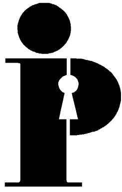

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

# ORDER MO-1919

## Appeal MA-040166-1

## City of Toronto

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## NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified Request for Proposal (RFP). Specifically, the requester sought access to the following:

1. List of all prices submitted for this proposal
2. Departmental evaluation scoring and worksheets for all proponents
3. Name of winning proponent
4. Fee at which winning proponent was awarded

The City denied access in full to the list of all prices submitted, to the individual evaluation sheets and to information related to the winning proponent, pursuant to sections 11(c), (d) and (e) of the *Act*.

However, the City granted access in full to a copy of the evaluation criteria form used by the review team and advised that the range of prices in response to the RFP was from a low of $158,370.07 to a high of $479,836.00.

The requester, now the appellant, appealed the City's decision.

During mediation, it was determined that the appellant's company had submitted a proposal in response to the specified RFP.

In light of this information, the City issued a supplementary decision letter, granting access in full to a copy of the appellant's evaluation form related to his submission and disclosing the name of the winning proponent. It also informed the appellant that access was denied to all other information related to the RFP pursuant to the mandatory exemption at section 10 and continued to rely on sections 11(c), (d), and (e) of the *Act*.

No further mediation was possible and the file was moved to adjudication.

A Notice of Inquiry, summarizing the facts and issues on appeal, was initially sent to the City and 21 organizations whose interests may be affected by the outcome of this appeal (affected parties). I received a response from the City and six affected parties. One of the affected parties consented to the disclosure of the "departmental scoring and worksheet" relating to her organization.

A Notice of Inquiry was then sent to the appellant along with a summary of the representations received from the affected parties and a complete copy of the representations submitted by the City.

The appellant did not make representations.

During the adjudication process on December 20, 2004, the City issued a revised decision letter informing the appellant of its decision to grant partial access to the records pertaining to the RFP and indicating the date after which the records will be released, providing no affected parties

appealed its decision. The City concurrently informed the affected parties (as described above) of its intention to provide the following records to the appellant:

1. The final total price
2. The identity of the winning bidder
3. The total price of each bidder
4. The total score of each bidder

The City advised that details regarding unit pricing, unit scoring, and specific details of the affected parties' submissions would not be disclosed. One of the affected parties appealed the City's decision, and Appeal MA-050037-1 was opened.

**Appeal MA-050037-1**

The affected party appellant appealed the City's decision to grant partial access to the records as described in its December 20, 2004 decision letter.

During the course of mediation, the affected party appellant agreed to disclosure of the record to the requester (appellant in appeal MA-040166-1) and provided written consent to the mediator. The affected party appellant clarified that he did not authorize the City to disclose the entirety of his proposal to the requester, but agreed to the disclosure of the records identified in the City's December 20, 2004 decision letter.

The mediator forwarded the affected party appellant's consent to me and the file in Appeal MA-050037-1 was closed.

**Appeal MA-040166-1**

This appeal relates to the remaining undisclosed information.

## RECORDS:

There are two groups of records at issue. In its representations the City agreed to disclose the following records from the Group I - Committee Notes and Recommendations:

- Pages 2, 4, 10 and 11 in their entirety
- Pages 3 and 6 in part

In the records described as Group II – Evaluation Sheets, the City agreed to disclose each worksheet absent any notations and numerical marks.

As stated one of the affected parties consented to the disclosure of the evaluation worksheets relating to her organization. As a result, pages 43 – 45 of the Group II records should be disclosed.

