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

ORDER MO-2637

Appeal MA10-21

The Regional Municipality of Niagara

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BACKGROUND:

The Regional Municipality of Niagara (Niagara Region) uses a Request for Pre-Qualification (RFPQ) to invite contractors to pre-qualify to provide services to Niagara Region. The pre-qualification of a contractor is done in accordance with its purchasing policies and is based on criteria developed by Niagara Region.

In June 2009, an RFPQ was issued for rates for equipment rental and day labour to be utilized by Niagara Region for "maintenance and repairs". In all, 37 contractors were ultimately pre-qualified under the RFPQ at issue in this appeal.

THE APPEAL

Niagara Region received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to all the responses to the June 2009 RFPQ detailing Rental Equipment Day Labour Rates.

Niagara Region identified records responsive to the request and granted partial access to them. Niagara Region relied on sections 10(1)(a), (b) and (c) of the *Act* (third party information) to deny access to the portion it withheld.

The requester, now the appellant, appealed Niagara Region's decision.

At mediation, Niagara Region clarified that certain parts of the records that it had originally identified were not responsive to the request. The appellant's representative advised the mediator that the appellant did not wish to pursue access to the non-responsive portions of the records. As a result, that information is no longer at issue in the appeal.

Mediation did not fully resolve the matter and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. At the close of mediation, the only information that remained at issue was contained in two pages of a document entitled "2009-2011 Roster of Equipment Rental and Specialized Labour Rates".

Prior to commencing my inquiry by issuing a Notice of Inquiry this office requested, and received, a copy of the June 2009 RFPQ.

I commenced my inquiry by asking Niagara Region for representations on the facts and issues set out in a Notice of Inquiry. Niagara Region provided representations. I then sent a Supplementary Notice of Inquiry setting out the facts and issues in the appeal to the pre-qualified contractors whose interests may be affected by disclosure of information in the records. A copy of a portion of Niagara Region's non-confidential representations accompanied this Supplementary Notice of Inquiry. Of the affected parties who responded, a number consented to disclosure of all the information relating to them, others provided consent to disclosure of some of their information and the balance did not consent to the disclosure of any of their information. Along with their position on disclosure, eight affected parties also provided some comments and/or submissions.

I then sent a Notice of Inquiry to the appellant along with Niagara Region's non-confidential representations. The Notice of Inquiry also contained a summary of the non-confidential comments and/or submissions of some of the affected parties. The appellant provided representations in response. I determined that the appellant's representations raised issues to which Niagara Region should be provided an opportunity to reply. Accordingly, I sent a letter to Niagara Region inviting their reply submissions, along with a complete copy of the appellant's representations. Niagara Region provided reply representations.

RECORD:

At issue in this appeal are pages 6 and 7 of a document entitled "2009-2011 Roster of Equipment Rental and Specialized Labour Rates".

DISCUSSION:

THIRD PARTY INFORMATION

Niagara Region submits that that the hourly rates contained in the record "constitute 'unit pricing' of competitors" and are, therefore, exempt under section 10(1)(a), (b) and (c) of the *Act*. In support of its position Niagara Region makes submissions on each part of the test under sections 10(1)(a), (b) and (c) of the *Act*.

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

> 10(1) 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; or
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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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of

confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the 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 or financial information; and

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

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

Part 1: type of information

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

> *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].
>
> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

I have reviewed the withheld information and I find that it qualifies as commercial and/or financial information for the purposes of section 10(1) of the *Act*. Although an affected party alleged that its information in the record at issue amounted to a "trade secret", I am not satisfied that it qualifies as a "trade secret" within the meaning of that term, as set out above. Furthermore, although alleged by another of the affected parties, I am also not satisfied that the records contain personal information within the meaning of that term as set out in section 2(1) of the *Act*.

As I have found that the information at issue qualifies as commercial and/or financial information for the purposes of section 10(1) of the *Act*, I conclude that Part 1 of the three part test for the application of the section 10(1) exemption has been satisfied.

Part 2: supplied in confidence

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 or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [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. 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. John Doe*, (cited above)].

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].

I will first address the "supplied" aspect of part 2 of the three part test for the application of the section 10(1) exemption.

Niagara Region's representations

Niagara Region submits that the purpose of having a list of pre-qualified contractors is:

> … to be able to use any of the pre-qualified vendors on the list at any time. As soon as you ask a vendor to "do" work by way of a verbal agreement, Purchase Order ("PO") or written agreement, the Region is in a contractual position and is obligated to pay for the work that the Region requested them to do.

Niagara Region further explains that:

> The hourly rates are mandatory to use if any of the vendors on the list are to be engaged to perform services by a Niagara Region department; there is no further negotiation of the hourly rate, though a statement of work with a number of hours estimated on a specific job may be requested by a department project manager. Use of an RFPQ in this situation was pursuant to s. 10(b)(iv) of Niagara Region's Purchasing Policy #C3-PO2, which states "Pre-qualification may be considered in the following circumstances: ...(iv) miscellaneous repairs and services as required by the Corporation such as plumbers, electricians, and drywall contractors". Further, s. 20 discusses use of an RFPQ for "(a)...the purpose of developing a roster of qualified Suppliers of Professional Services for groups of projects requiring similar and particular expertise" and "(f)...a Supplier may be selected from the roster to submit a Bid for Professional Services..."

