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

ORDER MO-1517

Appeal MA-010298-1

City of Toronto

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The following background information was provided by the original requester in this appeal. He indicates that several years ago, he purchased a new home in a housing development owned by the appellant. He indicates further that the development site is near a railway track and there are (at least from his perspective) some unresolved issues regarding noise and vibration with respect to the site. He notes that the severance of the property into lots went before the City of Toronto's (the City) Committee of Adjustment and then to the Ontario Municipal Board (the OMB). Although the OMB apparently did not conduct a "full hearing", according to the requester, it conducted a "preliminary hearing" during which the developer submitted documents. The requester states that the OMB applied certain conditions in accordance with two reports that were submitted by the developer during this preliminary hearing (the records at issue in this appeal).

The requester indicates that in order to determine whether the developer complied with the requirements of the OMB order, he went to the OMB offices to review the relevant file. In doing so, he noted that where the two records at issue in this appeal were supposed to be (Tabs "I" and "J"), there was a letter to the City from the OMB, which indicated that the two reports were being sent to the City. It appears that the OMB did not make replacement copies of these reports prior to sending them to the City.

NATURE OF THE APPEAL:

The requester submitted a request to the City under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for these two documents (Exhibit 4 – Tabs "I" and "J" - OMB motion records) insofar as they relate to the property he purchased. In its decision to the requester, the City confirmed that the requested records consist of Tabs "I" and "J" of Exhibit 4 from OMB File No. C970453.

Prior to issuing its decision on access, the City notified the engineering company that prepared the two reports for the developer pursuant to section 21 of the *Act*. The engineering company did not respond to this notice and the City subsequently issued a decision, granting the requester full access to the requested records.

Following receipt of this decision, the engineering company contacted the City by telephone and subsequently by letter advising the City that the records were originally prepared by it under engagement by and for the exclusive use of its client (the developer of the property in question). The engineering company requested the City to contact the developer.

Several weeks later, this office received a letter from a holding company as represented by its president in which he stated:

> The documents in question are engineering reports that were prepared by a consulting engineer for a development site… In our purchase of this property, we also acquired ownership of the said reports.
>
> The reports were issued to us for the purpose of providing guidelines for the construction of houses on the site. We are not aware of any requirement or by-law which required us to provide copies to the city, but we did so as a gesture of

> good faith on the understanding that it would be without prejudice to us, to aid them in understanding certain concerns that the homeowners had.

On the basis of this letter, this office opened an appeal of the decision of the City to grant access to the requested records. The appellant in this appeal is the holding company/developer of the property.

Mediation could not be effected and this appeal was forwarded to adjudication. I decided to seek representations from the appellant, initially, and sent him a Notice of Inquiry setting out the facts and issues on appeal. In doing so, I provided him with the background information as stated by the requester and asked him to address the issues raised in the background discussion relating to the manner in which the records were sent to the City, the reasonableness of the expectations of confidentiality, and the impact of the submission of these records to the OMB.

The appellant submitted representations in response. After reviewing them, I decided that it was not necessary to seek representations from the other parties.

RECORDS:

The two records at issue consist of:

a) Report No. WA97-17-V: Railway Vibration Measurements, dated April 24, 1997, and

b) Report No. WA97-17: Detailed Noise Control Study, dated June 3, 1997.

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1) of the *Act* 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.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the party resisting disclosure (in this case, 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; **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 subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

Part one - Type of Information

The appellant submits that the records comprise "technical information" as that term is defined by this office. Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 10(1)(a) of the *Act* (Order P-454).

Having reviewed the records at issue, I agree that they clearly contain technical information as they were prepared by engineers and consist of measurements, calculations and analysis with respect to noise and vibration levels in the area of the proposed residential housing development.

Accordingly, the first part of the test has been met.

Part two – Supplied in Confidence

In order to satisfy the second requirement, the appellant must show that the information was supplied to the City, either implicitly or explicitly in confidence. Information contained in a record not actually submitted to an institution will nonetheless be considered to have been "supplied" for the purposes of section 10(1) if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the City (Orders P-179, P-203, PO-1802 and PO-1816).

In addition to the "supplied" requirement, 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 to demonstrate simply that the 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 (Order M-169).

Since my finding on the "confidentiality" component of this part of the test is determinative, it is not necessary to consider whether the information was supplied.

In confidence

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure (Order P-561).

The appellant states:

> The documents were prepared in June 1997 specifically for the use of [the appellant]. Engineering reports such as these are always prepared under an engagement by a client for the sole use of that client. Although such a confidentiality clause is not contained within the reports themselves, they are always implicitly confidential given that the information about the status of lands could have a dramatic impact on the economic value of such lands. As such, you will find that it is impossible to obtain copies of engineering reports from the consultants who prepared them without the express permission of the party from whom the reports were commissioned. We, as the appellant, therefore, had a reasonable expectation that the reports would always remain confidential. In this case, the only reason that there is even an issue about the disclosure of the reports is because they were voluntarily supplied to the OMB as part of a motion record issued by [the appellant] in support of its appeal to sever the lands under the Planning Act. Had [the appellant] at the time not supplied the reports to the OMB (and in retrospect, given that the OMB hearing determined that an appeal was unwarranted, it would not have included the reports) they would have remained in the sole possession of the [appellant] and would not have been in the possession of the City and this request for information appeal would not be taking place.
>
> As to the issue of the manner in which the records were sent to the City, presumably they were sent as part of the information which comprised the decision of the Ontario Municipal Board. We never sent copies of the information to the City as, other than the fulfillment of requirements that were in the records, there was no obligation on our part to send the records to the City. In fact, contrary to the earlier statement of the writer that we had sent copies to the City in good faith, we did not send copies of the records at issue but rather we sent copies of the engineering reports confirming that the guidelines and design recommendations contained within said reports were in fact adhered to.
>
> The City retained the copies of the records for its own use in ensuring that the guidelines stipulated in the reports were adhered to as required by the decision of the Ontario Municipal Board. In receiving a request from the third party to make copies of the records, the City correctly denied the request as it is not within the mandate of the City to release information that has been supplied to it in confidence.