In its revised decision letter, the City agreed to disclose records that contained: the final total price, the identity of the winning bidder, the total price of each bidder and the total score of each bidder. This would include the following information from the Group I records:

- The total price on page 3
- The fees on page 6
- The total score of each affected party on page 8
- The fees on page 9

**Therefore, the records remaining at issue include the following:**

Group I Records

- Page 1 – in full (non-responsive)
- Page 3 – Fee Breakdown (sections 10 and 11)
- Page 5 – in full (sections 11(c) and (d))
- Page 6 – information under "Qualified/Disqualified" and "Ranking Fees" Headings (sections 11(c) and (d))
- Page 7 – in full (non-responsive)
- Page 8 – Breakdown of Scoring, information under "Comments" and information under "Disqualified Proponents" (sections 11(c) and (d))
- Page 9 – information under "Qualified/Disqualified" and "Ranking Fees" Headings (sections 11(c) and (d))

Group II Records

- Pages 1 – 42 and 49 – 51 – notations and numerical marks (sections 11(c) and (d))

## PRELIMINARY MATTER:

### NON-RESPONSIVE RECORDS

The City submits that pages 1 and 7 of the Group I Records are non-responsive to the appellant's request. The City states:

> The appellant requested the following information in relation to this RFP:
>
> List of all prices submitted for the proposal
> Department evaluation scoring and worksheets for all proponents
> Name of winning proponent
> Fee at which the winning proponent was awarded

> The City submits that page 1 of Group I on its face does not respond to the appellant's request. It contains none of the information requested by the appellant.
>
> The City submits that page 7 of Group I records is no longer relevant as the appellant has been provided with the name of the successful proponent. The information contained in page 7 of the Group I records does not respond to any of the specific details requested by the appellant in his request, set out above, and is, therefore, no longer responsive.

In Order P-880, former Adjudicator Anita Fineberg defined "responsive" as meaning "reasonably related to the request." I agree with this interpretation.

Page 1 of the Group I records is an administrative document that relates to the timing of the evaluation process and is not reasonably related to the information requested by the appellant. I agree with the City that the information on page 1 does not reasonably relate to the appellant's request and is non-responsive.

Page 7 of the Group I records is a letter between two City employees detailing the winning bidder of the RFP and the "quoted fee". The information in this letter is related to the appellant's request for the name of the winning bidder and the fee at which the winning proponent was awarded. As such, page 7 is responsive to the appellant's request. However, as the City has agreed to release the name of winning bidder and the total price of each bidder, I find that the information on page 7 is no longer at issue. As such, it should be disclosed to the appellant.

## DISCUSSION:

### THIRD PARTY INFORMATION

The City submits that sections 10(1)(a) and (c) apply to exempt the dollar amounts in the fee breakdown on page 3 of the Group I records. The affected party whose information is at issue on page 3 of the Group I records opposes the release of its professional hourly rates, which it feels would prejudice its competitive position.

Sections 10(1)(a) and (c) read as follows:

> 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;

(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 City and/or the affected parties 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), (c) and/or (d) of section 10(1) will occur.

**Part 1: type of information**

The City submits that the page 3 of the record contains commercial and financial information. This office has defined commercial and financial information in past orders as:

> *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 [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 agree with the City. The information on page 3 of the records includes the specific price amounts for the breakdown of fees and is financial and commercial information.

**Part 2: supplied in confidence**

In order to satisfy part two of the test, the affected party must have supplied information to the City in confidence, either implicitly or explicitly.

**Supplied**

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].

The contents 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].

The City submits:

> The financial/commercial information at issue, specifically the detailed break down of fees submitted by the successful proponent, found on Page 3, is information that was supplied to the City in response to the RFP. Although the information on page 3 is not that directly supplied in response to the RFP, (i.e. it appears on a form created by the City) the City submits that disclosure would permit accurate inferences to be drawn about information actually supplied, thereby it qualifies as information "supplied" to the City.

Page 3 of the Group I Records is a purchase order. I agree with the City's representations. The break down of fee information on page 3 of the records sets out the affected party's costs in providing the service required under the RFP. Disclosure of this information would permit an accurate inference to be drawn as to the information supplied by the affected party to the City in regard to its particular costs to provide the services in response to the RFP.

