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

ORDER MO-2403

Appeal MA08-132

Toronto Transit Commission

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NATURE OF THE APPEAL:

The Toronto Transit Commission (the TTC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to the request for proposals (RFP) for its website redevelopment. The requester later modified the request to include the TTC's analysis of the proposals, and clarified that he was interested in the summary of the bid totals, but not the financial portions of the bids.

After identifying the records responsive to the request, the TTC provided notice to the companies that had submitted proposals (the affected parties) pursuant to section 21 of the *Act*. Section 21 requires notification of affected parties prior to disclosure of information that might be subject to the mandatory exemption for confidential third party business information in section 10(1). In this way, affected parties are permitted an opportunity to provide submissions as to whether the requested records should be disclosed.

The successful bidder was among those companies notified by the TTC about the proposed disclosure of information relating to its proposal, and provided submissions objecting to disclosure. Following consideration of the affected party's submissions, the TTC issued an access decision. In the decision letter, the TTC clarified that the responsive records included the successful bidder's website redevelopment proposal (Record 1), the proposal analysis (Record 2) and pricing schedules (Record 3). The TTC stated that it was granting partial access to all three records, but withholding portions of these records under sections 10(1) and 14 (personal privacy) of the *Act*.

The affected party, now known as the appellant, appealed the TTC's decision to grant access to the identified pricing information, and this office opened a third party appeal to address the issues.

Only one of the other 16 affected parties notified by the TTC objected to disclosure of the information relating to their bid proposal. This other affected party's third-party appeal of the TTC's decision was addressed through Appeal MA08-127, which was eventually resolved.

During mediation, the parties confirmed that the personal privacy exemption was no longer at issue because the severances made under section 14 applied only to Records 1 and 2, which were not subject to an appeal. In addition, the requester did not appeal the TTC's decision to withhold the unit pricing information contained within seven pricing schedule components in Record 3. Accordingly, only the pricing total for each of those seven components remains at issue. The mediator referred the parties to a number of past orders of this office related to the section 10(1) exemption and pricing information.

It was not possible to resolve this appeal through mediation, and it was transferred to the adjudication stage, where it was assigned to me to conduct an inquiry. I sent a Notice of Inquiry to the appellant, outlining the issues and seeking representations on the possible application of section 10(1) of the *Act* to the undisclosed information in Record 3.

In the Notice, I directed the appellant's attention to several specific matters, including the presence of a term in the proposal call document regarding the application of the *Act*, and past orders of this office. Upon receipt of submissions from the appellant, I concluded that it would

not be necessary to seek representations from the TTC or the original requester.

In the Notice of Inquiry sent to the appellant, I also explained that this office's usual approach with respect to the sharing of representations is to share as much of the content as possible, subject to the confidentiality criteria, in order to provide for full argument of the issues. The confidentiality criteria were outlined in the document provided to the appellant called *IPC Practice Direction Number 7*. The appellant subsequently asserted a claim of complete confidentiality over its representations as regards the original requester, but not the TTC. The appellant submits that the injury (to its relations with this office) caused by the disclosure of its representations would outweigh the benefit gained for the correct disposal of the appeal. As I did not seek representations from the TTC or the original requester, it was not necessary to resolve the sharing issue earlier in the inquiry. Accordingly, I will not refer to the appellant's representations in any detail although I have reviewed them in their entirety.

RECORD:

The information at issue is the pricing total for seven categories in the pricing schedule (Record 3).

DISCUSSION:

THIRD PARTY INFORMATION

Although the appellant did not specify which particular exemptions under section 10(1) it is relying on in opposing disclosure, it appears from the representations provided that the appellant is arguing that sections 10(1) (a) and (c) apply to the information.

The relevant parts of section 10(1) states:

> 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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 appellant must satisfy each part of the following three-part test:

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

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The type of information listed in section 10(1) that appears to be relevant in this appeal has been discussed in prior orders in the following manner:

> *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].

I adopt this definition for the purpose of this appeal.

On my review of the record, I find that it is directly connected to the "buying, selling or exchange of goods or services," specifically the appellant's provision of web redevelopment services to the TTC. This includes the pricing total for each of the components of the services to be provided by the appellant to the TTC. Accordingly, I find that this information qualifies as the "commercial information" of the appellant for the purposes of part 1 of the test in section 10(1).

