

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4360

Appeal MA21-00426

Township of King

March 30, 2023

Summary: The Township of King received a five-part 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 full access to the responsive records. One of the third parties appealed the township's decision claiming that section 10(1) (third party information) applies to the responsive records. 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 the redevelopment of a specified long-term care property.

[2] The Township of King (the township) received a five-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The relevant portions of the request are (emphases added):

On Feb 8, 2021, Growth Management Services Department submitted [specified report] to Council.

In that report references were made to:

- Township staff, in early 2019, was requested to confirm whether a long term care facility is permitted on [specified property]. Could you please provide all correspondence directed to any Township staff or Council member requesting this Action.
- Township staff, between early 2019 and Dec 2019, participated in a number of discussions with [third party] representatives which formed the basis of staff's Dec 2019 opinion letter. Could you please copy all minutes and correspondence, as well as all raw utilization data, that provided backup information to staff to help form the opinion letter. Please include a copy of that opinion letter.
- In that opinion letter, staff are quoted as saying that they are satisfied that "long term care facility use has historically occurred on the [specified property] and continues and/or has been intended to continue to do so". Legal advice is adamant that during the zoning change process, guidelines and standards of the ORMCP¹ must be applied. As section 6(4) states:
 - o Nothing in this Plan applies to prevent the expansion of an 'existing*' institutional use, if the applicant demonstrates that,
 - there will be no change in use; and
 - the expansion will not adversely affect the ecological integrity of the Moraine area (*where 'existing' is defined by ORMCP as being lawfully in existence on November 15, 2001).
 - o Could you please provide all due diligence staff completed, including accessing legal assistance, site visits or interviews with residents/staff of the [specified building], to define number of residents, programs and activities offered and their utilization, staffing compliment by profession, etc. that were used to explain 'existing' services at the [specified building] on November 15, 2001.
 - o Could you please provide staff's review of the [specified building]'s Mission Statement, the Board's Vision Statement or any other documentation or evidence that provided staff

¹ Oak Ridges Moraine Conservation Plan.

information to conclude there was intent to offer a Long Term Care facility when the [third party] no longer needed the [specified building] as a residence.

[3] 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 the responsive records.

[4] 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.

[5] During mediation, the appellant maintained their view that the exemption at section 10(1) (third party information) of the *Act* applies to all of the records affecting their interests.²

[6] The requester advised that they wish to pursue access to the records.

[7] 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 an inquiry in which 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*.

[8] In this order, I dismiss the appeal and uphold the township's access decision that the section 10(1) exemption does not apply to the records. As a result, I order the township to disclose the records to the requester in accordance with its access decision.

RECORDS:

[9] The records³ in this appeal are as follows:

Record	Description
3	Letter to the township from the appellant re permitted uses with attachments
4	Letter to the township from the appellant re permitted uses and meeting follow-up
5	Letter to the appellant re a service provider's role
6	Letter to the township from the appellant re permitted uses and meeting follow-up

² Records 1 and 2, disclosed by the township, are not at issue in this appeal.

³ Some of these records were addressed in a parallel appeal involving a different request and requester.

7	Email chain discussing permitted uses
8	An email following up on a meeting
9	Email chain discussing the specified property
10	Email chain discussing permitted uses and meeting follow-up
11	Handwritten meeting notes by the township

[10] The township also disclosed records other than those listed above. The appeal relates only to those records that the third party appellant objects to disclosure of.

DISCUSSION:

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

[11] The appellant claims that the mandatory exemptions at sections 10(1)(a), (b), and (c) of the *Act* apply to the records and that they therefore should not be disclosed. The township and the requester argue that these exemptions do not apply.

[12] 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;

[13] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁴ 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.⁵

⁴ *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.*).

⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[14] 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:

- a. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- b. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
- c. 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.

[15] All three parts of the three-part test must be met to establish the exemption. Because I find below that the appellant has not established part 3 of the three-part test, it is not necessary for me to consider parts 1 and 2 of the test.

The third party appellant has not established that disclosure gives rise to a reasonable expectation that one of the section 10(1) harms will occur (Part 3)

[16] 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.⁶

[17] 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.⁷ 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*.⁸

Representations of the parties

[18] The appellant submits that part 3 of the section 10(1) test has been met because disclosure of the records could reasonably be expected to cause harm to another (related) third party.⁹ The appellant submits that disclosure could reasonably be

⁶ *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.

⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

⁸ Order PO-2435.

⁹ Although this party did not appeal the township's decision, I have considered the appellant's claims on its behalf.

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].”

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

[20] The township submits that many of the records were requested from the appellant by the township for the purpose of using the information to prepare an “opinion letter” describing the potential development and the permitted uses of the specified property. The township further submits that part of this “opinion letter” is quoted in a staff report, and that two public staff reports and a memorandum also include summarized information from the records.

[21] 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 in the records have already been disclosed in public records, such as the two staff reports and memorandum.

[22] 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

[23] 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 records, the circumstances of this appeal, including the records as a whole, and/or the representations made by the appellant.

[24] 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 records could reasonably be expected to result in the harms enumerated in sections 10(1)(a), (b), or (c) of the *Act*.

[25] 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*.¹⁰

[26] 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 in the records could reasonably be expected to cause or result in any of the stated harms in section 10(1). The records relate 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, such as the two staff reports and memorandum. I agree with the township's position that this fact undermines the appellant's argument that any of the stated harms could reasonably be expected to occur.

[27] 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 records could be reasonably expected to result in the harms set out in sections 10(1)(a), (b), or (c) of the *Act*.

[28] 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 records in this appeal from disclosure. I will therefore order the records 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 5, 2023** but not before **May 1, 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 30, 2023

¹⁰ Order PO-2435.