

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3521

Appeal MA16-525

City of Hamilton

November 17, 2017

Summary: The city received a request under the *Act* for records relating to a specified building permit. After notifying a third party, the city decided to disclose the record. The third party appealed the city'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), and upholds the city'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).

BACKGROUND:

[1] The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request was related to a specified property in Hamilton and in particular, records relating to a specified building permit.

[2] Following third party notification, the city issued its decision and advised that 18 pages of responsive records would be disclosed to the requester unless an appeal of the city's access decision was filed with this office.

[3] The third party, now the third party appellant, appealed the city's decision.

[4] During the course of mediation, the mediator confirmed with the city that there is one record at issue, consisting of 22 pages.

[5] During my inquiry, I invited the parties to provide representations. I note that the third party appellant is relying on representations contained in its letter to the city dated August 3, 2016. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of the parties' representations were shared with the other parties.

[6] In this order, I find that the appellant has not established the application of section 10(1), and I uphold the city's decision to disclose the record at issue.

RECORD:

[7] The record at issue consists of 22 pages of permit drawings and plans.

ISSUE:

[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 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

[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 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, from my review of the record, I find that the record contains information that qualifies as technical information for the purposes of section 10(1) of the *Act*. I note that the third party appellant did not provide any representations on the type of information contained in the records at issue. Accordingly, the first part of the test for the application of section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[14] The requirement that the information was "supplied" to the institution reflects

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.

³ Order PO-2010.

the purpose in section 10(1) of protecting the informational assets of third parties.⁴

[15] 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

In confidence

[16] 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

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

[18] Although the third party appellant submitted representations, its representations did not address these issues. However, it appears from my review of the record and the circumstances that the information was supplied by the third party appellant to the city during the process of obtaining a building permit. However, in the absence of additional evidence, I am unable to find that the information was supplied with a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. Furthermore, on the basis of the record, I am unable to discern whether the information would have been supplied in confidence. Accordingly, I find that the second part of the test has not been met for the application of section 10(1) of the *Act*. As *all* three parts of the test must be made out, I find the record is not exempt.

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

⁶ Order PO-2020.

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.

Part 3: harms

[19] 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

[20] Although it is unnecessary for me to consider part 3 of the test, I find that there is no evidence on the basis of the record itself that disclosure would result in any of the harms listed under sections 10(1)(a) to (d). Although the third party appellant provided representations, its representations did not address the issue of harms. I note that the third party appellant simply asserted that it and its tenant own the record at issue as they paid a substantial amount for them. As such, I find there is no evidence of any harms that may occur due to disclosure, and I will order the record disclosed.

ORDER:

I uphold the city's decision to disclose the record at issue to the requester and order the city to send a copy of the record to him. This disclosure is to take place by **December 22, 2017** but not before **December 15, 2017**.

Original Signed by: _____

Lan An
Adjudicator

November 17, 2017

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

⁹ Order PO-2435.