Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3062

Appeal MA12-433

City of Ottawa

June 24, 2014

Summary: The City of Ottawa received a request under the *Act* for access to two Para Transpo taxi contracts. The city granted partial access to the responsive records. Portions of them were withheld pursuant to section 10(1) (third party commercial information), sections 11(c) and (d) (economic and other interests) and section 14(1) (personal privacy) of the *Act*. During mediation, the appellant confirmed that he does not seek access to the information for which section 14(1) was claimed. That information was removed from the scope of the appeal. Although additional records were disclosed to the appellant during mediation, the appellant advised that he believes that more responsive records should exist. As a result, the issue of the reasonableness of the city's search was included in the appeal. This order finds that the city conducted a reasonable search for responsive records. This order also finds that the portions of the records withheld from disclosure are not exempt pursuant to section 10(1) or sections 11(c) or (d). The city is ordered to disclose the records, in full, to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 11(c) and (d), and 17.

Orders and Investigation Reports Considered: Orders MO-1706, MO-2093 and PO-3347

OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for two Para Transpo taxi contracts.

The requester stated that if he was unable to have access to these contracts he was specifically seeking the contract start and end dates for both contracts.

[2] As described by the city, Para Transpo is a door-to-door transportation service for persons with disabilities who are unable to use conventional transit services. It states that Para Transpo is a part of the City of Ottawa Transit Services Department and operates both conventional buses driven by city employees, as well as conventional taxis available to its customers.

[3] Pursuant to section 21(1) of the *Act,* the city notified an affected party who might have an interest in the disclosure of the responsive records, and subsequently advised that it was prepared to disclose the records, in part. The affected party did not appeal the city's decision. The city then issued a decision to the requester granting partial access to the records and advising that portions were exempt from disclosure as they consisted of third party information (sections 10(1)(a), (b), and (c)), and information that relates to the city's economic and other interests (sections 11(c) and (d)). The city also advised that it was withholding other portions of the records where disclosure would amount to an unjustified invasion of an identifiable individual's personal privacy (section 14(1)). The requester, now the appellant, appealed the city's decision.

[4] During mediation, the appellant advised that he is not interested in obtaining access to the information that the city believes would give rise to an unjustified invasion of an identifiable individual's personal privacy. Section 14(1) is, therefore, no longer at issue.

[5] During mediation, the city conducted another search. It located additional records and issued a supplementary decision letter and disclosed the records, in part, to the appellant. Portions of information from these records were withheld on the basis that they contain third party information (section 10(1)) and information relating to the city's economic and other interests (section 11(c) and (d)). Nevertheless, the appellant continues to believe that more responsive records should exist, the reasonableness of the city's search is still at issue in this appeal.

[6] Also during mediation, the affected party provided its consent for the city to disclose additional records to the appellant. The city issued a revised decision letter and disclosed additional information to the appellant.

[7] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeals process. During my inquiry, I received representations from the city and the appellant. I shared the city's representations with the appellant in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*. I deemed that it was not necessary to share the appellant's representations

with the city. Although invited to do so, the affected party did not submit representations.

[8] During the course of preparing representations for this appeal, the city located 45 additional pages of records responsive to the request. It notified the affected party and issued a second supplementary decision granting partial access to the newly located records, subject to the same exemptions, sections 10(1) and 11(c) and (d). The withheld portions of these records have been included in the scope of the appeal.

[9] In this order, I find that the city conducted a reasonable search for records responsive to the request and I uphold it. However, I find that neither section 10(1) nor sections 11(c) or (d) of the *Act* apply to exempt the information at issue from disclosure. I order the city to disclose the records at issue to the appellant, in their entirety.

RECORDS:

[10] The information that remains at issue in this appeal is the following:

(a) Identified in the original decision letter:

- Portions of pages 7, 10, 11, 13, 14, and 15 of the affected party's response to the city's Request for Tender (RFT) for the provision of Para Transpo taxi services; and

- Portions of 6 purchase orders or invoices that detail monies paid by the city to the affected party for the provision of Para Transpo taxi services.

(b) Identified in the supplementary decision letter:

- Portions of pages 1, 2, 21, and 45 of a "Clarification Document" including a letter that addresses several issues from a meeting between the affected party that provides Para Transpo taxi services and the city.

ISSUES:

A. Did the city conduct a reasonable search for two contracts related to Para Transpo taxi services?

B. Do portions of the records contain third party information that is exempt under the mandatory exemption at section 10(1) of the *Act*?

C. Do portions of the records contain information related to the city's economic and other interests that is exempt under the discretionary exemptions at either section 11(c) or (d) of the *Act*?

DISCUSSION:

A. Did the city conduct a reasonable search for two contracts related to Para Transpo taxi services?

[11] The appellant submits that the city did not conduct a reasonable search for two contracts related to Para Transpo taxi services.

[12] Where the appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[13] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3] In the circumstances

[14] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[15] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[5]

Representations

[16] The city submits that it conducted a reasonable search for records responsive to the request. In its representations, it submits that the scope of the request was correctly interpreted to include contracts for Para Transpo door-to-door taxi service providers. It submits that it was established that there was only one contract between

[1] Orders P-85, P-221 and PO-1954-I.
[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469, PO-2592.
[5] Order MO-2246.

the city and a service provider (the affected paty) for the provision of such services and that rather than having a separate and distinct contract for services, the basis of the commercial arrangement between the parties was established by terms outlined in the city's RFT, changes made to that RFT set out in addendums, terms set out in the winning proposal (the affected party's tender submission), and the purchase orders that demonstrate the city's acceptance of the affected party as the successful bidder. The city also identified a "clarification document" that clarifies or provides additional information in relation to specific items raised by either of the parties to the agreement and includes a letter that finalizes some outstanding terms between the parties. The city submits that all of these records together form the contract or the basis of the commercial relationship between itself and the affected party, the successful service provider.

