

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3907

Appeal MA18-564

Town of Ajax

February 27, 2020

**Summary:** The Town of Ajax (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the Central Park Ajax development and a named company. The town issued a decision granting partial access to the responsive records with severances made under section 10(1) (third party information) of the *Act*. The third party, now the appellant, appealed the town's decision to this office. In this order, the adjudicator upholds the town's decision, and dismisses the appeal.

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

### OVERVIEW:

[1] The Town of Ajax (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for certain records relating to the Central Park Ajax development and a named company.

[2] The town notified a third party<sup>1</sup> whose interests may be affected by the request, and sought representations regarding the disclosure of the responsive records to the requester. The third party responded to the town, asking that some specified records not be disclosed to the requester.

---

<sup>1</sup> The company is, by its own description, a facilitator of infrastructure development.

[3] The town issued a decision granting partial access to the records, while relying on sections 10(1)(a) and (c) (third party information) and 14(1) (personal privacy) of the *Act* to withhold certain information. The requester did not appeal the town's access decision.

[4] However, the third party, now the appellant, appealed the town's decision to this office and a mediator was appointed to explore the possibility of resolution. During the course of mediation, the appellant advised that it believes that the records at issue qualify for the mandatory exemption in section 10(1) of the *Act*.

[5] As a mediated resolution was not possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry, and invited representations from the appellant, the town and the requester.

[6] The appellant submitted representations, and a non-confidential copy was shared with the requester and the town. The town provided representations in response, but the requester declined to submit any. Although I have considered the appellant's representations in their entirety, only the non-confidential portions (which did not meet the confidentiality criteria in the IPC's *Practice Direction 7*) are set out below.

[7] In this appeal, I must determine whether the section 10(1) exemption applies to the portion of the records that the town decided to disclose to the requester. The portions of the records that the town decided to withhold under section 10(1) (and section 14(1)) are not at issue in this appeal, because the requester did not appeal the town's decision.

[8] During adjudication, I identified a single sentence in Record 351 as possibly containing the personal information of the appellant that could be exempt under the mandatory personal privacy exemption in section 14(1). However, as the requester confirmed that he is not seeking the personal information of the appellant, this sentence has been removed from the scope of the appeal, and is not to be disclosed by the town.

[9] In this order, I uphold the town's decision to disclose the identified responsive portions of the records, and dismiss the appeal.

## **RECORDS:**

[10] The information at issue in this appeal consists of the responsive portions of Records 342, 346, 350 and 351, which are emails between the appellant and the town.

## **DISCUSSION:**

### **Does the mandatory exemption at section 10(1) apply to the records?**

[11] The appellant claims that the mandatory exemption at section 10(1) of the *Act* applies to the information at issue in this appeal. Section 10(1) states, 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;
- b. result in undue loss or gain to any person, group, committee or financial institution or agency;

[12] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>2</sup> 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.<sup>3</sup>

[13] 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.

---

<sup>2</sup> *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.*).

<sup>3</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

## Part 1: type of information

[14] The types of information listed in section 10(1) have been discussed in prior orders. The ones that are relevant in this appeal are:

*Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- i. is, or may be used in a trade or business,
- ii. is not generally known in that trade or business,
- iii. has economic value from not being generally known, and
- iv. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>4</sup>

*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.<sup>5</sup>

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>6</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>7</sup>

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>8</sup>

---

<sup>4</sup> Order PO-2010.

<sup>5</sup> Order PO-2010.

<sup>6</sup> Order PO-2010.

<sup>7</sup> Order P-1621.

<sup>8</sup> Order PO-2010.

[15] The appellant argues that the records contain trade secret, technical, commercial and/or financial information. The appellant submits that specifically, the records discuss business strategy, the nature of the business that the appellant engages in, and its engagement with various investors and investor groups.

[16] The town submits that the redacted portion of the records at issue contain the financial and commercial information of the appellant, and that is why the town has redacted that information under the section 10(1) exemption. The town submits that the information at issue in this appeal (the unredacted portion of the records) contains a summary of actions taken on the project, general comments on the information the appellant is seeking from the town, general comments about the project, and comments of the Chief Administrative Officer (CAO) of the town, along with a publicly available news release from the town. The town submits that this information does not fit within the types of information that are exempt under section 10(1).

[17] After reviewing the records at issue and the representations of the parties, I am satisfied that the records at issue, including the portions that the town proposes to disclose, contain the commercial and financial information of the appellant as defined above, and I find that part of the test under section 10(1) has been met.

## **Part 2: supplied in confidence**

### ***Supplied***

[18] 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.<sup>9</sup>

[19] 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.<sup>10</sup>

### ***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.<sup>11</sup>

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

---

<sup>9</sup> Order MO-1706.

<sup>10</sup> Orders PO-2020 and PO-2043.

<sup>11</sup> 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; and
- prepared for a purpose that would not entail disclosure.<sup>12</sup>

[22] The appellant submits that any exchange of information between itself and the town occurred on the implicit understanding that the records contain sensitive information, given that these records involved critical financial information. The appellant submits that it discussed business strategy regarding mortgages, investors, and monies involved with the town, in confidence or with an expectation of confidentiality.

[23] The town submits that it recognizes the sensitivity of the financial information, business strategy, investors and monies contained in the records at issue, and treated that type of information as confidential.

