



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2125

Appeal MA-060166-1

Haldimand County



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NATURE OF THE APPEAL:

Haldimand County (the County) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to the following information about a corporately owned property and related business taxes:

1. Copies of all correspondence from [the requester] to The Corporation of the Township of Dunville [sic] and the Corporation of the County of Haldimand with respect to property taxes owing with respect to [an identified property] between January 1, 1991 to September 30, 2005.
2. Copies of all correspondence to [the requester] from The Corporation of the Township of Dunville and the Corporation of the County of Haldimand with respect to property taxes owing with respect to [an identified property] between January 1, 1991 to September 30, 2005.
3. Copies of all correspondence from [a named corporation] to The Corporation of the Township of Dunville and the Corporation of the County of Haldimand with respect to property taxes owing with respect to [an identified property] between January 1, 1991 to September 30, 2005.
4. Copies of all correspondence to [a named corporation] from The Corporation of the Township of Dunville and the Corporation of the County of Haldimand with respect to property taxes owing with respect to [an identified property] between January 1, 1991 to September 30, 2005.
5. Copies of all documentation confirming payment of amounts received from [the named corporation] for payment of property and business taxes from January 1, 1991 to December 31, 1997, for [an identified property].
6. Copies of all internal memoranda and correspondence of The Corporation of the Township of Dunville and The Corporation of the County of Haldimand with respect to property taxes paid and owing for the property municipally known as [an identified property].
7. All documents prepared and received by Laurie Davis, Town Treasurer of The Corporation of the Township of Dunville, with respect to the property taxes owing by [the requester] for [an identified property].
8. Copies of all typed and hand written notes kept by Laurie Davis, including but not limited to telephone conversations regarding the property taxes owing by [the requester] with respect to [an identified property].
9. Copies of the property tax roll for the property municipally known as [an identified property] for the period January 1, 1991 to September 30, 2005.

10. Copies of the Business Tax Roll for [the named corporation] for the period of January 1, 1999 to December 31, 1997 for [an identified business Tax Roll number].
11. Copies of all receipts issued by The Corporation of the Township of Dunville and the Corporation of the County of Haldimand to [the requester] and [the named corporation] with respect to payment of realty and business taxes for the period of January 1, 1991 to December 31, 1997.
12. Any and all documents related to the property taxes for property municipally known as [an identified property] between January 1, 1991 to September 30, 2005.

The County issued a decision letter in which it:

1. granted access in full to the records responsive to parts 1 and 2 of the request,
2. granted partial access to the records responsive to parts 3, 4 and 5 (relying upon section 10(1) of the *Act* to support the severances made),
3. granted partial access to the records responsive to parts 6, 7 and 8 (relying upon section 12 of the *Act* to support the severances made),
4. requested further clarification regarding parts 9 and 10 of the request,
5. granted partial access to the records responsive to part 11 of the request (relying upon section 10 of the *Act* to support the severances made),
6. granted partial access to the records responsive to part 12 of the request (relying upon section 10 of the *Act* to support the severances made), and
7. requested a deposit of \$69.70, based on a fee estimate of \$139.40.

The requester's legal representative responded to the decision letter, paid the deposit requested by the County and clarified that parts 9 and 10 of the request was for the "tax ledger" and not the "tax rolls".

The County issued a revised decision letter in which it:

1. granted access in full to the records responsive to parts 1 and 2 of the request,
2. granted partial access to the records responsive to parts 3, 4 and 5 (relying upon section 10(1)(a) of the *Act* to support the severances made),

3. granted partial access to the records responsive to parts 6, 7 and 8 (relying upon section 10(1)(a) of the *Act* to support the severances made),
4. granted partial access to the records responsive to part 9 (relying upon section 10(1)(a) to support the severances made). The County also advised that it was not in possession of any records responsive to part 9 that pre-dated January 1, 1993 and that it had severed information in the records that were dated after August 18, 2005 that related to the subsequent owner of the property,
5. withheld records responsive to part 10 of the request in their entirety (relying upon section 10(1)(a) to support the decision to withhold access), and
6. granted partial access to records responsive to parts 11 and 12 (relying upon section 10(1)(a) to support the severances made).

The County did not give notice to the affected party concerning the request under section 21(1) of the *Act*. In the revised decision letter, the County advised the requester's legal representative that it was "unable to definitively determine the corporate status" of the affected party and, on the advice of its legal counsel, it must therefore deny access to the records on the basis of section 10(1) of the *Act*.

