Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4514

Appeal MA22-00075

Region of Peel

April 24, 2024

Summary: At issue in this appeal are line items containing unit pricing information in the appellant's successful bid submission. The Region of Peel (the region) took the position that the information should be disclosed to the requester. The appellant argued that it qualified for exemption under section 10(1) (third party information) of the *Act*. In this order, the adjudicator finds that the unit pricing information does not qualify for exemption under section 10(1) of the *Act*. The adjudicator orders that the region disclose it to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M.56, section 10(1).

Orders Considered: Orders MO-3058-F and PO-2435.

OVERVIEW:

[1] This appeal addresses a request made to the Region of Peel (the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all unit pricing information in all line items found in a winning bid submission provided by a company in response to a specified tender issued by the region. The winning bid became, on acceptance, the basis of the commercial arrangement between the region and the successful bidder and there was no separate agreement related to the specified tender.

[2] In its decision, the region granted the requester full access to the company's bid

submission. The company (now the appellant) appealed the region's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[3] At mediation, the appellant agreed to disclose some additional information in its bid submission to the requester, which the region disclosed, but took the position that the remaining unit pricing information should be withheld because it qualifies for exemption under section 10(1) (third party information) of the *Act*.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[5] I decided to conduct an inquiry and sought representations from the parties. The region chose not to provide representations stating that it is up to the appellant to support its position regarding non-disclosure of the unit pricing information. The appellant provided representations, the non-confidential portions of which were shared with the requester, who provided brief responding representations.

[6] In this order, I find that the unit pricing information does not qualify for exemption under section 10(1) of the *Act*. I uphold the region's decision to disclose the withheld unit pricing information to the requester.

RECORDS:

[7] Remaining at issue in this appeal are portions of the appellant's bid submission to the region containing unit pricing information.[1]

DISCUSSION:

[8] The sole issue to be decided in this appeal is whether the mandatory exemption at section 10(1), which considers third party information, applies to unit pricing information in the appellant's bid submission to the region.

[9] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[2] where specific harms can reasonably be expected to result from its disclosure.[3]

[10] The appellant takes the position that sections 10(1)(a) and (b) apply to the unit pricing information. Those sections read:

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[1] The requester is only seeking access to the remaining withheld unit pricing information. Accordingly, this order only deals with the withheld unit pricing information in the responsive record.
[2] *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.*).
[3] Orders MO-1706, PO-1805, PO-2018 and PO-2184.

> 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, where the disclosure could reasonably be expected to,
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> > (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;

[11] For section 10(1)(a) and/or (b) 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) and/or (b) of section 10(1) will occur.

[12] The appellant submits that the withheld information consists of unit pricing information for 439 separate and specific lines of types of work. It submits that this information is not known or available to the public and is confidential and proprietary trade secret, commercial and financial information. It states that the experience that it has developed over the years allows it to employ unique pricing strategies to tender more competitive (i.e. lower priced) bid submissions. It emphasizes that because the work it bids on is so specialized it "comes up against the same core group of contractors on most tenders."

Part 1: type of information

[13] The types of information listed in section 10(1) have been discussed in prior orders:

> *Trade secret* includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
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> > (a) is, or may be used in a trade or business;

> (b) is not generally known in that trade or business;
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> (c) has economic value from not being generally known; and
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> (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]

> *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.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]
>
> *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.[7]

[14] The appellant submits that the unit pricing information qualifies as a trade secret, financial, and commercial information. The appellant explains that its unit prices are inclusive of all costs, including, but not limited to: labour, equipment, materials, travel time, transportation and fuel costs, traffic control, haulage and disposal, licensing, permits, safety certifications, warranty, and other related charges, for the completion of the work under its bid, including but not limited to all applicable taxes, overheads, profits and all other associate vendor expenses except HST.

