Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1861

Appeal MA-030192-1

City of Toronto

Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

This appeal concerns a decision of the City of Toronto (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) requested information pertaining to a Request for Quotation (RFQ) issued by the City (RFQ #0114-03-0001). In particular, the appellant requested: a list of all the items quoted, listing model and make of items by vendor; rejected selections of each vendor; and, the formula used to calculate the bid total for three named companies.

By way of background, on December 22, 2002, the City issued an RFQ for protective footwear for male and female employees of various City departments and its agencies, boards and commissions for the period July 1, 2003 to June 30, 2005. The appellant, along with four competitors, responded to the RFQ. The records at issue constitute information compiled by the City in response to the RFQ.

The City issued a decision granting partial access to the records, denying access to information under section 10 (third party information) of the *Act*.

The appellant appealed the City's decision.

During the mediation stage, the mediator contacted four affected parties to seek their consent for the release of their information. Three affected parties refused consent, but a fourth agreed to the release of product descriptions only, and refused consent to the release of the financial information found in the records. The City issued a new decision letter providing access to this information. The balance of the information remained at issue.

Further mediation was unsuccessful and the file was transferred to adjudication. I first sought representations from the City and the four affected parties. The City and three affected parties submitted representations and agreed to share their representations with the appellant in their entirety. The fourth affected party advised this office in writing that it now consents to the release of its financial information. This affected party confirmed its consent in writing with the City to the release of its financial information to the appellant.

I then sought representations from the appellant, which was provided with copies of the City's and the three affected party's representations in their entirety. The appellant submitted representations. I then determined that the appellant's representations raised issues that the City and the three affected parties should be given an opportunity to address and so I sought and received further representations from the City and the three affected parties.

With regard to the release of the fourth affected party's financial information, as of the date of this order, I have not received written confirmation from the City or the appellant that the City has issued a new decision letter and released the fourth affected party's financial information to the appellant. Therefore, I will order the City to do so.

RECORDS:

There are seven pages of records at issue. The records are comprised of a Product Summary Sheet (pages 1-5), Summary of Rejected Footwear by Supplier (page 6) and Bidders' Price

Comparison (page 7).

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1): the exemption

The City indicates in its representations that it is relying upon sections 10(1)(a), (b) and (c) to deny access to the information at issue.

Sections 10(1)(a), (b) and (c) of the *Act* state:

> 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,
>
> (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

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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) and/or (c) of section 10(1) will occur.

Part 1: type of information

The City and the three affected parties characterize the information at issue as commercial, technical and/or financial information. One of the affected parties also submits that the information consists of trade secrets.

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

> *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 [Order PO-2010].
>
> *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 [Order PO-2010].
>
> *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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].
>
> *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 [Order PO-2010].

I adopt these definitions for the purpose of this appeal.

The City states that the model numbers, names and descriptions as well as prices and other details of the footwear in relation to the City's requirements are commercial and/or financial information.

The affected parties have variously described the information as "product information", "pricing" and "information regarding the design, creation, sourcing, technical specifications, cost structure and unit pricing and related commercial information".

As noted, one affected party claims that some of the information contains trade secrets. It states that it provided quotations on footwear that was selected from known industry sources as well as footwear that was "specifically designed and created by [it] to meet or exceed the specifications set out in the RFQ." This affected party adds that the "designs, patterns and source of manufacturing are used by [it] in the development of new footwear to meet the specialized demands and needs of its customers."

The appellant does not offer any representations on the characterization of the information as commercial, financial or technical information. However, the appellant takes issue with the one affected party's suggestion that the information contains trade secrets. The appellant states that this affected party displays the safety footwear it sells in its lobby and storefront. Furthermore, the appellant states that the models for this footwear were designed and created by the respective manufacturers and are available to anyone in this industry. Therefore, the appellant disputes this affected party's contention that it has any proprietary interest in any of its information.

