

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3427

Appeal MA16-294

Town of Newmarket

April 21, 2017

Summary: A request was made to the Town of Newmarket (the town), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the engineering report on a specific property. After notifying a third party, the town decided to disclose the record. The third party appealed the town's decision on the basis that the record falls under the mandatory third party information exemption at section 10(1) of the *Act*. In this order, the adjudicator finds that the record at issue is not exempt under section 10(1) as disclosure could not reasonably be expected to result in any of the harms set out in that section. As a result, she upholds the town's decision to disclose the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 10(1).

Orders and Investigation Reports Considered: Orders MO-2735, PO-2490, and PO-3663.

BACKGROUND:

[1] The Town of Newmarket (the town), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), received the following request:

Re: [specified property], Newmarket, Ontario. Please provide a copy of the recently submitted engineering report that details what construction will be done on the property to eliminate the structural issues as a result of structural deterioration.

Report was submitted by the owner of [the specified property], Newmarket late February 2016.

[2] The town notified the third party of the request. The third party objected to disclosure of the record because it believes that the record falls under the mandatory third party information exemption at section 10(1) of the *Act*. The town subsequently issued a decision granting access to the responsive record.

[3] The third party, now the appellant, appealed the town's decision to this office.

[4] As mediation was unsuccessful, the appeal was transferred to the adjudication stage of the appeal process in which an adjudicator conducts a written inquiry under the *Act*.

[5] Representations were sought and received from all of the parties. In accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure and Practice Direction Number 7*, a copy of the town and the appellant's representations were shared with the requester.

[6] In this order, I find that the record at issue is not exempt under section 10(1) as disclosure could not reasonably be expected to result in any of the harms set out in that section.

RECORD:

[7] The record at issue is a structural engineering assessment report for a specified property.

DISCUSSION:

[8] The only issue in this appeal is whether the mandatory exemption for third party information at section 10(1) of the *Act* applies to the record at issue.

[9] Section 10(1) states:

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; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[10] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ 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.²

[11] For section 10(1) to apply, 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[12] Past orders of this office have defined technical information 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

¹ *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.) (*Boeing Co.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.³

[13] Adopting this definition, I find that the record contains information that qualifies as technical information for the purposes of section 10(1) of the *Act*.

[14] I note that, in their representations, both the town and the appellant assert that the record contains technical information.

[15] The requester provided representations but did not address this issue.

[16] Accordingly, the first part of the test for the application of section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[17] The requirement that the information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁴

[18] 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.⁵

[19] In their representations, both the town and the appellant assert that the record was supplied to the town’s by-law enforcement by the appellant to satisfy an order issued on the appellant’s property to address structural issues observed by the town’s employees. Again, the requester provided representations but did not address this issue. In the circumstances, I find that the record was supplied to the institution, as required by section 10(1).

In confidence

[20] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁶

[21] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the

³ Order PO-2010.

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

⁶ Order PO-2020.

information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure⁷

[22] in its representations, the town asserts that the appellant had an implicit expectation of confidentiality and that the record is maintained as 'confidential' (not routinely available to the public) as part of the by-law enforcement file on the property.

[23] In its representations, the appellant asserts that it supplied the information contained in the record in confidence and was assured that it would not be released without its consent.

[24] I note that the requester's representations did not address this issue.

[25] Having reviewed the record and the parties' representations, I find that the information contained in the record was supplied to the town in confidence. It has been treated consistently by the town in a manner that indicates a concern for confidentiality, such as the town's supervisor of municipal enforcement confirming that the record will only be used for the appellant's property and will not be distributed to any other parties outside the municipal offices. I conclude that the second part of the test has been satisfied.

Part 3: harms

[26] Parties relying on section 10(1) to resist disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative, although they need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁸ Parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁹

[27] In this case, it is unclear which sections of 10(1)(a) to (d) the appellant is relying

⁷ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁹ Order PO-2435.

upon with respect to the type of harm. However, it is clear that the appellant is not relying on section 10(1)(d) as that section has no application here. For convenience, I will repeat the other sections here:

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; or

Representations

[28] In its representations, the appellant asserts that the release of the record would result in it no longer supplying this or similar information to the town. It also asserts that the disclosure of the record could reasonably be expected to prejudice its property rights and by extension its competitive position as it is involved in litigation with its neighbours, in which the primary issues are the interpretation of its property rights and the valuation of its property. It further asserts that the release of the record could negatively influence the outcome of that litigation.