[15] It submits that its Manufactured Treatment Device (MTD) unit pricing information is a trade secret. The appellant states that this is because it includes pricing patterns and strategies that can be gleaned from the specific unit prices being applied to each of the scenarios set out in the region's request for proposal. It adds that:

> [The appellant] applies a unique pricing methodology and strategy to each MTD Unit for the purpose of arriving at the lump sum price for the overall bid submission. A competitor with knowledge of the industry would desire this information and be able to deduce from it [the appellant's] trade secret and financial unit pricing strategies, and then, undercut [the appellant] on future tenders and bids.
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> This bid submission was unique because the [region] required 439 separate MTD Unit prices for multiple scenarios, even though the [region]

[4] Order PO-2010.
[5] Order PO-2010.
[6] Order P-1621.
[7] Order PO-2010.

> did not know the quantities required. In other words, the bid called for future pricing work and required detailed unit pricing without knowledge of the actual work to be done. And […] only a fraction (356 of the 439) of the actual MTD Unit pricing line items of work have been awarded under the contract.

[16] The appellant submits that its unit pricing is commercial information because it relates specifically to the ability to supply MTD cleaning, hauling and disposal services to municipalities, towns, and regions at competitive prices.

[17] Finally, the appellant submits that the information at issue in this appeal also consists of financial information, as contemplated by section 10(1), given that it relates to the specific monetary amounts being charged to complete very specific items of work that may, or may not, be required by the region.

[18] In brief submissions the requester explains that it is a company seeking disclosure of the bid and that there is "absolutely nothing proprietary about the process/work that is being done."

Analysis and finding

[19] I have reviewed the withheld information and I find that it qualifies as commercial information because it is information that relates to the buying, selling or exchange of merchandise or services. Specifically, the information the appellant seeks to have withheld relates to the appellant's selling of MTD cleaning and material disposal services to the region.

[20] Although the appellant alleges that the withheld unit pricing information amounts to a trade secret it does not provide sufficient evidence to establish that its unit pricing information qualifies as a pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism as required by the definition. For example, the appellant does not explain exactly how disclosure of its unit pricing information, which is comprised of many components, would enable a competitor to deduce information about any of the appellant's trade secrets that may meet the definition above. I find that the unit pricing information at issue does not fall within the scope of the definition of a trade secret as set out above.

[21] As I have found that the information at issue qualifies as commercial information[8] for the purposes of section 10(1) of the *Act*, I conclude that part 1 of the three-part test for the application of the section 10(1) exemption has been satisfied.

[8] As I have concluded that the information is commercial information, it is not necessary for me to also consider whether the information qualifies as financial information.

Part 2: supplied in confidence

[22] Part two of the three-part test itself has two parts: the appellant must have "supplied" the information to the region, and must have done so "in confidence", either implicitly or explicitly. 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.[9]

[23] 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.[10]

[24] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[11]

[25] There are two exceptions to this general rule:

1. the "inferred disclosure" exception. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.[12]

2. the "immutability" exception. This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[13]

[26] In order to satisfy the "in confidence" component of part two, the party 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.[14]

[27] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was:

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[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[12] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[13] *Miller Transit*, cited above at para. 34.
[14] Order PO-2020.

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the appellant 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 disclosure.[15]

[28] The appellant submits that it had an explicit and implicit understanding and expectation that the information it supplied would be held in confidence. It submits that this was based on a number of factors, including the following:

- the region's representations in the Request for Tender that it would only publish the lump-sum contract price and not the specific MTD Unit pricing provided;[16]
- the bid was submitted through the region's secure bidding system;
- although it had intended to indicate that information in its bid was confidential the region's bidding system did not allow the bid submission form to be altered;
- the appellant maintains the confidentiality of its MTD Unit pricing and this information is not otherwise disclosed or available from other sources to the public or to its competitors.

Analysis and finding

[29] For the reasons set out below I find that the withheld unit pricing information does not qualify for exemption under section 10(1) of the *Act* because it was negotiated and therefore not "supplied" for the purposes of part 2 of the section 10(1) test. As I find that the unit pricing information was not "supplied" it is not necessary for me to consider the "in confidence" portion of the part 2 test, or the appellant's submissions in that regard.

[30] If the terms of a contract are developed through a process of negotiation, a long line of IPC orders have held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. Except in unusual circumstances, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counteroffers or preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be

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[15] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).
[16] In support of this submission the appellant refers to provisions of the Request for Tender.

the product of a negotiation process and therefore not "supplied".[17]

[31] When a bid submission forms the basis of the commercial arrangement between the parties and no separate contract is created, IPC Orders have also found that the information was negotiated and therefore not "supplied" for the purposes of part 2 of the section 10(1) test. I set out two examples below.

