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

ORDER MO-2052

Appeal MA-040037-1

Regional Municipality of Durham

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NATURE OF THE APPEAL:

The Regional Municipality of Durham (the Region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a contract between the Region and a named company (the affected party) relating to the installation and supply of water meters.

The Region identified records that were responsive to the request and granted partial access. The Region issued a decision denying access to the records on the basis of the exemption found at section 10 (third party information) of the *Act*. The Region did not provide further details in its decision.

The requester, now the appellant, appealed this decision.

During mediation of the appeal, the affected party provided consent to disclose Appendices 3 and 4 of a "VIP Proposal" document and to a two-page "Standing Agreement', with the exception of the maximum contract value and the pricing information. The Region issued a supplementary decision letter and disclosed this information, which is, therefore, no longer an issue in this appeal.

Further mediation was not possible and the appeal was moved to adjudication.

This office issued a Notice of Inquiry to the Region and the affected party, initially. Both the Region and the affected party provided representations in response. The complete representations of the Region and the affected party were then sent to the appellant along with a Notice of Inquiry. The appellant chose not to submit representations. The file was then re-assigned to me to continue the inquiry.

During my inquiry, I decided that I required additional clarification regarding the status of the "VIP Proposal". I sent Supplementary Notices of Inquiry to the Region and the affected party and received reply and sur-reply representations from both.

RECORDS:

The records at issue in this appeal are:

- an eighty-six page "VIP Proposal" submitted to the Region by the affected party (excluding Appendix 3 and 4), and

- the undisclosed portions of the two-page Standing Agreement.

DISCUSSION:

Third Party Information

As noted previously, the Region did not make reference to the specific subsection of section 10 that it relied on in its decision letter to the appellant. In the Notice of Inquiry, this office invited

representations from both the Region and the affected party on sections 10(1)(a), (b), (c) and (d). The Region, in its representations, again did not make specific reference to the sections of the *Act* that it relied on. However, based on my review of its representations, it appears as though the Region relied on sections 10(1)(a), (b) and (c). The affected party, in its representations, relied expressly on sections 10(1)(a), (b) and (c).

Sections 10(1)(a)(b) and (c) 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,
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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;
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> (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;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency…

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, and MO-1706].

For section 10(1) to apply, the institution and/or the affected 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), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The parties have taken the position that the records at issue contain trade secrets, commercial and financial information.

These types of information listed in section 10(1) have been discussed and defined in prior orders as follows:

> *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
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
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> *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].
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> *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.

I have carefully reviewed the records. The records, as noted, consist of a "VIP Proposal" and the withheld portions of a Standing Agreement. The VIP Proposal is a document that contains a variety of information prepared by the affected party for the Region. During my inquiry, I obtained clarification from the Region and the affected party regarding the contractual status of the VIP Proposal. Having reviewed their representations, I am satisfied that the VIP Proposal was in fact accepted as part of the contract, and I will therefore treat both records together as the contract entered into between the Region and the affected party.

I am satisfied that certain portions of the VIP Proposal contain commercial information within the meaning of section 10(1) of the *Act*. These portions contain information that pertains to the proposed terms of a commercial relationship between the parties involving the sale of

merchandise and services by the affected party to the Region [Order PO-1973]. I am also satisfied that the withheld portions of the Standing Agreement are commercial and financial information.

Because of my findings under part 3 of the section 10(1) test set out below, it is not necessary for me to identify specifically which portions of the records do not satisfy part 1 of the test.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the affected party must have supplied the information to the Region in confidence, either implicitly or explicitly.

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, PO- 2371, MO-1706]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

I have carefully reviewed and considered the parties' representations. The parties rely primarily on the following:

- The Region has always treated the information as confidential, and that long-standing practice should be continued.

- The records were not negotiated, they "are the actual terms and conditions supplied" by the affected party. Alternatively, if they were to be considered negotiated, the records might still be considered supplied if immutable or not susceptible to change.

- Disclosure would permit an inference of non-negotiated information placed "wholesale in to the Standing Agreement".

- The information supplied to the Region was done so on the basis that it would be kept confidential.

- The information was supplied directly to the Region and was not "made in the context of an open and transparent bidding process where the information would be made available to other bidders.

The Region also relied on Order P-807 to support its position that the records were supplied in confidence, stating that the facts before me are similar and the "same principles outlined in this order should be applied to this appeal".

I invited the parties to comment on the findings in two more recent decisions. In Order MO-1706, Adjudicator Bernard Morrow found that, except in unusual circumstances, agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be supplied. Adjudicator Steven Faughnan made a similar finding in Order PO-2371.

The Region, in reply representations, repeated its position that the information was "supplied". The Region focused on excerpts from Orders MO-1706 and PO-2371 which, isolated and without the accompanying commentary of the Adjudicators, appear to support the Region's position. However, the same quotes produce a different interpretation when properly considered in the context of the orders.

The affected party previously submitted that it found support for its position in Orders PO-1794, PO-1791, MO-1706, P-408, M-288 and M-511. The affected party did not address the "supplied" part of the test. Rather, its representations focused on the "in confidence" part of the test. The affected party did not respond to my invitation to comment on the findings in Orders MO-1706 and PO-2371, and how they relate to the issues in this appeal.

