

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4352

Appeals MA21-00423

Township of King

March 27, 2023

**Summary:** The Township of King received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a specified property. After notifying third parties, the township issued a decision granting partial access to the responsive records. One of the third parties appealed the township's decision to the Information and Privacy Commissioner of Ontario claiming that section 10(1) (third party information) applies to the responsive records. The requester did not appeal the township's decision. In this order, the adjudicator upholds the township's decision, and she orders the township to disclose the records to the requester in accordance with its access decision.

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

### OVERVIEW:

[1] This order determines the issue of access to records related to a long-term care redevelopment of a specified property. The Township of King (the township) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a specified property.

[2] After notifying third parties about the request to seek their views on disclosure of the records affecting their interests, the township issued a decision granting full access to four of the five responsive records and partial access to the fifth.

[3] One of the third parties, now the appellant, appealed the township's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] During mediation, the appellant maintained view that the exemption at section 10(1) (third party information) of the *Act* applies to the records.

[5] Although the requester withdrew their appeal of the township's decision to partially deny access, they advised that they continue to pursue access to the records at issue in this appeal. The requester took the position that even if the section 10(1) exemption applies, the public interest in the disclosure of the records would override the exemption. As a result, the public interest override in section 16 of the *Act* was added as an issue in this appeal.

[6] As no further mediation was possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I decided to commence the inquiry by inviting representations from the appellant, initially. I sought and received representations from the parties about the issues in the appeal. Portions of the appellant's representations were withheld in accordance with the confidentiality criteria in IPC Practice Direction 7 and section 7 of the IPC's *Code of Procedure*.

[7] In this order, I dismiss the appeal and uphold the township's access decision. As a result, I order the township to disclose the records to the requester in accordance with its access decision.

## **RECORDS:**

[8] The records at issue in this appeal are as follows:

<b>Record</b>	<b>Description</b>
2	An email attaching a revised concept plan for the specified property
3	An email attaching drawings of development options for the specified property
4	Email chain discussing an agenda for a meeting about the specified property
5	Letter from the Toronto and Region Conservation Authority (TRCA) about the development proposal for the specified property
15	Email chain setting up a meeting about the specified property

[9] The township decided to disclose records 3, 4, 5, and 15 in full. The township withheld a portion of record 2 because it contains financial information. Since the requester is no longer appealing the township's decision to partially deny access to record 2, the portion of record 2 that the township has decided to withhold is not at issue in this appeal.

## **DISCUSSION:**

### **Does the mandatory third party information exemption at section 10(1) apply to the information at issue?**

[10] The appellant claims that the mandatory exemptions at sections 10(1)(a), (b), and (c) of the *Act* apply to the information at issue in this appeal. The township and the requester argue that they do not.

[11] 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 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;

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

[13] For section 10(1) to apply, the party resisting disclosure – in this case, the third party 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

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<sup>1</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>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[14] All three parts of the three-part test must be met to establish the exemption. Since I find below that the appellant has not established part 3 of the three-part test, I will not set out parts 1 and 2.

### ***Part 3: harms***

[15] 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>3</sup>

[16] 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>4</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>5</sup>

### *Representations of the parties*

[17] The appellant submits that part 3 of the section 10(1) test has been met because disclosure of the withheld information could reasonably be expected to cause harm to another (related) third party.<sup>6</sup> The appellant submits that disclosure could reasonably be expected to:

- “prejudice significantly the competitive position and interfere significantly with the contractual or other negotiations engaged by [the other third party] with respect to the [specified property] redevelopment;”
- “result in similar information no longer being supplied to the township where it is in the public interest that similar information continue to be so supplied;” and
- “result in undue loss or gain to [the other third party].”

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<sup>3</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>4</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>5</sup> Order PO-2435.

<sup>6</sup> Although this party did not appeal the township’s decision, I have considered the appellant’s claims on its behalf.

[18] The appellant further submits that they and the other third party do not consent to the disclosure of the withheld information.

[19] The township generally submits that the appellant was aware that information provided to the township could be made public and that most of the information at issue has already been disclosed in public records. The township states that record 5 originated with the TRCA and the TRCA consented to the disclosure of the record. The township further states that record 5 includes a detailed description of all conceptual plans that are visually represented in records 2 and 3. The township provided an email between it and the appellant wherein the appellant states that it was "assumed" that the TRCA letter would be "referenced" or "attached" to a public report. The township also states that records 4 and 15 are emails setting up meetings about the specified property and do not meet the section 10(1) test.

[20] The requester argues that the responsive records do not meet the three-part test in section 10(1) and should not be exempt from disclosure.

#### *Analysis and findings*

[21] To find that any of the section 10(1) harms could reasonably be expected to result from disclosure, I must be satisfied that there is a reasonable expectation of the specified harm. I can reach this conclusion either based on my review of the information at issue, the circumstances of this appeal, including the records as a whole, and/or the representations made by the appellant.

[22] Based on my review of the records and the representations of the parties, I find that the appellant has not established that disclosure of the information at issue could reasonably be expected to result in the harms enumerated in sections 10(1)(a), (b), or (c) of the *Act*.

[23] The appellant's arguments, summarized above, merely repeat the wording of the claimed exemptions without providing detailed evidence to support these assertions. These arguments are insufficient to establish the harms in section 10(1). As noted above, parties should not assume that the harms under section 10(1) can be proven simply by repeating the description of harms in the *Act*.<sup>7</sup>

[24] Without detailed evidence, I then reviewed the information itself to determine whether it is evident that disclosure could reasonably be expected to result or cause any of the stated harms. From my review of the records and the circumstances of this appeal, I am unable to conclude that disclosure of the information could reasonably be expected to cause or result in any of the stated harms in section 10(1). The information at issue relates to the proposed redevelopment of the specified property, which is known to the public. As the township has explained, most of the withheld information has already been disclosed in public records. I agree with the township's position that

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<sup>7</sup> Order PO-2435.

this fact undermines the appellant's argument that any of the stated harms could reasonably be expected to occur.

[25] In sum, in the absence of any detailed evidence from the appellant and based on my review of the records, I am unable to conclude that the disclosure of the information at issue could be reasonably expected to result in the harms set out in sections 10(1)(a), (b), or (c) of the *Act*.

[26] All parts of the three-part test must be met for the mandatory exemption at section 10(1) to apply. Since the appellant has not established part 3 of the section 10(1) test, I find that section 10(1) does not apply to exempt the information at issue in this appeal from disclosure. I will therefore order the information at issue to be disclosed to the requester.

**ORDER:**

1. I uphold the township's access decision and dismiss the appeal.
2. I order the township to disclose the records in accordance with its access decision by **May 3, 2023** but not before **April 28, 2023**.
3. In order to verify compliance with this order, I reserve the right to require the township to provide me with a copy of the records disclosed to the requester upon request.

Original signed by: \_\_\_\_\_

Anna Truong  
Adjudicator

March 27, 2023 \_\_\_\_\_