Having determined that the records contain commercial information, I find that part 1 of the test under section 10(1) of the *Act* has been met. I will now go on to consider whether the appellant's commercial information was "supplied in confidence" to the TTC under part 2 of the test.

Part 2: supplied in confidence

In order to satisfy part 2 of the test under section 10(1), the appellant must have "supplied" the information to the TTC in confidence, either implicitly or explicitly.

Supplied

The requirement that the information be demonstrated as having been "supplied" reflects that the purpose of section 10(1) of the *Act* is to protect 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 or where the final agreement reflects information that originated from a single party. Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not, therefore, considered to be "supplied." This approach was approved by the Divisional Court in *Boeing Co. 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.); see also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis and John Doe*, [2008] O.J. No. 3475 (Div. Ct.)].

There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences 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 is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis and John Doe*, (cited above)].

Analysis and Findings

As previously stated, even though the appellant's representations may not be set out in detail in this order, I have considered them in their entirety. While the appellant provides brief arguments related to the "in confidence" component of part 2 of the section 10(1) test, the representations do not address the "supplied" issue as discussed in the identified orders at all [For example, Orders MO-2299, PO-2435, PO-2453, PO-2616].

The application of the "supplied" part of the section 10(1) test to the disclosure of pricing information contained within a contract or bid proposal has been addressed in a number of previous orders of this office. I note that although the appellant's attention was drawn to these orders, it did not provide submissions that addressed any of these orders or the fact the information at issue is contained in a bid proposal submitted to an institution that is subject to the *Act*. In the circumstances, and for the reasons that follow, I find that the information is not

exempt under section 10(1).

In Order PO-2435, Assistant Commissioner Brian Beamish considered the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish rejected that position and observed that the government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

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

Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part 2 of the section 10(1) test to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other items, the record at issue in Order PO-2453 contained the successful bidder's pricing for various components of the service to be delivered as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were not "supplied" pursuant to part 2 of the test under section 17(1) (the equivalent to section 10(1) in the provincial *Act*), Adjudicator Corban stated (at page 7):

> 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.

> 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.

In my view, this excerpt from Adjudicator Corban's reasons in Order PO-2453 emphasizes that the exemption in section 10(1) is intended to protect information belonging to an affected party that *cannot* change through negotiation, not that which could, but was not, changed [see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.); Orders PO-2371, PO-2433 and PO-2435].

I agree with the reasoning articulated in the orders excerpted and discussed above, and have applied it in my analysis of the records at issue.

With regard to the actual information at issue, and the appellant's brief representations on this point, I have concluded that the appellant's pricing totals are not immune from disclosure under section 10(1). In my view, pricing information, particularly the pricing totals at issue here, cannot reasonably be said to have inherent value as an informational asset. Rather, with specific reliance on the principles expressed in past orders of this office, I find that the information at issue represents the position taken by the appellant in its bid regarding the cost of providing and performing the various components of the TTC website redevelopment contract. If the pricing or rates submitted by the appellant had been deemed by the TTC to be "too high, or otherwise unacceptable," the TTC was in a position to accept or reject them. This is the form of negotiation envisaged by Assistant Commissioner Beamish in Order PO-2435.

Moreover, I have not been provided with any evidence to demonstrate that the pricing totals reflect the appellant's "immutable" or fixed underlying costs, or that disclosure would somehow permit accurate inferences to be drawn about other, non-negotiated confidential information of the appellant. In my view, the pricing totals at issue reflect the contractual interests and intentions of the TTC and the appellant. Accordingly, I find that this information was not "supplied" within the meaning ascribed to that term in section 10(1) of the *Act*.

As all parts of the test for exemption under section 10(1) must be met, and the information at issue does not meet the requirements of the "supplied" portion of part 2 of the test, I find that it does not qualify for exemption under section 10(1). Accordingly, it is not necessary for me to review the "in confidence" portion or part 3 of the test.

ORDER:

1. I uphold the TTC's decision to disclose the pricing totals in Record 3 to the original requester.

2. I order the TTC to disclose the information by sending the pricing totals in Record 3 to the requester by **May 1, 2009** but not before **April 24, 2009.**

3. In order to verify compliance with provision 2, I reserve the right to require the TTC to provide me with a copy of the record disclosed to the requester.

Original Signed By: March 26, 2009
Daphne Loukidelis
Adjudicator