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

ORDER MO-2323

Appeal MA08-117

City of Toronto

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NATURE OF THE APPEAL:

The requester submitted the following access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the City):

> All records, correspondence, plans, reports, minutes of meetings etc. pertaining to [specified address] where a new [place of worship] is proposed to be constructed.

The City granted access to many of the records identified as responsive to the request. The City also provided notice with respect to the disclosure of a particular record to the affected party, the religious society (the Society) sponsoring the proposed place of worship. Section 21 of the *Act* requires notification of affected parties prior to disclosure of information that might be subject to the mandatory exemption for confidential third party information in section 10(1) of the *Act*. In this way, affected parties are permitted an opportunity to provide submissions to the institution as to whether the requested record should be disclosed.

The City received correspondence from the Society objecting to the release of the identified record. Following consideration of the Society's submissions, the City issued a decision letter denying the requester access to the record on the basis that it qualifies for exemption under the mandatory provision in section 10(1).

The requester, now the appellant, appealed the City's decision to this office.

This office appointed a mediator to try to resolve the appeal. However, a mediated resolution was not possible and the appeal was transferred to the adjudication stage of the appeal process, where it was assigned to me to conduct an inquiry.

I sent a Notice of Inquiry to the City and to the Society, initially, to seek their representations on the application of the mandatory exemption in section 10(1). Upon review of the submissions I received from the City and the Society, I concluded that it was not necessary to hear from the appellant.

RECORD:

The sole record at issue in this appeal is a report titled "Heritage Impact Statement", which is dated January 2008 and consists of 27 pages and six 11" x 17" drawings.

DISCUSSION:

THIRD PARTY INFORMATION

The City is relying on paragraphs (a) and (c) of section 10(1) as the basis for denying access to the record.

The relevant parts of section 10(1) state:

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

Section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. 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.) ("*Boeing*")]. 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 City and the Society submit that the record contains "technical information." This term has been defined in previous orders as:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 [Order PO-2010].

I adopt this definition for the purposes of this order.

Representations

The City's submissions describe the record as technical information consisting of "an evaluation of the proposed alterations to the property, the proposed conservation strategy, … design developments, and building plans."

The Society submits:

> The report was prepared by … [a]rchitects, who are employed by the [Society]. The report describes in great detail the materials used in the existing building and those that will be salvaged for use in the proposed building. There are many references to such materials and how they might used in the construction of the proposed building, a few named are the exterior stone, interior wood paneling, stained glass windows, etc. [A portion of the report] details the strategy proposed by [the architects] on behalf of the [Society] for addressing Heritage Conservation.

Finding

Having considered the report and the representations provided by the Society and the City, I find that it contains technical information within the definition of that term, as it includes a detailed, professional analysis of the heritage property in question from an architectural perspective. In view of my finding that the record contains technical information, the first part of the three part test for exemption under 10(1) is satisfied.

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 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]

Background

The notes taken during the Mediation stage of this appeal indicate that both City staff and the Society's representative advised the Mediator that once the Society filed a "formal building application" with the City, the record at issue would form part of that application and would, thereby, be made public. In order to confirm that point, I asked the City and the Society through the Notice of Inquiry to clarify the status of the site plan application, or planning process in general, since it could affect the public availability of the record and, by implication, the expectation of confidentiality surrounding it.

Representations

The Society states simply that "the report was supplied with implicit confidence to the City" and "was prepared to enable a discussion of the heritage aspects of the building."

For its part, the City notes that the report was prepared by the Society's architect and supplied to Heritage Preservation Services in the City's Planning Department.

> At the time it supplied the information, the [Society] held a reasonable expectation of confidentiality pending discussions with the Heritage Preservation Services and followed by a formal site plan application. The discussions with Heritage Preservation Services could have had an impact on the development plans of the [Society].
>
> The City therefore would have held the contents of the report in confidence. It would not have been made available to the public.

Under its representations on the harms issue, the City submits that the report did not ultimately form part of the Society's formal building application, which was made after this appeal was initiated by the appellant.

Analysis and Findings

Based on the circumstances of this appeal, I accept that the Society supplied the record to the City as a step toward fulfilling the requirements of its building application process for the development of the new place of worship. In my view, it is clear that the record was "supplied" to the City within the meaning of section 10(1).

As to the "in confidence" component of part two, no direct evidence was tendered in support of the Society's position that the record was provided to the City on a confidential basis. For example, the record does not have any particular label to outwardly indicate confidentiality. In addition, the Mediator's notes of conversations with the parties suggest that the City and the Society both anticipated that the record would form part of the Society's formal building application following completion of the consultation between Heritage Preservation Services and the Society. It is admitted that this eventuality would have rendered the record public under the *Planning Act*.

