



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

ORDER MO-2550

Appeal MA10-153

Town of Aurora



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NATURE OF THE APPEAL:

A homeowner submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Town of Aurora (the town) for access to the following engineering report respecting her property:

A copy of the previously declined (FOI 2009-12)¹ structural review on the pier system installed on the south addition of [specified address] – related to [a specified building permit number].

The town identified a two-page record, consisting of a document titled “Structural Review and Inspection,” which is dated July 7, 2000 and accompanied by three photographs, as the record responsive to the request. The town denied access to the record pursuant to sections 7(1) (advice or recommendations), 8 (law enforcement) and 10(1) (confidential third party business information) of the *Act*.

Following an appeal of the town’s access decision to this office, a mediator was appointed to explore resolution. During mediation, the town withdrew its claim for exemption under section 7(1) and issued a revised decision (July 16, 2010), confirming its reliance on sections 10(1)(b) and (c) and section 8(2)(c) to deny access. The town indicated that the engineer who created the record (the affected party) had advised that since he had been retained by the previous property owners, he would only agree to release the report if their permission could be obtained. Based on emails exchanged between the town and the appellant subsequently, it appears that efforts to locate and contact the previous property owners were not successful and that the previous property owners may be deceased. Accordingly, the affected party declined to consent to the disclosure of the record and the town would not otherwise reconsider its position on access.

A mediated resolution of this appeal was not possible and so it was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry into the issues. I sent a Notice of Inquiry outlining the issues to the town and to the affected party, initially, in order to seek representations.

The town responded to the Notice of Inquiry by providing another copy of its July 16, 2010 revised decision and simply re-stating its reliance on the exemptions claimed in that letter, without further elaboration. At my request, staff from this office confirmed with the town that this correspondence constituted the sum of the town’s representations in this appeal. The affected party did not respond to the Notice of Inquiry. In the circumstances, I determined that it was not necessary to seek the appellant’s representations.

WOULD DISCLOSURE REVEAL CONFIDENTIAL THIRD PARTY BUSINESS INFORMATION?

The town relies on sections 10(1)(b) and (c) of the *Act* to deny access to the record. As section 10(1) is a mandatory exemption, I must address its possible application notwithstanding that the

¹ It appears that the requester did not appeal the denial of access to the record at issue in this appeal at the time of the earlier request.

information at issue does not appear to qualify as “informational assets” belonging to a business, and the fact that neither the town nor the affected party submitted representations.

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,

- (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;

In setting out the test for the application of section 10(1) in the Notice of Inquiry sent to the town and the affected party, I emphasized that the objective of this exemption is to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.² Indeed, section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses that is deserving of protection under the *Act*. I noted in the Notice of Inquiry that 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.³

For section 10(1) to apply, the town (or the affected party), as the parties bearing the burden of proof, are required to 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.

For the reasons that follow, I find that the record at issue in this appeal does not meet even the first of the three requirements of the test for exemption under section 10(1) of the *Act*.

² *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.).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

In the absence of representations from the town or the affected party, I must rely on the content of the record itself to determine if the information qualifies for exemption under section 10(1)(b) or (c). Of all of the types of information protected by section 10(1) of the *Act* (“a trade secret or scientific, technical, commercial, financial or labour relations information”), I conclude that the type of record at issue here – a structural review and inspection report – could only contain “technical information” as that term has been interpreted in past orders of this office. Specifically, the term has been defined as follows:

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 have adopted this definition for the purposes of this appeal.

The record at issue was prepared by an engineering consultant retained by the former owners of the identified property. By all appearances, including the fact that it is addressed to the town’s building department, it was evidently provided to the town to satisfy building permit and *Ontario Building Code* requirements.

As an initial observation, I note that this record does not contain information provided by a third party to whom that information relates. Further, on my review of the record, I am not satisfied that the information it contains is technical information as that term has been interpreted by this office. In my view, the record merely contains very brief observations and opinions of the engineering consultant respecting structural support for the addition to the identified property, without any significant description or degree of detail. Accordingly, I find that the observations and opinions expressed in the July 7, 2000 Structure Review & Inspection do not reach a level of specificity or particularization respecting the description of the structural support (or any other) issue to qualify as technical information.⁴

As such, I find that the record does not contain technical or any other type of information that meets part one of the test for exemption under section 10(1). Furthermore, as neither the town nor the affected party has provided representations, I also have no evidence from the parties bearing the burden of proof to satisfy parts two or three of the test. As all three parts of the section 10(1) test must be met, I find that the record does not qualify for exemption under section 10(1).

⁴ *Cf.* the following past orders: Order MO-2262 where the records included drawings, sketches, and written descriptions of specifications, including site plans; or Order MO-1957 where the records consisted of structural plans containing details of a construction design of structures and including information, such as load conditions; or Order MO-2081 where the record was a copy of a site plan that included drawings prepared by a licensed surveyor. All of these records were found to qualify as “technical information” for the purpose of part one of the test for exemption under section 10(1).

I will now review the town's denial of access to the record under the discretionary exemption in section 8(2)(c).

COULD DISCLOSURE EXPOSE THE RECORD'S AUTHOR TO CIVIL LIABILITY?

In denying access to the record, the town also relies on section 8(2)(c) of the *Act*, which states:

A head may refuse to disclose a record,

that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability.

In order to qualify for exemption pursuant to section 8(2)(c), the record must first fit within the definition of "law enforcement" found in section 2(1). This section defines "law enforcement" as:

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

The term "law enforcement" has been found to apply in situations related to a municipality's investigation into a possible violation of a municipal by-law (Orders M-16 and MO-1245). Past orders of this office have also established that since the investigations or inspections carried out in the process of enforcing the provisions of the *Building Code Act* could lead to proceedings in a court of law, records of this type may qualify as law enforcement records.⁵ Accordingly, in the present appeal, I am prepared to accept that the record at issue is related to law enforcement in that it appears to have resulted from an inspection conducted to ensure compliance with the *Ontario Building Code*.

As I advised the town in the Notice of Inquiry, where section 8 uses the words "could reasonably be expected to," as section 8(2)(c) does, "detailed and convincing" evidence to establish a "reasonable expectation of harm" with disclosure of the record must be provided in order to establish the application of the exemption. Evidence amounting to speculation of possible harm is not sufficient.⁶ As stated, the town did not provide any representations on the application of section 8(2)(c) of the *Act* to the responsive record.

⁵ See Orders M-364 and MO-1990.

⁶ Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

The exemption in section 8(2)(c) is intended to protect individuals who have provided information to a law enforcement agency during a law enforcement investigation, or who have prepared a record in this context, the nature of which may expose them to civil liability. No evidence, let alone “detailed and convincing evidence,” has been put before me to support the claim that the author of the record, or any other individual, could reasonably be expected to be exposed to civil liability as a result of their involvement in the inspection or the preparation of the record. Therefore, having no evidence before me that would support the town’s decision to deny access to the record pursuant to the discretionary law enforcement exemption claimed, I find that the record does not qualify for exemption under section 8(2)(c) of the *Act*.

As I have not upheld the town’s claims for exemption under either section 10(1) or section 8 respecting the record, I will order the record disclosed to the appellant.

ORDER:

I order the town to disclose the record to the appellant by **October 18, 2010**.

Original signed by: _____
Daphne Loukidelis
Adjudicator

September 24, 2010