

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4466

Appeal MA23-00040

City of Sarnia

November 28, 2023

Summary: The City of Sarnia (the city) received a request for permit application drawings for a specified address. The city granted access to the records and notified affected parties of their decision. An affected party appealed the decision, stating that the drawings were exempt from disclosure under section 10(1) (third-party information) of the *Act*.

In this order, the adjudicator upholds the city's decision. He finds that the drawings are not exempt from disclosure and orders them disclosed.

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

Orders Considered: Orders MO-2132 and MO-2735.

OVERVIEW:

[1] The City of Sarnia (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for permit application drawings for a specified address.

[2] The city notified affected parties of the request, seeking their views regarding the disclosure of the responsive records. One of the affected parties responded, objecting to the disclosure of the records. The city issued an access decision to the affected parties and the requester, advising them of its decision to grant full access to

the responsive records. The affected party who responded to the city (now the appellant) appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC).

[3] During mediation, the requester advised the mediator that she continues to seek access to the drawings and the appellant confirmed their position that access should be denied under section 10(1) (third-party information) of the *Act*. No further mediation was possible, and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. I sought and received representations from the parties, and reply representations from the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[4] For the reasons that follow, I uphold the city's decision and dismiss the appeal. I order the information disclosed.

RECORDS:

[5] The records at issue consist of five pages of permit application drawings (the drawings).

DISCUSSION:

[6] The sole issue in this appeal is whether the drawings are exempt from disclosure under section 10(1) of the *Act*. The appellant did not initially specify which subsections they were claiming, but based on their representations they rely on sections 10(1)(a) and (c).

[7] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,¹ where specific harms can reasonably be expected to result from its disclosure.²

[8] 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,

¹ *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.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[9] In this case, for section 10(1) to apply, 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;
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

[10] As noted above, to satisfy part one of the section 10(1) test, the appellant must show that the records contain information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

Representations, analysis and finding

[11] The appellant submits that the drawings are architectural drawings used in the construction of a residential home and are therefore technical information within the meaning of section 10(1). The city does not dispute that the drawings contain technical information. The requester did not provide specific representations on the type of information, but generally stated that she required the drawings in order to address issues with the construction of her new home. I have reviewed the drawings and it is clear that they contain technical information related to the construction of a home.³ Accordingly, I find that the first part of the section 10(1) test has been met.

Part 2: supplied in confidence

[12] 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. The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of

³ Order PO-2010.

third parties.⁴

[13] 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.⁵

[14] In order to satisfy the “in confidence” component of part two, the party resisting disclosure must establish that, as the supplier of the information, it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁶

[15] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case must be 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.⁷

Representations

The appellant’s representations

[16] The appellant submits that the drawings were supplied in confidence to the city for the sole purpose of taking out a building permit. They submit that they do not otherwise make their drawings or other drawings they purchase available to their customers or the public. They reference Order MO-2132, where an engineer opposed the release of a plan that detailed how various nutrients were applied to a land base, filed in support of a building permit for a hog barn. They submit that the adjudicator accepted the engineer’s brief submissions that he had an expectation of confidentiality with respect to the construction plans or engineering drawings that described components of the proposed hog barn, and that the adjudicator agreed that the detailed information in the engineering drawings outlining the structures was supplied with an implicit expectation of confidentiality.

⁴ Order PO-2010.

⁵ Orders PO-2020 and PO-2043.

⁶ Order PO-2020.

⁷ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[17] The appellant states that the drawings in this appeal include detailed components of a residential home that are still offered as a design by the appellant, and that when the drawings were supplied in support of the building permit, they did so with an expectation that they would remain confidential, protecting the design from unauthorized or unintended use. They note that the city's building department website states that it can only release building permits to the individual they were issued to, and all other requests must go through the freedom of information process. They submit that this amounts to an "express and clear understanding" that the drawings are received by the city in confidence.

The city's representations

[18] The city and requester were provided the appellant's representations for a response. The requester did not provide specific representations on part two of the test.

[19] The city agrees that the drawings were supplied for the purposes of section 10(1), but submit that they were not supplied "in confidence." The city submits that it provided no implied or express assurances of confidentiality. It states that the drawings were not stamped "confidential" or otherwise noted in the building permit application as having been provided in confidence. Citing Order MO-2735, the city submits that the expectation by the appellant that the records would be used solely for building permit purposes is not equivalent to a reasonable expectation of confidentiality.