[32] In Order PO-2435, which dealt with section section 17(1) of the *Freedom of Information and Protection of Privacy Act*[18], former Commissioner Brian Beamish found that per diem rates in proposals submitted by potential vendors to government Requests for Proposals are not negotiated because the government either accepts or rejects the proposal in its entirety. The former Commissioner observed that the exercise of the government's option in accepting or rejecting a consultant's bid is a "form of negotiation." He wrote:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect.
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> The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

[33] In Order MO-3058-F former Assistant Commissioner Sherry Liang considered the IPC's caselaw with respect to whether a winning proposal qualifies as being supplied, explaining that a distinction should be made when a winning proposal becomes, on acceptance, the basis of the commercial arrangement between the parties, and no separate contract between the parties is created.

[34] The former Assistant Commissioner wrote at paragraphs 25 and 26 of her decision:

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[17] See for example, Orders MO-1706 and MO-1735.
[18] RSO 1990, c F.31. The provincial equivalent of section 10(1) of the *Act*.

> I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.
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> I distinguish the circumstances before me from those where a winning proposal becomes, on acceptance, the basis of the commercial arrangement between the parties, and no separate contract between the parties is created. In Order MO-2093, for instance, this office found that where a winning proposal governed the commercial relationship between a city and a proponent, and there was no separate written agreement, the terms of the winning proposal were mutually generated and not "supplied" for the purpose of section 10(1). In such a case, it is reasonable to view the winning proposal as no longer the "informational asset" of the proponent alone but as belonging equally to both sides of the transaction.

[35] I agree with and adopt the reasoning in the above-quoted orders for the purposes of this appeal.

[36] In my opinion, the unit pricing information was not supplied within the meaning of part 2 of the test under section 10(1). This is because I find that the unit price set out in the appellant's winning proposal is the price that the appellant agreed to charge for its services and represents the price that the region is prepared to pay, should any of the services be used. As held by Former Commissioner Beamish in Order PO-2435, I find this acceptance of the unit prices by the region is a form of negotiation.

[37] Moreover, with no separate contract between the parties being created, I find that the appellant's winning proposal became, on acceptance, the basis of the commercial arrangement between the parties. In keeping with former Assistant Commissioner Liang's reasoning in Order MO-3058-F, I also find in this case that it is reasonable to view the unit pricing information in the bid as no longer being the "informational asset" of the appellant alone but as belonging equally to both sides of the transaction. Therefore, I find that the unit pricing information was mutually generated and not "supplied" for the purpose of section 10(1).

[38] Furthermore, I have not been provided with sufficient evidence to establish that either of the two exceptions to the general rule that the contents of a contract will not normally qualify as having been "supplied" apply in this case. I do not accept that the unit pricing information is the kind of non-negotiable information that is immutable

because by their nature the unit prices were subject to negotiation, as discussed above. I also do not accept that I have been provided with sufficient evidence to establish that disclosure of the unit pricing information would permit the drawing of accurate inferences or result in the inferred disclosure of any underlying, non-negotiated, confidential information supplied to the region or reveal the appellant's actual underlying costs.

[39] Accordingly, as I have found that the unit pricing information was not supplied for the purposes of section 10(1) of the *Act*, part 2 of the three-part test under section 10(1) has not been established. As all three parts must be established for section 10(1) to apply, I need not consider part 3 of the test, and I find that the information at issue is not exempt under that exemption.

[40] I uphold the region's decision to disclose the remaining withheld unit pricing information to the requester, in accordance with its original access decision. I order that the region disclose this information to the requester.

ORDER:

1. I order the region to disclose the remaining withheld unit pricing information to the requester by sending it to the requester by **May 30, 2024,** but not before **May 25, 2024**.

2. In order to ensure compliance with paragraph 1 of this order, I reserve the right to require the region to provide me with a copy of the record as disclosed to the requester.

Original signed by: April 24, 2024

Steven Faughnan
Adjudicator