On my review of the information at issue and the parties' representations, I am satisfied that it constitutes commercial information since it pertains to a proposed commercial relationship between the City and the affected parties regarding the supply of protective footwear to the City. I am also satisfied that some of the withheld information contains financial information, including forecasted unit and aggregate costs for the proposed supply of the footwear.

I acknowledge the one affected party's position that some of the information at issue contains trade secrets including specially designed or customized footwear. However, in my view, neither its representations nor the records themselves demonstrate how this information meets the criteria for trade secrets articulated in Order PO-2010.

In conclusion, I find that part one of the test under section 10(1) has been met for all of the information at issue.

Part 2: supplied in confidence

Supplied

General principles

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043].

Parties' representations

The City submits that all of the information at issue was supplied to it in response to the RFQ. The City also states that the disclosure of any information that could be construed as having not been directly supplied in response to the RFQ (for example, the assessment of various models of shoes that appears on page 6 of the information), would permit accurate inferences regarding information directly supplied (the shoe models), thereby revealing it. The City states that while all of the information at issue constitutes documents created by it, disclosure of this information would reveal information supplied in response to the RFQ, namely the models proposed by each potential supplier.

The three affected parties all state that they supplied the information at issue to the City in response to the RFQ. One of the affected parties (the successful bidder) states that once its proposal was accepted by the City, it became bound by the technical specifications and pricing information it provided to the City in regard to the supply of safety footwear. However, this affected party asserts that the City's acceptance of the terms of its proposal was not the result of contractual negotiations and that, therefore, this information qualifies as having been supplied under section 10.

The appellant does not offer representations on the "supplied" requirement.

Analysis and findings

It is clear that the records at issue were created by the City. However, on my review of these records and the parties' representations, I am satisfied that the information contained in these records has been supplied by the affected parties to the City in response to the RFQ with one notable exception, the City's assessment notes.

The Summary of Rejected Footwear by Supplier (page 6) contains the names of the shoe types, model numbers and the City's assessment notes. I am satisfied that the shoe types and model

numbers were supplied by the affected parties to the City. However, it is clear that the assessment notes were prepared by the City and do not on their own qualify as having been supplied to the City. In my view, disclosure of the assessment notes would not reveal or permit the drawing of accurate inferences with respect to the shoe types and model numbers supplied by the affected parties to the City.

Although the information submitted by the successful bidder appears in the same format as that provided by the other affected parties, the acceptance by the City of this affected party's proposal resulted in a contract, whose terms may be partly reflected in the successful bidder's information in the records. Many previous orders indicate that the terms of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706]. However, in this case, I have not been provided with a copy of the contract and so I cannot be sure of the extent to which the successful bidder's information in the records would also appear in the contract. However, because of my conclusions in the analysis below on the issue of whether the information was supplied "in confidence", it is not necessary for me to conclusively determine this point.

In conclusion, I find that the City's assessment notes were not "supplied", and therefore cannot be exempt under section 10(1).

In confidence

General principles

In order to satisfy the "in confidence" component of part two of the section 10(1) test, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [Order PO-2043]

Parties' representaions

The City submits that confidentiality was both an implicit and explicit part of the RFQ process. The City asserts that any disclosure of information would only be in accordance with the RFQ documents. In support of its position the City refers to portions of the City's Quotation Request.

A one-page Quotation Request form provides the following statement regarding the "public opening" of quotations received by the City:

> **Public Opening** – Unless otherwise indicated you are invited to attend a public opening of this quotation at the time and location indicated above. The prices will be read aloud at this time and will not be made available by telephone until **AFTER** the award has been made. This generally takes two to three weeks. Contact the above named buyer at that time to obtain the name of the successful bidder and the price quoted.