[20] The city distinguished Order MO-2132 from the present appeal, submitting that it relates to different information, notably that the plan contained financial and commercial information, as well as engineering drawings for the operation of a commercial enterprise using a "new construction technique" to make up a hog facility. They state that there has been a long line of IPC orders in more recent years that confirm that building permit applications are not supplied in confidence for the purposes of section 10(1).⁸

[21] The city submits that its website states that building records, including building permits, can be requested through a freedom of information request through the clerk's department. The city states that the building department itself only releases the records to the individuals they are issued to, but in accordance with the *Act*, every person has a right of access to records in the custody or control of institutions, subject to the exemptions in the *Act*. It submits that, given that municipalities are subject to the *Act*, it is unreasonable to make basic assumptions of confidentiality.

[22] The city further notes that many municipalities have adopted routine disclosure policies that permit the disclosure of building plans and residential site plans to the property owner without the use of the freedom of information process, and they state that this was recognized by the IPC in Order MO-2735. They state that this routine

⁸ The city cites Orders MO-2735 and MO-4219 in support of their position.

disclosure process is contrary to a reasonable and objective expectation of confidentiality regarding building plans.

The appellant's reply representations

[23] The city and requester's representations were provided to the appellant for reply. The appellant, referencing Order PO-2020, states that information is supplied in confidence when there is a reasonable expectation of confidentiality, whether implicit or explicit, when it is provided. They submit that the present appeal is similar to Order MO-2132 because the drawings have been amended based on years of experience in the home construction business, and that through their experience they have identified more efficient and cost-effective means of designing homes. They submit that in Order MO-2132, it was the detailed information in the engineering drawings that the adjudicator accepted had been supplied, implicitly, in confidence.

Analysis and finding

[24] I have reviewed the drawings and I find that they were supplied for the purposes of section 10(1). It is clear from drawings and the surrounding context that they were supplied by the appellant to the city for the purposes of obtaining a building permit.

[25] However, based on the information before me, I find that the drawings were not supplied with a reasonable expectation of confidentiality. As outlined above, the expectation of confidentiality must have an objective basis, in consideration of all of the circumstances of the case. The appellant submits that they had an expectation of confidentiality when submitting the drawings as part of a building permit application, particularly due to information that the drawings provide about their building design and construction process. They state that this is analogous to Order MO-2132, where a nutrient management plan for a hog barn was found to be supplied in confidence.

[26] I have reviewed the city's representations distinguishing Order MO-2132 from the current appeal, and I agree that the facts of this appeal are sufficiently different to distinguish it from the situation in Order MO-2132. While I generally agree that there is some similarity between the drawings here and the engineering drawings used for the structures discussed in Order MO-2132, a key distinction is that in Order MO-2132 the adjudicator made the finding in the absence of representations from the township regarding how they treated the information.

[27] Here, the city has explained that the drawings were not stamped "confidential" or otherwise noted in the building permit application as being provided in confidence. Additionally, the city explained that although the building department only provides the records to individuals who the permits were issued to, they are not otherwise treated as being provided to the city in confidence as part of the building permit process. Last, as the city points out, in Order MO-2735 it was recognized that many municipalities have routine disclosure policies that permit the disclosure of building plans to the property

owner outside of the freedom of information process.

[28] I acknowledge the appellant's concern that their drawings contain information related to their home designs that they only supplied because they were required to do so as part of the building permit process, and that this information reflects their expertise in home construction. However, I am not satisfied that this information being in the drawings means that they are being supplied with a reasonable expectation of confidentiality, whether implied or explicit. The city submitted that they provided no implied or express assurances of confidentiality, and there is no evidence before me to suggest that they did.

[29] I do not agree with the city's submission that the city being subject to the *Act* and the drawings potentially being accessible through the freedom of information process means that it is necessarily unreasonable to make basic assumptions of confidentiality. It may be the case that certain types of records could be supplied with a reasonable expectation of confidentiality, despite being supplied to an institution subject to the *Act*. However, in this case, considering the totality of the evidence before me, I find that the drawings were not supplied with a reasonable expectation of confidentiality.

[30] As all three parts of the test must be met in order for section 10(1) to apply to the drawings and I have found that part two of the test is not made out, I find that section 10(1) does not apply to the drawings.

ORDER:

I uphold the city's original access decision and dismiss the appeal. I order the city to disclose the drawings in accordance with their access decision by **January 5, 2024**, but not before **December 31, 2023**.

Original signed by:

Chris Anzenberger
Adjudicator

November 28, 2023