**In confidence**

In order to satisfy the "in confidence" component of part two, 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]

The City submits that the information was supplied to the City with the reasonably held expectation that it would be treated confidentially. In support of this, the City quotes from the confidentiality condition in its RFP document which states, in part:

> Confidentiality of records and information relating to this work must be maintained at all times.
>
> …
>
> All correspondence, documentation and information provided to staff of the City by any Proponent in connection with, or arising out of this RFP, and the submission of any proposal will become the property of the City, and as such, subject to MFIPPA, and may be released pursuant to the Act. The Proponent's name, at a minimum, shall be made public on request.
>
> Because of MFIPPA, Proponents are advised to identify in their proposals material any scientific, technical, commercial, proprietary or similar confidential information, the disclosure of which could cause them injury.
>
> Any information in the Proponent's submissions that is not specifically identified as confidential will be treated as public information.

The City goes on to state the following:

> …confidentiality was an implicit and explicit part of the process for both the City and those companies submitting quotations. As described above, the RFP document states that proponents may claim confidentiality for information

> supplied and sets out that there may be restrictions on the confidentiality, such as disclosure of the total bid.
>
> The City submits that the more detailed information, about specific aspects of the proposal, was supplied in confidence to the City by the successful proponent.
>
> The City has confirmed that none of the proponents specifically requested that the information at issue be treated as confidential as suggested by the RFP. However, the City submits that non-disclosure of this kind of information is such a long-standing practice that the confidentiality is implicitly understood and anticipated, regardless of the wording of the RFP.
>
> Part 2 of the established test for the application of section 10 states that confidentiality may be explicit or implicit. The City submits that the presence of "conditional confidentiality" as set out in the RFP does not rule out the possibility of the existence of an implied understanding of confidentiality based on traditional practice. The City further submits that past practice, particularly if the practice has been followed even though an RFP contained a clause similar or identical to the wording of this RFP, is an objective basis for implied confidentiality.

The affected party (successful proponent) did not make representations on this issue.

I accept the City's submission that the City's past practices dealing with similar information in an RFP process may be indicative of an "implied confidentiality" by an affected party. However, this is not the case in the current appeal.

The City has confirmed that none of the proponents specifically requested that the information at issue be treated as confidential despite the specific reference in confidentiality condition in the RFP. The affected party (successful proponent) did not confirm that it had an implicit expectation of confidentiality based on the City's past practices, nor did it provide representations on the "supplied in confidence" issue . Based on these factors I find that the affected party (successful proponent) did not have an expectation of confidentiality, either implicit or explicit, when it supplied the information at issue to the City.

Accordingly, part two of test for the application of the section 10(1) exemption has not been met.

While all three parts of the test must be satisfied for the section 10(1) exemption to apply, I have decided to deal with the "harms" component of the test as well.

**Part 3: harms**

**General principles**

To meet this part of the test, the City and/or the affected 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 failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The City submits that disclosure of the information contained on page 3 could reasonably be expected to lead to one or more of the harms set out in sections 10(1)(a) and/or (c) of the *Act*.

**Section 10(1)(a): prejudice to competitive position**

In support of its position that section 10(1)(a) applies, the City states:

> The individual cost of each aspect of the project is the equivalent of unit pricing. Disclosure of the successful proponent's unit price for each aspect of the project could reasonably be expected to prejudice the successful proponent's competitive position. Once a competitor knows the cost that has been proposed by the proponents for each aspect of the work to be done, particularly the successful proponent's cost, he/she has the ability to submit a bid that could undercut the current successful proponent in future RFP's. In addition, the requester/appellant would gain an unfair advantage by virtue of knowing the financial details of each aspect of the project. Knowing how the successful proponent allocated resources within the project may disclose information which has a negative impact on the successful proponent's competitive position in future RFP's.
>
> In addition, if the cost details of individual aspects of the project are disclosed, the successful proponent may feel pressure from other purchasing organizations or other current customers to supply similar work at a similar price. This would also have a negative impact on its competitive position.