However, page 1 of a seven-page Quotation Request form states in bold:

> **Due to the large number of anticipated bids and/or items for this quotation, prices will not be read aloud at the public opening. Interested bidders can make an appointment with the above named buyer approximately one week after closing and arrange to review the prices.**

On page 4 of the seven-page Quotation Request, prospective bidders are provided with the following notice:

> **NOTICE**
>
> The Municipal Freedom of Information and Protection of Privacy Act (the Act) applies to all tenders, quotations and proposals submitted to the City of Toronto. Tenders, quotations and proposals will be received in confidence subject to the disclosure requirements of the Act. Bidders/proponents should identify any portions of their tender/quotation/proposal which contain a trade secret, scientific, technical, financial, commercial or labour relations information supplied in confidence and which will cause harm if disclosed. […]
>
> Please be aware that bidders' names and the total amount of bid are always made public.

The City concludes it representations by stating that "[t]he model number or other identifying information about individual products would not be disclosed."

One affected party states that there is "clearly a reasonable expectation of confidentiality when it is clearly stated that only the bidders names and total amount of the bid are made public." There is "no mention [in the Request Quotation] that every price and/or item will be revealed." Furthermore, this affected party asserts that the information the appellant is seeking is not made public. It is provided upon request and does not reveal to the appellant which styles were awarded on the contract since "a contract is a confidential thing" between the parties.

A second affected party states that the information it submitted pursuant to the RFQ was provided in the "strictest of confidence and in accordance with tendering protocol stipulated by the City…" This affected party adds that "[u]nder no circumstances was there ever any expectation whatsoever, implicitly, explicitly or otherwise…" that any of its information would "to any extent" be disclosed to third parties.

The third affected party (the successful bidder) states that it supplied its information in confidence just as it had in all previous responses to the City's RFQs. In addressing the application of the *Act*, this affected party submits that it did not expressly identify any portions of its bid as being supplied in confidence because there was "an implicit understanding and expectation that the information provided […] would be treated in confidence." It views confidentiality as "an implied term of the tendering process." It states further that due to the nature of the "competitive bidding process", there was a "clear objective basis" for concluding that there was and remains a "reasonable expectation that the information be given and remain in confidence."

The appellant submits that there is a ten-year history of the City making the information he is seeking public after the completion of an RFQ process. The appellant questions how the successful bidder can claim that there is an implicit understanding and expectation that the information provided in response to the City's RFQs would be treated in confidence. On the contrary, the appellant submits that there is "an implicit understanding that the information will be made public, unless one asks that it not be." The appellant cites four other RFQ processes dating back to 1994 (1994, 1999, 2001 and 2003) in which the "prices and model numbers" were provided to the public. The appellant states that on those occasions the Quotation Request documents invited bidders to identify confidential information and when they did not the information was disclosed. The appellant states that the affected parties were given the same opportunity in this case to identify confidential information. As in the past, they chose not to and so the information should be disclosed.

The City and two affected parties replied to the appellant's representations.

The City disagrees with the appellant's assertion regarding a history of disclosure. It states that through discussions with the successful bidder it has learned that this company's information regarding the 1994 RFQ was disclosed when a company employee erroneously consented to its disclosure. The City submits that consent has not been provided in subsequent years. With regard to the 2001 RFQ, the City submits that this information was not disclosed pursuant to the *Act*, nor was it disclosed pursuant to any routine disclosure policy in the City's Purchasing or

Finance Departments. The City suggests that a temporary employee in its Finance Department may have disclosed the information in error. The City states that there was no intention on its part to disclose information under the *Act* and, therefore, disclosure of the information in the past does not support the appellant's submission that information should be disclosed to it under the *Act* on this occasion.

The successful bidder states that it has always been the City's practice to provide the unit prices by category on request. However, this does not include "the manufacturer's name and style or specifications". This affected party supports the City's position that information provided to the appellant regarding the 1994 and 2001 RFQ processes was provided in error. It states that until reading the appellant's representations it had been unaware that this information had been obtained by the appellant. According to this affected party the "common understanding was that the information requested has always been submitted in confidence." It states that had it known the information would have been provided outside the "stated policies and accepted practices" as set out in the City's standard Quotation Request document, it would have "identified those parts of our bids that should have been kept confidential."

The second affected party reiterates that there is a reasonable expectation of confidentiality since it is clearly stated in the Quotation request documents that only the bidders names and total amount of the bid are to be made public. There is no mention that every price and/or item will be revealed.