Niagara Region states that the RFPQ process is designed to provide it with prices that are competitive and represent the best value for taxpayers. It states:

> Though being on the list in question is not equivalent to a promise of receiving contracts with Niagara Region, the Region may at any time and without further competitive process enter into a contract with the proponents on the list.

Representations of the affected parties

For the most part, the representations of the affected parties who objected to disclosure set out their position on the harms that they assert would arise as a result of disclosing the withheld information. However, one of the objecting affected parties submitted in particular that "the release of commercially sensitive information such as unit prices is neither fair, nor in fact, necessary. …We consider the RFPQ process is intended to select contractors who are qualified to execute the work and that the pricing component (i.e. unit prices) is part of a follow up process that should not form part of this request". This affected party further submitted that "[t]he RFPQ

process is intended solely to establish qualifications of certain contractors, i.e. financial and past experience. Pricing should be irrelevant".

Representations of the appellant

The appellant's representations do not address the supplied aspect of the section 10(1) test but rather focus on its position that releasing this information would not cause the section 10(1) harms alleged. The appellant also asserts that this type of information had been disclosed by Niagara Region in the past and that Niagara Region typically publicly opens tenders and requests for proposals.

Niagara Region's reply representations

Niagara Region submits in reply that it has modified its former practices to accord with its contractors' expressed preferences and what it views as the current state of the law. It emphasizes that the appellant mischaracterized its practices regarding tenders and requests for proposals, maintaining that "[a]part from the actual RFP [Request for Proposal] issued by the Region, any tender document submitted by a bidder remains confidential, whether the bidder is successful or otherwise". It submits that:

> Further to this, the RFPQ process differs from the RFP and tender processes, in that contractors supply a rate in order to pre-qualify to be placed on a roster list for future use, with no guarantee of work. Whereas standard RFPs produce negotiated service rates, the RFPQ involves service rates that are set and not open to negotiation. As set out in section 11 "Date and Place for Receiving Submissions" of the Pre-qualification Information and General Conditions document, the contractor's applications are brought to the Region's Corporate Services Department on a specified date and time and are not opened in a public forum. Instead, the submissions are accepted and assessed at the sole discretion of the Region. RFP and RFPQ procedures are both governed by the Region's Purchasing Policy and By-Law C3-P02 … which contains a further explanation of confidentiality and the Region's obligations under the *Act*.
>
> … The rates provided by the RFPQ proponents are unit rates directly supplied and not subject to change through negotiation. Use of a contractor on the prequalified list is understood to involve paying the stated unit price of the contractor for whatever number of hours of work may be needed.

In support of its position that the information qualifies for exemption, Niagara Region relies on Order P-166 and the determinations in Appeal Number MA08-132, which, although not cited by Niagara Region, resulted in Order MO-2403.

Analysis and Finding

In Order PO-2384, I addressed the "supplied" aspect of section 17(1) of the Provincial *Freedom of Information and Protection of Privacy Act* (*FIPPA*), which is the equivalent provision to section 10(1) of the *Act*:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, 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 preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".
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> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

In Order PO-2435, Assistant Commissioner Brian Beamish rejected the position taken in that appeal by the Ministry of Health and Long-Term Care 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 observed that the exercise of the government's option in accepting or rejecting a consultant's bid is a "form of negotiation." He wrote:

> 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 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) of *FIPPA*, Adjudicator Corban stated:

> 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 Order MO-2403, after reviewing the information and the representations of the parties in that appeal and citing the excerpts from Orders PO-2435 and PO-2453 reproduced above, Adjudicator Daphne Loukidelis determined that the information at issue in appeal MA08-132 ***did not*** qualify for exemption under section 10(1). She wrote on that point:

> 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.

In my opinion, and in keeping with the excerpts from the Orders reproduced above, the information at issue was not supplied within the meaning of part 2 of the test under section 10(1). I find that accepting the hourly rates proposed by the contractors through the pre-qualification process, in the circumstances of this appeal, was a form of negotiation. This is because the pre-approved price is the price that the contractor has agreed to charge for its services and represents the price that Niagara Region has agreed to pay, should the services be used.

Additionally, having reviewed the information at issue, I find that I have not been provided with sufficiently detailed and convincing evidence to show that any of the information at issue is "immutable" or that disclosure of the information, would permit the drawing of accurate inferences with respect to any underlying, non-negotiated, confidential information supplied to Niagara Region by an affected party. Finally, I have also not been provided with any evidence to show that the pricing information reflects an affected party's actual underlying costs.

Accordingly, as I have found that the information was not supplied for he purposes of section 10(1) of the *Act*, Niagara Region and the affected parties who objected to disclosure have failed to establish part 2 of the three part test under section 10(1). As all three parts must be established for section 10(1) to apply, I find that the information at issue is not exempt under that exemption.

ORDER:

1. I order Niagara Region to disclose the information at issue to the appellant by sending it to the appellant by **August 23, 2011** but not before **August 16, 2011.**

2. In order to verify compliance with provision 1, I reserve the right to require Niagara Region to provide me with a copy of the record disclosed to the appellant.

Original signed by: July 18, 2011
Steven Faughnan
Adjudicator