[29] In its representations, the town asserts that the record was provided to it as part of a process to avoid possible prosecution of a property standards by-law matter. It points out that if the appellant refuses to provide such information in the future, an impending action will proceed in the normal course. The town also asserts that the appellant's objections to disclosure of the records fail to articulate how disclosure would create a reasonable expectation that its competitive position could be prejudiced or that there could be interference with its contractual rights or that the appellant would incur an undue loss or gain.¹⁰ It further points out that paragraphs 2(c) and (d) of the appellant's objections (dated April 13, 2016) did not set out any information to meet the requirements of the third part of the test.

¹⁰ The town's representations contain similar reasons set out in its decision letter to the appellant.

Analysis and findings

[30] I have reviewed the parties' representations and the record at issue. For the following reasons, I find that the third part of the test has not been satisfied. As a result, I find that section 10(1) does not apply and I order disclosure of the record at issue.

[31] I will first address the appellant's argument under section 10(1)(b). The appellant asserts that it will no longer supply this or similar information to the town, if the record is disclosed. As the town asserts in its submissions, if the appellant does not supply this or similar information to it, an impending action will proceed in the normal course with respect to a by-law prosecution. As such, with respect to possible future by-law prosecutions, the appellant may choose not to provide this or similar information in the future but such actions will have consequences to it.

[32] In these circumstances, I am not satisfied that the exemption in section 10(1)(b) applies. This section applies if disclosure could reasonably be expected to result in similar information no longer being supplied to the institution where it is in the public interest that similar information continues to be so supplied. Although the appellant states that it may no longer supply the information in the future, any decision not to do so would be to the appellant's detriment. As noted by the town, if this information is not provided by parties alleged to be in violation of a by-law, prosecutions may simply proceed in the ordinary course. Although there may be some benefit to having matters resolved through the voluntary provision of information by parties, I am satisfied that the town could otherwise address these issues through its by-law prosecution process.¹¹ In these circumstances, I find that section 10(1)(b) does not apply.

[33] The appellant also asserts that the disclosure could reasonably be expected to prejudice its property rights and by extension its competitive position as it is involved in litigation with its neighbours. It is unclear whether the appellant is claiming harms under section 10(1)(a) or (c) here. Regardless, I will address this argument.

[34] I understand that the appellant is involved in litigation with its neighbours, as evidenced by a copy of the Statement of Claim. In this litigation, the appellant is seeking damages for diminution of the value of its property from the town and other named defendants. The appellant asserts that the requester wants the record to be able to cause an undue loss to it by a further diminution of the value of the property.

[35] In Order PO-2490, Adjudicator John Higgins states:

[36] In my opinion, the reference to "competitive position" in section 17(1)(a) of the [*Freedom of Information and Protection of Privacy Act*, which is the equivalent of section 10(1) of the *Act*,] was not intended to include a litigant's competitive position in

¹¹ See order PO-1666.

civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "information assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts.

[37] I agree with the reasoning set out in the above order.

[38] In my view, the appellant's representations on this point do not explain how its position would be harmed by disclosure pursuant to sections 10(1)(a) or (c). Beyond providing a copy of the Statement of Claim, which states the issues are right-of-way/easement and nuisance, the appellant does not explain how the information in the record would diminish the value of its property. My understanding is that once the structural deficiencies were addressed and resolved, they would not have an impact on the value of the property. As well, it is unclear what the connection is between the structural deficiencies (as described in the record) and the references in the Statement of Claim, and other than its general statements, the appellant has not identified any particular connection. The only connection seems to be that they relate to the appellant's property. As well, no reasonable expectation of the harms in sections 10(1)(a) or (c) is evident from my review of the information in the record and the appellant's representations.

[39] For the above reasons, I am not satisfied that disclosure of the record could reasonably be expected to (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the appellant; (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; or (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[40] I conclude, therefore, that part 3 of the test has not been made out. As a result, the record at issue is not exempt under section 10(1) of the *Act*.

ORDER:

I uphold the town's decision to disclose the record at issue to the requester and order the town to send a copy of the record to him. This disclosure is to take place by **May, 26, 2017** but not before **May 21, 2017**.

Original Signed by: _____

Lan An
Adjudicator

April 21, 2017