Analysis and findings

Clearly, the City and the affected parties feel strongly that there was an implicit and, possibly, even an explicit expectation that information supplied to the City through the quotation process was supplied "in confidence". In support of this position, the City and affected parties rely on the wording of the RFQ documents and, in particular, the portions of the Quotation Request that address the process for the "public opening" of quotations and the application of the *Act*.

There appears to be agreement between the City, at least one affected party and the appellant that the bidders' names and the total amount of their respective bids are always made public. I have already determined that the assessment notes do not meet the "supplied" component of part 2 of the test. Therefore, I am left to consider whether the shoe types and model numbers together with corresponding pricing information meet the "in confidence" element under part 2 of the test.

I have carefully reviewed the relevant portions of the Quotation Request in conjunction with the parties' representations. In my view, the key piece of evidence for me to consider in determining the "in confidence" issue is the "notice" provision regarding the application of the *Act*, as set out above. While stating in its "notice" that quotations are to be received in confidence, in the next sentence the City clearly places the onus on individual bidders to identify any portions of their quotation that contain information supplied in confidence. It may be true that information relating to previous quotations was disclosed to the appellant in error. However,

in my view, this is irrelevant to a consideration of the treatment of the information at issue in this case under the *Act*.

The impact of a notice provision which places the onous on an individual bidder to identify confidential information was explored by former adjudicator Laurel Cropley in Order M-845 [upheld on judicial review in *Ottawa Home Health Care Inc. v. Ontario (Information and Privacy Commissioner)* (January 26, 1998) Ottawa Doc. 1209/96 (Ont. Div. Ct.)]. In that case the requester had sought information pertaining to portions of the submissions provided by two named companies (the affected parties) in response to a Request for Proposals (RFP) issued by the Regional Municipality of Ottawa-Carleton for the provision of Home Support Services to the Home Care Program and Social Services Department. The RFP contained the following paragraph:

> I/We understand that submissions in response to this proposal may become public information unless I/we specifically request certain parts of the submission to remain confidential and permission will be granted at the Program's discretion and will be subject to the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).

Adjudicator Cropley concluded that the affected parties did not have a reasonably held expectation of confidentiality with respect to the contents of information supplied in its proposals since the Municipality had a well–understood formalized policy and practice of disclosing information, subject to specific requests for confidentiality at the time the proposals were submitted and the operation of the *Act*.

I find the circumstances in this case very similar to those in Order M-845 and I am satisfied that the analysis in that case applies here. The notice provision in the RFQ is a clearly worded formalized policy regarding the disclosure of information supplied pursuant to an RFQ. I concur with the appellant that the affected parties had an opportunity at the time they completed and submitted their quotations to identify any information they viewed as confidential. None of the affected parties did so. Having been invited to explicitly identify confidential information and having chosen not to do so, I am not persuaded that the affected parties had an implicit reasonable expectation of confidentiality.

With regard to the City's statement that the model numbers or other identifying information about individual products would not be disclosed despite the notice provision, aside from this self-serving statement, the City has not provided any evidence that this was its practice in regard to information received through an RFQ process. In addition, none of the affected parties have directly addressed such an expectation in their representations. Clearly, if the City had wanted to assume such a stance the time and place to have done so would have been in the notice provision not at the time of making submissions in support of its position in this appeal.

In conclusion, I find that the information at issue does not meet the "in confidence" component under part two of the test under section 10(1).

As indicated above, all three parts of the section 10(1) test must be established in order for the information at issue to qualify for exemption. Having found that part two of the test has not been met I am not required to consider part three of the test. The information at issue should be disclosed to the appellant.

ORDER:

1. I order the City to disclose the records to the appellant in their entirety no later than **December 2, 2004** but not before **November 26, 2004**. This includes the information relating to the fourth affected party, which it had consented to the release of previously.

2. In order to verify compliance with provision 1 of this order, I order the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: October 26, 2004
Bernard Morrow
Adjudicator