



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-668

Appeal M_9500526

Township of West Carleton



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BACKGROUND:

The requester is the registered owner of a piece of land in the Township of West Carleton (the Township) for which conditional subdivision approval was granted in 1988. The requester could not afford to fulfil the conditions of approval, and offered the proposed subdivision for sale to another developer (the affected party). The requester and the affected party entered into an agreement of purchase and sale in 1993, which required the affected party to fulfil the Township's conditions of approval at the affected party's expense. Before the affected party had title to the land, it commissioned engineering reports and plans for a draft subdivision agreement at a cost to it of \$35,952.70. Eventually, the affected party decided not to proceed with the transaction. The requester and the affected party entered into a mutual release in 1995 and, in accordance with the terms of the agreement of purchase and sale, the affected party forfeited its deposit of \$5,000 which was paid to the requester.

NATURE OF THE APPEAL:

The requester submitted a request to the Township under the Municipal Freedom of Information and Protection of Privacy Act for a copy of the engineering reports supplied to the Township in support of the subdivision application. After notifying the affected party of the request, the Township denied access to 14 records under to the following exemption:

- third party information - section 10

The requester appealed the Township's decision to deny access to the records. A Notice of Inquiry was sent to the Township, the affected party and the appellant. Representations were received from the affected party and the appellant. The Township did not submit representations, but was contacted during the inquiry to clarify factual issues related to the appeal.

DISCUSSION:

THIRD PARTY INFORMATION

The affected party states that to give the appellant free copies of the records which the affected party had to pay for would give the appellant an unnecessary advantage which is not deserved or appropriate. The affected party indicates that if the appellant wants the material, it would only seem right that he pay for it.

The appellant indicates that the records were done on his behalf, and the fact that someone else was paying for the records does not change the fact that the land in question belonged to him and that he would have an interest in the completed records.

For a record to qualify for exemption under section 10(1)(a), (b) or (c) the Township and/or the affected party 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 (a), (b) or (c) of section 10(1) will occur.

Part One

The records involve information prepared by professional engineers and describe hydrogeology, terrain analysis and the drainage and storm water management process on a draft subdivision agreement. There is no dispute between the parties that the records contain technical information. I agree, and find that the first part of the test for exemption under section 10 has been met.

Part Two

In order to satisfy Part 2 of the test, the information must have been **supplied** to the Township **in confidence**.

I am satisfied that the records were supplied to the Township.

Five of the records (Records 2, 3, 5, 8 and 12) predate the conditional approval given by the Township to the appellant's subdivision plan and three of these (the first, third and fifth chronologically) list the owners of the appellant's company as the "client" for whom the records were prepared. The other two (Records 3 and 8) do not identify a client. One other undated record (Record 6) also identifies the owners of the appellant's company as the client. In my view, the only reasonable conclusion is that these six records were supplied to the Township by the appellant. Accordingly, there is no "third party" whose interests would be protected by section 10, and the exemption does not apply.

Five of the records (Records 9, 10, 11, 13 and 14) are dated after the conditional approval but before the agreement of purchase and sale was entered into between the appellant and the affected party. It is clear to me that these records would not have been supplied by the affected party, as they predate the agreement of purchase and sale between the appellant and the affected party by at least two years. Two of these records (Records 11 and 13) list a party other than the appellant and the affected party as the client. The remaining three records (Records 9, 10 and 14) do not identify a client. In my view, it is only reasonable to conclude that these records were supplied to the Township by this other party.

The three remaining records (Records 1, 4 and 7) are dated after the agreement of purchase and sale but before the date the affected party indicated it was not proceeding with the purchase. Each of these three records lists the affected party as the client. I am satisfied that these three records were supplied to the Township by the affected party.

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

The appellant submits that subdividing land is not a confidential process. If the records were approved by the Township, they would ultimately become incorporated into documents which would be adopted by the Township by resolution of Council, registered in the Land Titles Office and available to all members of the public. The appellant indicates that once the plan of subdivision achieves final registration, the records would become part of the Township's public record (in accordance with the provisions of the Planning Act).

The Township indicates that its practice is not to distribute reports and plans submitted by one developer to another developer unless permission has been obtained. It also indicated that the records were prepared in support of a **proposed** subdivision agreement as at the time, the affected party did not own the property. The Township states that formal subdivision approval could not be given until the lands were registered in the affected party's name. The Township also provided a copy of a letter which it received from the affected party on the date the affected party indicated it was not proceeding with the purchase, where the affected party informs the Township of this fact and asks the Township not to use or distribute the records without the affected party's approval.

It is clear that formal subdivision approval has not been granted, and none of the records are public records at this point. While the goal of the process is formal approval, which entails publicizing the approved plan, the process will involve the submission of plans, drawings, etc. which either are not ultimately approved or do not form part of the approved plan and, therefore, never become public. I am satisfied that it is reasonable for a party to have had an expectation of confidentiality with respect to the records it submitted while the process was underway, and I find that the second part of the test has been met for the records submitted by parties other than the appellant.

Part Three

Section 10(1)(c) applies to technical information supplied in confidence if the disclosure could reasonably be expected to "result in undue loss or gain to any person, group, committee or financial institution or agency."

The appellant argues that as the agreement does not provide the affected party with a legal right to recover the engineering costs it incurred, the disclosure of the records would not adversely affect the affected party in any economic manner and is not a "loss" to it. The appellant also submits that as the affected party is not entitled to be compensated for the cost of the records, it follows that provision of these reports does not constitute an undue gain to the appellant. At the same time, however, the appellant argues that non-disclosure of the records will cause the appellant substantial harm.

The information at issue is commercially valuable. In order to obtain the records, the parties had to make a substantial capital expenditure. Although it appears that the affected party agreed to absorb these costs if the agreement fell through, the agreement does not require the affected party to surrender any commercially valuable records to the appellant.

The appellant intends to proceed with the subdivision, either directly or through a new buyer. Proceeding with the subdivision entails meeting the conditions for approval, and the records could reasonably be expected to bring the appellant closer to doing so. If the records had not already been commissioned by the affected party, the appellant or another buyer would have to commit the capital to obtain them. On this basis, I am satisfied that disclosure of the records could reasonably be expected to result in a gain to the appellant and, having considered the amount of investment required and the terms of the agreement and release, I am satisfied that such a gain would be undue. Accordingly, I find the section 10(1)(c) applies to the records which were not supplied to the Township by the appellant.

ORDER:

1. I uphold the Township's decision not to disclose Records 1, 4, 7, 9, 10, 11, 13 and 14.
2. I order the Township to disclose Records 2, 3, 5, 6, 8 and 12 to the appellant within thirty-five (35) days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order.
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 which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ December 15, 1995