As stated above, the affected party (successful proponent) submitted that disclosure of its professional hourly rates would prejudice its competitive position.

From my review of the items in the fee breakdown on page 3 of the Group I records, none of the information in the items relate to professional hourly rates. In addition, it is unclear to me, as the City submits how the individual cost of each aspect is the equivalent of unit pricing. From my

review of page 3 of the record, it appears that the affected party (successful proponent) is being hired to provide a specific service to the City. The description of each of the "aspects" is generalized and each individual cost appears to be an aggregate of a number of costs. For instance, item 7 lists in parenthesis a number of items which are included in the cost listed for that particular item. From the breakdown of fees I am unable to determine how the individual cost of each aspect, combined with the total bid cost, could be used to calculate a "unit price" or a "professional hourly rate".

Past decisions of this office have found that section 10(1) applies to exempt unit pricing information from disclosure as such information could reasonably be expected to prejudice the competitive position of the business that supplied the information. A reasonable expectation of prejudice to competitive position has been found in cases where information related to pricing, material variations and bid breakdowns was contained in the records (see Orders P-166, P-610 and M-240). Past orders also upheld the application of section 10(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.

The City's submissions identify the potential harm of underbidding by the affected party's competitors in connection with unit pricing. In addition, the City submits that the affected party's current customers may also use the information on page 3 to the prejudice of the affected party. The affected party submits that disclosure of its professional hourly rates could reasonably be expected to prejudice its competitive position. However, the affected party does not provide representations on how the breakdown of fees on page 3 relates to its professional hourly rates nor how disclosure of this information could be expected to prejudice its competitive position or interfere significantly with its contractual or other negotiations.

In the present case, I do not find that the information on page 3 is unit pricing or a description of the affected party's professional hourly rates. Moreover, I have not been provided with the "detailed and convincing" evidence that disclosure of the information on page 3 could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party.

Accordingly, I find that section 10(1)(a) does not apply to the information on page 3.

**Section 10(1)(c): undue loss or gain**

In support of its position that section 10(1)(c) applies, the City states:

> …disclosure of the record could result in undue loss to the applicant and undue gain to other groups or agencies. Disclosure of the requested information could result in loss of future contracts for the successful proponents and undue gain to the requester/appellant for the reasons outlined under (a) above.

The affected party (successful proponent) does not provide representations on this issue.

As stated above, the City's representations in regard to the possible harms under sections 10(1)(a) and (c) relate to the disclosure of the affected party's "unit pricing". As I have found that the information on page 3 is not unit pricing nor does it include the affected party's professional hourly rate, I am unable to find that disclosure of the information on page 3 could reasonably be expected to result in undue loss to the affected party.

As the City and the affected party have not provided the "detailed and convincing" evidence necessary for me to find that disclosure of the fee breakdown on page 3 could reasonably be expected to result in undue loss to the affected party or undue gain to other organizations, I find that section 10(1)(c) does not apply.

## ECONOMIC AND OTHER INTERESTS

The City originally relied on sections 11(c), (d) and (e) to exempt the information at issue. The City did not provide representations on the application of section 11(e), thus the discussion below relates to sections 11(c) and (d) and their possible application to the following records:

### Group I Records

Page 3 – all dollar amounts in items 1 – 7
Page 5 - in its entirety
Page 6 – all information set out on the headings "Qualified/Disqualified" and "Ranking Fees"
Page 8 – all numerical notations; under Comments "and…applicable"
Page 9 – duplicate of page 6

### Group II Records

Pages 1 – 45 – numerical marks and notations
Pages 49 – 51 – numerical marks and notations.

Sections 11(c) and (d) read as follows.

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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 purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

To establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests.

The City submits the following in support of its position that sections 11(c) and (d) should apply to the information.