However, in my view, it can be said that the record was provided with an expectation that it would remain confidential subject to it forming part of the building application. As noted previously, the City has now advised that the record did not ultimately form part of the building application. On balance, therefore, I am satisfied that the circumstances surrounding the submission of the record to the City's Heritage Preservation Services Department support an inference that it was supplied in confidence. Moreover, I find that it was supplied to the City with a reasonably-held expectation that it would be treated confidentially. Accordingly, I find that the record meets the requirements of the second part of the test for exemption under section 10(1).

Part three: harms

To meet this part of the test, the City and/or the Society, as the parties resisting disclosure, 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].

Representations

The City submits that at the time of the request, the Society was in the process of consulting with the City's Heritage Preservation Services and the report in question was prepared and submitted prior to the formal planning application to that Department. Alluding to the harms described in paragraphs (a) and (c) of section 10(1), the City alleges that:

> It would have thus been premature to disclose this document since the disclosure could have interfered with any "negotiations" that may have arisen with respect to moving forward on the formal application for the proposed development.
>
> …

> If the information in this report were to be disclosed at this stage, it could have an impact on the ability of the [Society] and its architect with respect to negotiating on the construction of the development itself since the knowledge of the type of information the report contains could be used as leverage by contractors and subcontractors to obtain more favourable terms. This could result in an undue loss to the [Society] and/or its architect.

In support of its argument that harm will result from disclosure of the record, the Society submits that:

> The technical information in this report is confidential in nature and will be used to form part of a Request for Proposals. Releasing this technical information will interfere in our ability to reach a competitive contract through the tender and negotiations process. I understand that there is case law on this matter, [*Boeing, supra*].

Analysis and Findings

As already noted, the exemption in section 10(1) is intended to protect the "informational assets" of private businesses and other organizations from which the government receives information in the course of carrying out its public responsibilities (*Boeing, supra*).

The Society, in its representations, alludes to the *Boeing* case in stating that release of the "technical information will interfere in our ability to reach a competitive contract through the tender and negotiations process." This is the only potential harm described by the Society in its representations. I note that nothing further is added to supplement the bald assertion of harm under section 10(1)(a). As I have previously indicated, the onus rests on the parties resisting disclosure to satisfy me with "detailed and convincing" evidence that a connection exists between disclosure and an alleged harm such that the latter could reasonably be expected to occur if the former is permitted. Having reviewed the record at issue carefully, I am not satisfied that the information contained therein could reasonably be expected to be used to undermine the Society's position with respect to a future tender situation, which is the only potential harm described by it.

Moreover, it is worth emphasizing that the central intent of this exemption is to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace. On my review, it remains unclear who, or what, could be considered a competitor of the Society in this situation. It remains similarly unclear and unsubstantiated how the information, if released to the appellant, could either prevent the Society from using information contained in the record to prepare the request for proposal or to pursue that process and simultaneously safeguard the Society's interests.

I also reject the City's argument that disclosure to this appellant will lead to interference, either in earlier stages of the heritage consultation process or currently, with negotiations between the Society and the City with regard to the planning of the proposed development of the new place of worship. At all times, both the City and the Society already had a copy of the record at issue.

The City has failed to provide me with a basis for its argument that the planning or development process could reasonably be expected to be harmed by the disclosure of the record to this appellant.

In sum, I find that I have not been provided with sufficiently detailed or convincing evidence of significant harm to the competitive position of the Society or its negotiations with other parties, at least in the sense intended by section 10(1)(a) of the *Act*.

With respect to section 10(1)(c) of the *Act*, the harms contemplated by this section are established if disclosure of the record could reasonably be expected to result in undue loss or gain to any person, group, committee, or financial institution or agency.

Only the City referred to section 10(1)(c) in its submissions. Having considered the City's representations, and all of the circumstances of this appeal, I find that there is no evidentiary support for the City's allegation that disclosure of the report would lead to undue loss to the Society. Apart from the claim of harm, no clear link has been established between contractors having access to the report and an adverse impact on the Society's ability to negotiate favourable terms for the construction of the new place of worship. The City did not elaborate on its simple assertion that contractors could use the information in the record as "leverage" and I do not see any such link upon my own review of the record. Accordingly, I find that section 10(1)(c) of the *Act* does not apply.

In view of my finding that neither the City nor the Society have established that the harms contemplated by sections 10(1)(a) or (c) of the *Act* could reasonably be expected to occur should the report be disclosed, I find that the third part of the section 10(1) test has not been met. Since all three parts of the test for exemption under section 10(1) must be met, the report should therefore be released to the appellant.

ORDER:

I order the City to disclose the record to the appellant by sending him a copy of it not earlier than **July 25, 2008** and not later than **August 1, 2008**.

Original signed by: June 26, 2008
Daphne Loukidelis
Adjudicator