> As such, it is quite clear that the information was supplied in confidence and should remain confidential.

The appellant admits that his company submitted the records at issue to the OMB as part of a motion record to support its position in an appeal relating to the appellant's application for consent to convey part of the subject lands. It is apparent that the OMB sent the records at issue to the City as attachments to the OMB's Order allowing the appellant's motion to dismiss this appeal from a decision of the Committee of Adjustment of the City, which approved the appellant's application. In particular, the Board ordered, in part:

> The consent to convey as set out in the Committee of Adjustment will be authorized subject to the following conditions:
>
> 1. That the configuration of the proposed development shall conform to the recommendation set out in Tabs 'I' and 'J' of Exhibit 4.

In light of these circumstances, I must now determine whether the appellant's expectation of confidentiality with respect to the records at issue is reasonable.

With respect to the appellant's submissions regarding his expectations of confidentiality *vis-à-vis* the engineering firm that conducted the study, I accept that a party entering into a private business relationship would maintain the confidentiality of the client's information and/or records prepared within that relationship (see: Order PO-1825). However, in my view, the confidentiality expectations are held within the context of the interests of this business relationship and do not assist me in determining whether the appellant held a reasonable expectation of confidentiality at the time the records were submitted to the OMB or when they found their way to the City.

Similarly, the fact that the appellant submitted certain other records to the City in connection with the matter does not, in and of itself, support the argument that the appellant held a reasonable expectation of confidentiality for other information, particularly in the circumstances under which the records at issue became part of the official record of the OMB.

In response to the appeal of the City's decision to disclose the records at issue, the requester indicated that the OMB hearing was open to the public and that the records at issue are part of the public record. In this regard, he writes:

> I attended at the offices of the OMB earlier this year and was given access to the entire contents of the OMB File (No. C970453) on this matter. OMB files and OMB hearings are a matter of public record. Exhibit 4 contains a series of documents submitted by legal counsel for [the appellant] in support of its position at the OMB proceeding.
>
> The contents of Tabs 'I' and 'J' of Exhibit 4 were missing from the OMB file. When I asked about the missing items, a further check of OMB records by OMB staff produced a letter from the City of Toronto requesting the contents of the two

> Tabs in light of applications for building permits. I saw a letter of transmittal from the OMB to the City forwarding the requested documents. OMB staff informed me that they did not keep a copy of these two tabs for their file and that I should approach the City if I wanted access to them …

In correspondence to this office from the appellant (prior to this matter proceeding to inquiry), he states:

> [Y]ou indicate that the documents in question were part of an OMB file which is part of the "public record". If that is in fact the case (and we are awaiting an opinion from our legal counsel on this issue), then it is a mystery to us why this issue has been prolonged for such a long time.

In the Notice of Inquiry, I specifically asked the appellant to address the impact of the submission of these records to the OMB, particularly with respect to the reasonableness of his expectations of confidentiality.

In response, the appellant takes the position that, but for the fact that the records were submitted to the OMB as part of a motion record to support his company's application to sever the lands under the *Planning Act*, they would have remained in the company's sole possession. Regardless of the fact that the appellant might not otherwise have made the reports available to any other party, the "fact" that the records were submitted to the OMB and the circumstances under which this occurred are relevant to the issue of whether the appellant had a reasonable expectation of confidentiality. In my view, the appellant's response to my queries does not assist me in determining this issue.

In particular, the appellant does not indicate that the OMB proceedings were held in the absence of the public or that the records provided to it in support formed part of a private record. Looking at the records themselves, there is nothing on them that would indicate that they are confidential documents. The appellant's representations do not suggest that there was an explicit understanding that the records at issue would be treated confidentially. Moreover, his representations fall short of satisfying me that there was an implicit understanding that the records were submitted to the OMB in confidence. Absent representations or other evidence on this point from the appellant, I accept the requester's position that the records at issue formed part of the public record. When viewed objectively, it is unreasonable for the submitting party to have any expectations of confidentiality with respect to them in these circumstances. Accordingly, I find that the appellant has failed to establish that the records at issue were supplied in confidence and the second part of the test has, therefore, not been met.

As all three parts of the section 10(1) test must be met in order for a record to be exempt under this section, I find that it does not apply. As a result, the records at issue must be disclosed to the requester.

ORDER:

1. I uphold the City's decision to disclose the records at issue.

2. I order the City to disclose the records at issue to the requester by providing him with a copy of them by **April 3, 2002**, but not before **March 28, 2002**.

3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the material disclosed to the requester in accordance with Provision 2.

Original signed by: February 26, 2002
Laurel Cropley
Adjudicator