> It is in the City's financial interest to protect the details of proposal evaluations, such as numerical scores, marks, comments or notations, because disclosure would telegraph what the City is looking for in a successful bid.
>
> It is in the best interest of the City to have the information provided to the City by the proponents reflect the proponents' own assessment of what is involved in each aspect of the project. Disclosing evaluative information such as scoring or comments would prejudice the City's ability to receive this information. The same applies to the specific financial details of the successful proposal. Disclosing the resources that have been directed at each aspect of the winning proposal would give a future proponent an unfair advantage and thereby prejudice the City's economic and financial interests because the proponent may not have done the detailed analysis required to make a knowledgeable and realistic proposal with respect to its own resources and methodology to be employed by it.
>
> Section 9 of the RFP headed EVALUATION/SELECTION CRITERIA AND PROCESS states under section 9.1 – Proposal Evaluation/Selection Criteria:

> Proposal evaluation results are the property of the City. The City intends not to disclose evaluation results, under any circumstances, either before, during, or after the RFP process. An award of an agreement, if any, shall be based on the evaluation results. By responding to this RFP, Proponents agree to accept the recommendations of the evaluation Team as final and binding.

> The City submits that it includes this paragraph in the RFP proposal for the reasons outlined above. The City submits that as one of the proponents in this RFP, the requester/appellant has accepted this term of the RFP.

> Therefore, the City submits that the disclosure of evaluative information contained in the records as well as the financial/commercial information reflected by the detailed cost of each aspect of the project would prejudice the economic interests and the competitive position of the City and be injurious to its financial interests.

I do not accept the City's submissions regarding the harms that would arise should the information at issue be disclosed. The majority of the records that the City claims are exempt under sections 11(c) and (d) all relate to the evaluation and scoring of the various proposals submitted by the affected parties in response to the RFP. Page 3 as stated above contains a fee breakdown. Pages 5, 6, 8 and 9 of the Group I records all relate to scoring, ranking or comments about the various submissions of the affected parties. The City's submission that disclosure of this information would telegraph to potential bidders what the City is looking for in a successful proposal and thus could reasonably be expected to prejudice its economic interests or be injurious to its financial interests is unsupported. In fact, I am unconvinced that the City would not receive better proposals once organizations are aware of the way in which the City evaluates a proposal. Furthermore, the City's submission that disclosure of the information on page 3 of the Group I records would result in future RFP proponents not conducting the detailed analysis necessary to make a knowledgeable and realistic proposal is speculative at best. The City has not provided "detailed and convincing" evidence that disclosure of these pages of the Group I records could reasonably be expected to either prejudice its economic interests or competitive position, or be injurious to its financial interests.

For the same reasons, I find that the numerical marks and notations on pages 1-45 and 49-51 of the Group II records also does not qualify for exemption under sections 11(c) and (d). These evaluation worksheets all relate to the affected parties and the City has not provided "detailed and convincing" evidence that the disclosure of this information could reasonably be expected to prejudice its economic interests or competitive position.

Regarding the City's argument that a term of the RFP was that the evaluations belonged to the City once a proposal is submitted, and the fact that the appellant accepted this term, bears no weight. The fact that the proposal evaluations are the "property" of the City is not significant to a finding that there would be harm under sections 11(c) and (d).

Consequently, I find that sections 11(c) and (d) do not apply to exempt pages 3, 5, 6, 8 and 9 of the Group I Records and pages 1 - 42 and 49-51 of the Group II Records.

## ORDER:

1. I uphold the City's decision to deny access to page 1 of the Group I records on the basis that it is not responsive to the appellant's request.

2. I order the City to provide the appellant with a copy of pages 2, 3, 4, 5, 6, 7, 8, 9 10 and 11 of the Group I records, and pages 1 – 45 and 49 – 51 of the Group II records by **May 24, 2005** but not before **May 16, 2005**.

2. In order to verify compliance with provision 2 above, I reserve the right to require the City to provide me with a copy of the material sent to the appellant.

Original Signed By: April 18, 2005
Stephanie Haly
Adjudicator