



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1787

Appeal MA-030056-1

City of Cornwall



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NATURE OF THE APPEAL:

The City of Cornwall (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of an identified company's "request for proposal" with regard to the operation of a marina.

After notifying the identified company (the affected party), the City issued a decision stating that it was denying access to the requested record under section 10 (third party information) of the *Act*. The decision also stated that the information was provided in strict confidence, and its release would prejudice the competitive position of the affected party.

The requester (now the appellant) appealed the City's decision.

During mediation the City agreed that subsequent clarifications to the request for proposal were within the scope of the request. The City then issued a second decision letter to the appellant, in which it also denied access to this additional responsive information on the basis of section 10. The appellant also appealed this second decision.

Mediation did not resolve this appeal, and it was transferred to the adjudication stage of the process. I sent a Notice of Inquiry to the City and the affected party, initially. Both the City and the affected party provided representations in response to the Notice of Inquiry.

In its representations, the City identified that some of the information contained in the records may contain information which constitutes the personal information of identifiable individuals, and may therefore be exempt under the mandatory exemption in section 14 (invasion of privacy) of the *Act*. Accordingly, that issue was included in this appeal.

In the circumstances, I decided to send a Supplementary Notice of Inquiry to one identified individual. I invited that individual to provide representations regarding whether any portions of the records may contain information which constitutes his personal information and, if so, whether its disclosure would constitute an unjustified invasion of personal privacy. The identified individual did not provide representations in response to the supplementary Notice of Inquiry.

I then sent the Notice of Inquiry, which included both section 10 and section 14 as issues, to the appellant. I included a copy of the representations of the City and the non-confidential portions of the representations of the affected party. I did not receive representations from the appellant.

RECORDS:

The records at issue in this appeal are:

- 1) A "Request for Proposal", which includes a 5-page Proposal (the Request for Proposal) and a 2-page cover letter (the Letter); and
- 2) A subsequent 4-page submission (the Subsequent Submission).

DISCUSSION:

THIRD PARTY INFORMATION

The City takes the position that the records qualify for exemption under section 10 of the *Act*. Its decision identifies that the disclosure of the information would “prejudice the competitive position of the affected party.” In its representations, the City also refers to its concern that disclosing this information would “inadvertently discourage potential future bidders from submitting financial ... information” on Requests for Proposals or tenders. The affected party’s representations refer only to specific portions of the records at issue, which it objects to disclosing on the basis that the disclosure of the information will prejudice the competitive position of the affected party, and result in undue loss to it. The City and the affected party therefore take the view that the relevant portions of the records are exempt from disclosure under sections 10(1)(a), (b) and (c) of the *Act*. Those sections read:

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; or

Section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 10(1) is designed to protect the “informational assets” of businesses or other organizations that provide information to the government (Order PO-1805).

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 information which, while held by government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the City and/or the affected party must satisfy each part of the following three-part test:

the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 10(1) will occur. (Orders 36, P-373, M-29 and M-37).

Part one: type of information

Both the City and the affected party submit that portions of the records contain financial information.

The City refers to page 5 of the Request for Proposal, and states:

[This page] provides financial information given to [the City], as a result of [the affected party's] Request for Proposal to operate [the Marina]. The affected party provided an estimated budget to the [City] implicitly believing that this financial information as to how they propose to run their business, would not be divulged to the general public.

The affected party identifies in its representations the specific information that it considers to be "financial". This includes the estimated budget information included on page 5 of the Request for Proposal, as well as one portion of page 2 of the Request for Proposal dealing with the amount of the management fee payable, and four portions of the Subsequent Submission which deal with management fees, insurance, mooring fees, and staffing information, respectively.

This office has defined the term financial information as follows:

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. (Orders P-47, P-87, P-113, P-228, P-295 and P-394)

I adopt this definition for the purpose of this appeal.

On my review of information referred to by the City and the affected party, I am satisfied that page 5 of the Request for Proposal, as well as the information relating to the management fees, the insurance, and the mooring fees, constitute financial information, since it pertains to the pricing practices, overhead and operating costs of the affected party. (See Order PO-1973).