The requester, now the appellant, by its legal representative, appealed the decision of the County. In correspondence sent to our office along with the Notice of Appeal the appellant's legal representative stated:

With respect to the correspondence of Haldimand County received April 10, 2006 it is our position that Haldimand County has improperly denied our request for documentation on the basis that the disclosure of such documentation could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of [the affected party]. Please find attached a copy of a Corporation Profile Report for [the affected party] dated May 5, 2006. As you can see, this report indicates that the last document recorded with the Ministry of Consumer and Business Services is a Default Notice under the Business Corporations Act on April 22, 1995. It would appear that [the affected party] has not been a going concern for over 11 years and [the affected party] will therefore not be significantly prejudiced.

The matter proceeded to the mediation stage of the appeal process. During mediation, the appellant's counsel indicated that it is not appealing the County's decision regarding parts 9 and 10 of the request with respect to the records that pre-date January 1, 1993 and the severances made to records that were dated from August 18, 2005 to the present. Also, the County clarified that it would not be relying upon section 12 of the *Act*. It was determined that no further mediation was possible and the matter was moved to the adjudication stage of the appeal process.

I began my inquiry by issuing a Notice of Inquiry to the County. I also sent a copy of the Notice of Inquiry to the registered head office of the affected party. I invited representations from the County and the affected party on the issues set out in the notice. I received representations from the County that made reference to a legal opinion dated June 6, 2006 that was prepared by its legal counsel. The County asked that the legal opinion be considered by me in my consideration of the issues in this appeal.

I did not receive any representations or other communications from the affected party.

After carefully reviewing the representations received, I determined that it was not necessary for the appellant to provide me with representations and I moved this appeal to the order stage of the appeal process. I intend to dispose of the issues in this appeal based on my review of the records at issue and the representations of the County.

RECORDS:

The records at issue in this appeal are correspondence, memoranda, handwritten notes, receipts, affidavits, the property tax ledger and other documentation relating to property taxes owing by the affected party for property identified in the request.

The records at issue also include correspondence, memoranda, handwritten notes, receipts, affidavits and the business tax ledger relating to business taxes owing to the County by the affected party.

The records provided to this office included a duplicate set of the records that were released to the appellant. One of those duplicate sets is unsevered and the other reveals the severances that were made by the County. Along with the severed and unsevered versions of the records released, the County provided this office with a copy of the records that were withheld in their entirety.

The pages of the unsevered records are numbered from 39 to 138. The pages of the severed records are numbered from 139 to 236. The pages of the records that have been withheld in their entirety are numbered from 238 to 345. For the purposes of this order, I will adopt the numbering system used by the County and will refer to the page numbers of the unsevered records (i.e. Records 39 to 138) and the records that have been withheld (i.e. Records 238 to 345).

DISCUSSION:

RESPONSIVENESS OF RECORDS/SCOPE OF APPEAL

The County has identified, by the use of highlighting, information in Records 83 and 84 that it claims is unresponsive to the request. The information highlighted is property tax information that relates to a corporation other than the appellant and the affected party, being the subsequent owner of the identified property. During mediation, the appellant's counsel advised that it would

not be appealing this aspect of the County's decision and therefore, the severed information is no longer at issue.

As previously noted, the appellant agreed to clarify the request following the receipt of the first decision letter from the County. The appellant clarified that parts 9 and 10 of the request relate to property and business "tax ledgers" and not the "tax rolls". Accordingly, the copies of the tax rolls that were provided to this office by the County with respect to this appeal are not responsive to the request and should not be disclosed.

THIRD PARTY INFORMATION

The County submits that the third party exemption found in section 10(1)(a) of the *Act* applies to the records at issue. Section 10(1) reads, 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;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The types of information listed in section 10(1) have been discussed in prior orders. Having reviewed the responsive records, I find that the information that is contained in the records is financial information. The records include information relation to payments made and received, the financial status and banking information of the affected party. Accordingly, I find that part one of the three part test noted above has been met.

Part 2: supplied in confidence

The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043]. In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Although the County did not make any representations or provide this office with any evidence that specifically relates to this issue, having reviewed the records, I find that much of the information was supplied as that term is used in section 10 of the *Act*. Furthermore, I believe that it is reasonable to conclude that the affected party had an expectation of confidentiality,

albeit only implied, given the nature of the information at issue. The information contained in these records relates to the balances owing on the affected party's accounts with the County, the financial status of the affected party and payment arrangements that were agreed to between the County and the affected party. This is all information that if disclosed at the time would have had an impact on the affected party's ability to continue to compete in the marketplace and to negotiate arrangements with other creditors and, in my view, it is reasonable to conclude that the affected party would have supplied this information in confidence. In view of these circumstances, I find that part two of the test has been satisfied.

Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The County's representations read:

The County has no over-riding concern or objection to the release of the requested records but has based its disclosure decision on the advice of legal counsel. Said legal opinion has been provided to the Commission within its submission dated June 6, 2006.

The legal opinion of the County's counsel reads:

As I indicated to you in our telephone discussion, these corporate searches do not definitively conclude that [the affected party] is in fact bankrupt. On that basis, I do not believe it is appropriate to disclose the documents requested in items 3, 4 and 5 in the request by [the appellant]. Further, any documentation in the other paragraphs that might pertain to [the affected party] should not be disclosed.

Having carefully reviewed the records and the representations of the County, I am unable to conclude that it would be reasonable to expect that the affected party will suffer any harm as a result of the disclosure of the responsive records, with one exception, that I discuss below.

As previously noted, the affected party's Corporate Profile Report maintained by the Ministry of Consumer and Business Services was provided to this office by the appellant at the time the Notice of Appeal was filed. The County also provided this office with a duplicate of that report. The two reports reveal, among other things, that the affected party was incorporated in 1991 and

that its current status is “active”. The report also reveals that the last document recorded on the affected party’s file was a default notice dated in 1995. Therefore, although the report reveals that for the purposes of the records filed with the Ministry of Consumer and Business Services, the affected party is “active”, there is no indication on the face of the report as to exactly what this means and, it also suggests that there has been no registered activity on the file since 1995.

It is worth repeating here that the affected party did not respond to the Notice of Inquiry sent to the registered head office. In the circumstances of this appeal, I believe that it would be reasonable for me to infer that the affected party has little or no concern regarding the impact of any decision that I might make regarding the release of the records at issue in this appeal. Furthermore, because the affected party failed to respond to the Notice of Inquiry, there is scant evidence before me that would support a reasonable expectation that the affected party will suffer any harm as a result of the disclosure of the records that are at issue. As noted above, other than noting that the corporate search does not definitively conclude that the affected party is bankrupt, the County provided no evidence relating to harm that might be experienced by the affected party. In these circumstances, I must turn to upon the records that are before me.

I have carefully reviewed the responsive records and, with one exception, find that they do not provide me with the clear and convincing evidence of the kind that is required to satisfy me that the harms set out in section 10 of the *Act* could reasonably be expected to result from the disclosure of the records.

The financial information that is contained in the records at issue in this appeal is all information that is more than ten years old. Given the lack of registered activity of the affected party revealed by the Corporate Profile Report and the failure of the affected party to respond to the Notice of Inquiry in this appeal and the age of the information at issue, the evidence that is before me is not detailed and convincing and does not support a reasonable expectation that the affected party will suffer any harm as a result of the disclosure of the records at issue in this appeal. On the contrary, based on the evidence before me, it is reasonable to conclude that the affected party will suffer no harm since it has apparently long ceased to conduct business.

I now turn to the one exception referred to above. The records contain details of the bank account numbers of the affected party. I believe that disclosure of the banking information of the affected party could reasonably be expected to result in undue loss to the affected party. I find that the banking information on its face provides clear and convincing evidence of a reasonable expectation that the disclosure of the information to the appellant in the circumstances of this appeal may lead to the kind of harm to the affected party that is contemplated by section 10(1)(c) of the *Act*. As disclosure under the *Act* to the appellant is disclosure to the world, I can not order the disclosure of this banking information. Therefore, I find that the bank account details should be severed from the records released to the appellant.

Accordingly, I find that part three of the test has not been met except as it applies to the bank account information that is contained in the records. I therefore order, subject to this exception, that the responsive records be released to the appellant.

In summary, other than the severances of unresponsive information, I do not uphold the County's decision to sever Records 39 to 138 and they should be disclosed in their entirety. Records 238 to 345 should be disclosed in their entirety but for the severances that should be made to the bank account information in Record 249. For clarity, I have highlighted the parts of Record 249 that are exempt under section 10(1)(c) on a copy of the record provided to the County with this order.

ORDER:

1. I order the County to release all of the records at issue in this appeal subject to the severances to be made to any information relating to the bank accounts of the affected party. For greater certainty, I have highlighted the exempt parts of these records on a copy of the records that is being sent to the County with this order. The highlighted information is *not* to be disclosed.
2. The County is to disclose these records by sending copies to the appellant by **January 5, 2007** but not before **December 28, 2006**.
3. In order to verify compliance with provision 1, I reserve the right to require the County to provide me with copies of the records disclosed to the appellant.

Original Signed by: _____
Brian Beamish
Assistant Commissioner

November 27, 2006