In Order PO-2453, Adjudicator Corban provides a detailed synopsis of recent orders of this office on the "supplied" issue, including MO-1706 and PO-2371, in the context of information in a contract:

> Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.
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> In Order PO-2435, Assistant Commissioner Brian Beamish adopted the view articulated in Orders MO-1706, PO-2371 and PO-2384 that except in unusual

> circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be "supplied".
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> …
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> Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.
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> Additionally, having reviewed the information at issue, I do not find, nor have I been provided with any evidence to show, that any of the information at issue is "immutable" or that disclosure of the information, including the pricing information, would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied to the Ministry by the affected party. I have also not been provided with any evidence to show that the pricing information reflects the affected party's underlying costs. In fact in my view, the information contained in the record itself appears to point to the opposite conclusion that the amounts charged by the affected party are for the provision of particular services.

I adopt this analysis for the purposes of the appeal before me. The portions of the VIP Proposal which contain the type of information contemplated under section 10(1) of the *Act*, along with the withheld portions of the Standing Agreement, are not, on the face of the record, the type of information that falls into the "inferred disclosure" or "immutability exceptions".

In summary, the information at issue does not meet the "supplied" portion of part 2 of the test. Accordingly, it is not necessary for me to comment on the "in confidence" portion.

As all parts of the test must be met, the fact that part 2 is not met is sufficient for me to find that section 10(1) does not apply. However, for the sake of completeness, I will consider whether any of the information at issue in the Agreement meets the part 3 "harms" test, although it is not necessary for me to do so.

Part 3: harms

To meet part 3 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 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].

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

The representations provided by the affected party state generally that its competitive position would be harmed because disclosure would give competitors the "ability to replicate … terms and conditions and pricing structure" and would allow competitors to duplicate its services without incurring the costs of developing the services. This would permit a competitor to underbid and undercut the affected party's prices. No particulars as to how this could reasonably be expected to take place are provided.

Based on these representations and my review of the record, I am not persuaded that disclosing the records could reasonably be expected to significantly prejudice the competitive position of the affected party or to interfere significantly with any future contractual or other negotiations the affected party may be involved in. In my view, the evidence and argument put forward by the affected party is speculative and not supported by my review of the content of the records. I do not have the necessary detailed and convincing evidence required to support the harms component of section 10(1)(a).

Section 10(1)(b): similar information no longer supplied

The Region submits that the affected party would be "unwilling to provide this type of service" to the Region if the records are disclosed. The Region submits further that "other potential suppliers of similar customized products and services would be unwilling to provide these products and services because of the concern that the information would not be kept confidential". The affected party states that disclosure of the records would "clearly deter the competitive bidding process". With respect, this unsubstantiated statement is confusing because disclosure of the records, in my view, would likely contribute to a **competitive** bidding process. The affected party echoes the representations of the Region that it, and other companies, is "unlikely" to supply "similar information to the Region or other municipalities in the future". Again, however, these submissions are broad, generalized statements and are not supported by the necessary detailed and convincing evidence required to support the harms component of section 10(1)(b).

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

The Region's representations focus on the damage that would occur to it and to the taxpayers if the records were disclosed. The Region submits that a loss of the VIP Program could result in a loss of $90,000 annually. The Region also submits that disclosure would result in an unwillingness of the affected party and other "potential suppliers of similar information" to provide service. In this appeal, no reasonable expectation of this harm is apparent from a review of the record, and I have been provided with only very general submissions without any detailed explanation.

In my opinion, the parties have provided scant detail of how disclosure of the VIP Proposal could reasonably be expected to result in the harms contemplated in section 10(1)(a), (b) or (c). The affected party's submissions read as speculative conclusions that fail to provide persuasive evidence of how these potential harms could reasonably be expected to occur in the circumstances.

The Region has provided representations that forecast harms to it, however, these again lack detail and particulars of how these harms could reasonably be expected to occur.

Assistant Commissioner Brian Beamish commented on the need for "detailed and convincing" evidence and the burden of proof which falls on the parties in Order PO-2435:

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

The Assistant Commissioner goes on to state that the "need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1)." In my opinion, this principle is equally applicable to this appeal.

In summary, in the circumstances of this appeal, I have not been provided with "detailed and convincing" evidence to establish a "reasonable expectation" of the identified harms in sections 10(1)(a)(b) and (c). Having reviewed the records, I am not persuaded that disclosure could reasonably be expected to result in these harms.

To conclude, I have found that parts 2 and 3 of the section 10(1) test have not been met. As all three parts of the test must be established, I find that the records at issue in this appeal do not qualify for exemption under section 10(1). As no other exemption has been claimed, I will order that the records be disclosed to the appellant.

ORDER:

1. I order the Region to disclose the responsive records, in their entirety, to the appellant no later than **June 8, 2006** but not before **June 2, 2006.**

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Region to provide me with a copy of the records disclosed to the requester pursuant to Provision 1.

Original signed by: May 3, 2006
Beverley Caddigan
Adjudicator