Furthermore, I am satisfied that the information contained in the Request for Proposal and the Subsequent Submission constitutes commercial information, since it pertains to the proposed and agreed upon terms of a commercial relationship between the affected party and the City involving the provision of services by the affected party to the City (see Order PO-1973, MO-1706).

However, I am not satisfied that the information contained in the Letter qualifies as “financial information” for the purpose of section 10 of the *Act*. I am also of the view that it does not contain any of the other categories of information listed in section 10 of the *Act*. Accordingly, the Letter does not qualify for exemption under section 10.

Part two: supplied in confidence

Introduction

In order to satisfy part 2 of the test, the City and/or the affected party must show that the information was “supplied” to the City “in confidence”, either implicitly or explicitly.

“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. The following passage, from *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen’s Printer, 1980) (the Williams Commission Report) addresses this purpose:

. . . [T]he [proposed] exemption is restricted to information “obtained from a person” in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind.
(pp. 312-315) [emphasis added]

To meet the “supplied” aspect of part 2 of the test, it must first be established that the information in the record was actually supplied to the City, or that its disclosure would permit

the drawing of accurate inferences with respect to the information actually supplied to it (Orders P-203, P-388 and P-393).

Representations

The City states that the information at issue was “given” to the City “as a result of [its] Request for Proposal to operate the Marina”. It also states:

This information, given by all potential bidders, is given with the understanding that it will not be given to [their] competitors.

The affected party states that the information was supplied to the City in implicit confidence. It refers to the City’s invitation to submit proposals, which states that only the names of the respondents shall be made public. The affected party takes the position that the information in the body of the proposal shall therefore remain confidential.

Findings

The records remaining at issue are the 5-page Request for Proposal and the 4-page Subsequent Submission. On their face, both records appear to have been supplied to the City by the affected party.

Previous orders of this office have determined, however, that the contents of contracts involving an institution and an affected party will not normally qualify as having been “supplied” for the purposes of section 10(1) of the *Act* since the information in a contract is typically the product of a negotiation process between two parties (see, for example, Orders P-36, P-204, P-251, P-1545, PO-2018, MO-1705).

In addition, the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was “supplied” within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been “supplied” by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545, MO-1705, MO-1706). The parties were referred to the manner in which previous orders have dealt with the contents of contracts, and advised that these will not normally qualify as having been “supplied”.

Upon my review of the records, it is my view that they constitute a proposal (the Request for Proposal) and a clarification of the proposal (the Subsequent Submission) and therefore form the terms of an agreement put forward by the affected party, who was the successful bidder in the process. These terms could be accepted, rejected or further negotiated between the parties. Indeed, the Subsequent Submission clarifies some of the terms contained in the Request for Proposal. The nature and detail contained in these documents support the view that they reflect the terms of the agreement entered into between the City and the affected party.

As identified by Adjudicator Morrow in Order MO-1706, in general, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers, or the result of an immediate acceptance of the terms offered in a proposal. As he stated, except in unusual circumstances (for example, where a contractual term incorporates a company's "secret formula" for manufacturing a product, amounting to a trade secret), agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to have been "supplied".

In this appeal, I accept that as a practical matter, the affected party physically supplied the Request for Proposal and the Subsequent Submission to the City. However, when the proposal (with the Subsequent Submission) was agreed to by the City, and reflected the agreement between the parties, it changed from constituting a mere proposal to a document (with clarifications) reflecting the terms of the agreement between the City and the affected party.

Accordingly, I find that, based on the evidence before me, with one exception, the information in the remaining records comprises the terms of the agreement between the City and the affected party, and does not meet the "supplied" test in section 10(1). Therefore, part 2 of the 3-part test has not been met.

The one exception to this is page 5 of the Request for Proposal, which contains the affected party's estimated budget. Although provided as an attachment to the Request for Proposal, in my view this document does not contain the "terms" of the agreement between the City and the affected party. It contains "estimated" budget information, and does not comprise an "essential term" of the agreement between the City and the affected party (See Order MO-1706). Accordingly, I am satisfied that the information on page 5 was supplied to the City by the affected party for the purpose of section 10 of the *Act*.