[24] After reviewing the representations of the parties and the records at issue, which are emails between the appellant and the town, I find that only some of the information at issue was supplied by the appellant to the town. Specifically, I do not find that the comments of the CAO of the town and the attachments to Records 350 and 351, which are a publicly available news release and a decision letter, were supplied by the appellant. Therefore, this information does not meet part two of the test, and I find that the mandatory section 10(1) exemption does not apply to it.

[25] With respect to the remainder of the information at issue in Records 342, 346, 350 and 351, I find that this information was supplied by the appellant to the town. As noted above, the remainder of the information at issue contains a summary of actions taken on the project, general comments on the information the appellant is seeking from the town and general comments about the project, all of which were supplied by the appellant to the town, and which would reveal, if disclosed, commercial and financial information of the appellant.

[26] Additionally, I find that this information was supplied to the town by the

---

<sup>12</sup> Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

appellant, in confidence, because I am satisfied that the appellant had an objectively reasonable expectation of confidentiality at the time the information was provided. Both parties acknowledge this. Furthermore, the appellant marked some of its emails as "Confidential", and the town marked one email as "Without Prejudice," both of which I find support the conclusion that the appellant had a reasonable expectation of confidentiality at the time it supplied the information to the town.

[27] Since I find that the remainder of the information at issue in Records 342, 346, 350 and 351 meets part two of the test, because it was supplied in confidence by the appellant to the town, I must now determine if this information meets part three of the test in section 10(1), by reason of there being a reasonable expectation of one of the outlined harms resulting from its disclosure.

### **Part 3: harms**

[28] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.<sup>13</sup>

[29] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>14</sup> The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, 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*.<sup>15</sup>

### ***Representations***

[30] The appellant submits that the likely harm to it is not merely speculative. The appellant submits that although the town has redacted the names of certain investors, this does not sufficiently protect its interests, as the finance industry is extremely competitive and any disclosure of the underlying transactions that it has been involved in may provide a competitive edge to its competitors.

[31] The appellant submits that with the proposed release of the records, it faces reputational damage along with financial and/or commercial backlash because a

---

<sup>13</sup> *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>14</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>15</sup> Order PO-2435.

majority of its investor groups are private entities or individuals. The appellant further submits that since the project has failed, any reference to the appellant in relation to this project and/or the named company is harmful to the appellant's reputation.

[32] The appellant submits that, similar to other companies, it currently operates in a challenging financial environment where the reputation of the player is key to securing investors and clients, and disclosure of the records at issue will significantly harm its position in the market as a trusted financial facilitator of such large-scale projects. The appellant submits that it is constantly in negotiations with various business entities that require capital for mammoth projects, and any link to the named company and/or the project will result in serious economic repercussions.

[33] The town submits that it has redacted all portions of the records that are prejudicial to the appellant's competitive position. The town submits that general comments or updates on the project from the appellant do not fall within the intent of section 10(1), and the town does not take issue with the release of the comments of its staff, or the news release, which is already public information. The town submits that the four records at issue in this appeal should be released to the requester with the redactions previously identified. As noted above, the town submits that it recognizes the sensitivity of the information contained in the records at issue; however, the fact that an email may contain sensitive information does not mean that the entire email should be withheld, when it is possible to withhold only the sensitive portions, which the town submits it has done.

### ***Analysis and findings***

[34] While the appellant argues that it could suffer harm if the information at issue is disclosed, its representations, including the confidential portions, do not provide sufficiently detailed evidence in support of its arguments, which is required to establish part three of the test. Instead, I find its representations amount to speculation of possible harms. For example, the appellant argues more generally that disclosure of the information at issue could harm its reputation by linking it with the named company and the project, which would result in serious economic repercussions, but the appellant does not sufficiently explain how or why disclosure could reasonably be expected to have that result in relation to, for example, any specific, future negotiations for the purpose of section 10(1)(a).<sup>16</sup>

[35] I find the representations of the appellant to be vague, and conclude that they do not establish that disclosure of the information at issue could reasonably be expected to lead to the harms listed in sections 10(1)(a) and (c). Specifically, I do not find that the release of the records could reasonably be expected to cause significant

---

<sup>16</sup> Order MO-3659.



prejudice to the appellant's competitive position or contractual negotiations, or undue loss to the appellant or undue gain to the requester or any other entity. Further, from my review of the information at issue, I am not persuaded that the harms in sections 10(1)(a) and (c) are inferable from the information itself.

[36] Accordingly, I find that the appellant has not established that any of the harms outlined in sections 10(1)(a) or (c) could reasonably be expected to result from disclosure of the information at issue.

[37] All parts of the three-part test must be met for the mandatory exemption at section 10(1) to apply. I have already found that the section 10(1) exemption does not apply to some of the information at issue in this appeal, because it failed to meet part two of the test. Since the reasonable expectation of harm in the third part of the test has not been established for the remainder of the information at issue, I find that the section 10(1) exemption does not apply to any of the information at issue in this appeal. Accordingly, I uphold the town's decision to grant partial access to the records, and dismiss the appeal.

**ORDER:**

1. The town should not disclose the highlighted sentence in the copy of Record 351 that accompanies this order, because it has been removed from the scope of this appeal.
2. I otherwise uphold the town's decision to grant partial access to the records, and order it to disclose the records in accordance with its access decision (except for the information identified in order provision 1). This disclosure is to take place by April 2, 2020 but not before March 30, 2020.

Original Signed By: \_\_\_\_\_  
Anna Truong  
Adjudicator

February 27, 2020 \_\_\_\_\_