Conservation notes that in seeking to change Kawartha Conservation’s decision, the appellant had expressed an understanding that the records would not be public until the permit was approved.

¹⁰ Order PO-2020.

¹¹ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

[31] Kawartha Conservation states that permit applications begin with the knowledge that the documentation is public, saying:

Permit information is supplied with the knowledge of a permit applicant that information submitted is considered a public document that may be requested, subject to MFIPPA considerations. This is done at the outset of the application process, while noting that their personal information is protected through this process. Further if a permit application requires a Board decision (representing the furthest extent of the permit approval process), the application and all technical information is subject to a public process.

[32] Kawartha Conservation also sets out the following wording from the permit application form itself:

I acknowledge that this application and supporting documents will be considered as public documents and are available upon written request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). I understand that any and all personal information gathered by the Kawartha Conservation will be used only for the express purpose(s) of the application for which it has been provided, and will not be divulged to any third party, private or public, without prior written consent, as provided for in the Act.

[33] In response to Kawartha Conservation's representations, the appellant reiterated their objection to disclosure (largely based on previously presented considerations), and their objection to the section 10(1) framework of analysis.

[34] Based on my review of the records, the parties' representations (and in particular, the language in the permit application form), I am not persuaded that the permit application documentation was supplied to Kawartha Conservation with an explicit or implicit expectation of confidentiality. As a result, I find that the remaining records at issue do not meet part two of the test for section 10(1) of the *Act*, and, therefore, I uphold Kawartha Conservation's decision to disclose them to the original requester.

Related email correspondence

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

[35] Some of the records at issue are correspondence relating to the permit application.

[36] I have reviewed this correspondence and, based on that review, I find that this correspondence does not qualify as any of the types of information that the IPC has described as being protected under section 10(1) of the *Act*. That is, the

correspondence does not reveal a trade secret or scientific, technical, commercial, financial or labour relations information.¹²

[37] As a result, the correspondence related to the permit application does not meet part one of the test for section 10(1), so there is no need to discuss whether it meets parts two and three of the test. Therefore, I uphold Kawartha Conservation's decision to release the portions of it that are at issue in this appeal.

[38] In conclusion, for the reasons set out in this order, I uphold Kawartha Conservation's decision, and dismiss the appeal.

ORDER:

1. I uphold Kawartha Conservation's decision to release copies of the redacted records to the original requester by **December 8, 2023** but not before **December 3, 2023**, and dismiss the appeal.
2. To verify compliance with provision 1, I reserve the right to require Kawartha Conservation to provide me with a copy of the records disclosed to the original requester upon request.

Original Signed By: _____
Marian Sami
Adjudicator

_____ November 3, 2023

¹² See Order PO-2010 for the definitions of these terms.