Furthermore, based on the representations of both the City and the affected party set out above, I am satisfied that the information on page 5 was supplied to the City by the affected party "in confidence".

In summary, I have found that the Request for Proposal (with the exception of page 5) and the Subsequent Submission, contain information which was not supplied to the City for the purpose of section 10 of the *Act*. As all three parts of the test must be met in order for section 10(1) to apply, I find that these records do not qualify for exemption under section 10(1).

Part 3: Harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The affected party states that the information on page 5 of the Request for Proposal contains profit and loss information relating to the affected party, and then identifies a specific example of

the confidential information which would be disclosed if this information was released to competitors. The affected party states that the disclosure of this information will prejudice its competitive position, as it will enable others to use the information to the detriment of the affected party.

I accept the affected party's position that disclosure of the information on page 5 could lead to the identified harms. On my review of the representations of the parties and the material before me, I am satisfied that the parties have established that disclosure of the information on Page 5 of the Request for Proposal could reasonably be expected to prejudice significantly the competitive position of the affected party. I accept that the details of cost and revenue projections found on this page could affect the competitive position of the affected party in the future.

Accordingly, I uphold the City's decision to deny access to page 5 of the Request for Proposal on the basis of the exemption found in section 10(1)(a) of the *Act*.

In summary, I have found that page 5 of the Request for Proposal qualifies for exemption under section 10 of the *Act*, but that the remaining information in the records does not qualify for exemption under that section.

PERSONAL INFORMATION

In the course of this appeal, the City identified that certain portions of the records contain the personal information of identifiable individuals. One of the identified individuals was contacted and invited to provide representations regarding whether the information contained his personal information and, if so, whether or not its disclosure would constitute an unjustified invasion of personal privacy. The identified individual did not provide representations on this issue.

"Personal information", as defined in section 2(1) of the *Act* means recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Having reviewed the records, I find that portions of the records contain the personal information of the identified individual and three other individuals.

The City has taken the position that certain information contained on page 4 of the Subsequent Submission is the personal information of the identified individual. I do not agree. In my view, this information relates to the corporate affected party, and is not "personal information" for the purpose of section 2 of the *Act*.

However, I find that page 4 of the Request for Proposal contains the personal information of three identified individuals, including those individuals' names where they appear with other personal information relating to those individuals. I am also satisfied that the information contained on page 2 of the Subsequent Submission under the heading "Qualifications", as well as the information in the final paragraph of page 1 of the Letter, contains the identified individual's

employment and educational history, and qualifies as his personal information for the purpose of section 2 of the *Act*.

PERSONAL INFORMATION/INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception which could apply to the circumstances of this appeal is section 14(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy. Section 14(2) lists some criteria for the City to consider in making this determination; and section 14(3) identifies certain types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.)).

As I noted above, the appellant did not submit representations in this appeal. In my view, I have not been provided with sufficient information for me to conclude that any of the factors which favour disclosure of the personal information contained in the records apply in the circumstances of this appeal. Therefore, in the absence of any factors favouring disclosure, I find that the mandatory exemption provided by section 14(1) of the *Act* applies to the personal information contained in the records. This information is, accordingly, exempt from disclosure.

ORDER:

1. I uphold the City's decision to deny access to page 5 of the Request for Proposal on the basis of section 10(1)(a) of the *Act*.
2. I find that the information contained on page 2 of the Subsequent Submission under the heading "Qualifications", all of page 4 of the Request for Proposal, and the final paragraph of page 1 of the Letter, qualify for exemption on the basis of section 14(1) of the *Act*.
3. I order the City to disclose to the appellant the remaining portions of the records, not referred to in provisions 1 or 2, by **June 4, 2004** but not before **May 31, 2004**.

4. In order to verify compliance with the terms of Provision 3, I reserve the right to require the City to provide me with a copy of the records that are disclosed to the appellant, upon request.

Original signed by: _____
Frank DeVries
Adjudicator

_____ April 29, 2004