[17] The city submits that it made a reasonable effort to identify and locate records that form the commercial arrangement between the affected party and the city. It submits that a reasonable search was conducted by an experienced employee knowledgeable in the subject matter of the request who expended a reasonable effort to locate records which are reasonably related to the request.[6] It points to the affidavit sworn by the analyst in the access to information office to support their submissions on this point.

[18] In her affidavit, the analyst indicates that following an initial search for records by the city's transit services department staff, who located the RFT and the affected party's tender submission, she liaised closely with a staff member in the city's supply management branch, the department that had retrieved and retained records related to this commercial arrangement, and an additional targeted search was completed to ensure that all records containing additional contract terms were located and provided to the appellant. The analyst also confirms that she was satisfied that her contact at the city's supply management branch was familiar with the subject matter of the request and that they had the required knowledge and means to locate and retrieve the responsive records.

[19] The appellant submits, first, that the city did not provide him with the contract that he sought access to but the RFT, together with the affected party's successful tender submission that would ultimately develop into the final contract. He argues that a contract is one document and he questions which of the records provided actually governs the terms of the arrangement, the RFT or the affected party's response. Additionally, he does not accept that the city would allow the affected party direct control over services costing over $8 million dollars a year, relying on just an RFT and the response of a successful bidder, in this case, the affected party.

[6] Orders M-909, PO-2469, PO-2592.

[20] Second, he takes the position that he has not seen signatures on any of the documents and that there should be some form of legal document stating that the RFT or the affected party's proposal is the legal binding contract for the provision of services.

[21] Third, he takes the position that the RFT has negotiable clauses in it and that another record should exist because there must be clauses that stipulate terms such as the minimum dollar amount each year. He submits that this type of information is not found in either the RFT or the affected party's tender submission.

[22] Fourth, the appellant submits that there have been changes made to the agreement, for example, the date on which the contract is to expire has been extended. He questions how the contract can be changed with any form of documentation.

[23] Finally, the appellant submits that the RFT states that administration fee was negotiable up to 15%. He states that he assumes that this fee was outlined in the affected party's response, but questions whether it can be legally binding without a document stipulating that the fee described in the response was accepted.

Analysis and finding

[24] On my review of the information before me in this appeal, I accept that the city has provided me with sufficient evidence to demonstrate that it made a reasonable effort to identify and locate records sought by the appellant. I accept that the searches were conducted by an experienced employee who is knowledgeable about records sought by the appellant (staff in the city's supply management branch) under the guidance of the analyst in the city's access and privacy office and that these individuals expended a reasonable effort to locate any records that might be responsive to the appellant's request.

[25] As noted above, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[7] In the circumstances of this appeal, I find that I have not been provided with a reasonable basis for concluding that additional records responsive to the request exist.

[26] Although I acknowledge that the appellant is of the view that there should be some kind of formal recorded documentation outlining the city's acceptance of the affected party's proposal and confirming the existence of a binding contract, I accept that the records that have already been identified by the city (including the RFT package, the affected party's successful tender submission, the purchase orders which demonstrate the city's acceptance of the affected party's tender, the clarification

[7] Order MO-2246.

document and letter), make up the commercial agreement between itself and the affected party for the provision of Para Transpo taxi services. The city has provided clear representations to this effect. Moreover, the appellant has not provided me with sufficient evidence to suggest or demonstrate that a separate or distinct contract for these services was created or specific records other than those that have already been identified by the city should exist.

[27] Additionally, as previously stated, the *Act* does not require the institution to prove with absolute certainty that further records *do not* exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In the circumstances of the current appeal, I accept that I have been provided with sufficient evidence to show that the city has made a reasonable effort to identify and locate records responsive to the appellant's request.

[28] Accordingly, I find that the city has conducted a reasonable search for responsive records and I dismiss this aspect of the appeal.

B. Do portions of the records contain third party information that is exempt under the mandatory exemption at section 10(1) of the *Act*?

[29] The city has withheld portions of the records at issue as it is of the view that they contain third party information within the meaning of section 10(1)(a), (b) and/or (c) of the *Act*.

[30] Section 10(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[31] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[8] 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.[9]

[32] For section 10(1) to apply, the institution and/or the third 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

[33] The city claims that the records contain commercial and financial information. The types of information listed in section 10(1) have been discussed in prior orders. Commercial and financial information have been defined as follows:

> *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].

[8] *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.).
[9] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[34] I adopt these definitions for the purposes of this appeal.

[35] The city submits that the records contain both commercial and financial information as they contain details about the affected party's operational matters, such as how its dispatch centre is operated, what resources it has available to it, including personnel resources, and monetary contingencies required to recoup various operational costs.

[36] The appellant does not address this part of the test in his representations.

[37] I agree with the city that the records contain both commercial and financial information. The records contain details of a commercial transaction between the city and the affected party whereby the affected party provides transit services to the city for a fee. I further find that the records reveal financial information related to the commercial arrangement, including cost accounting methods for the provision of transit services to the city. As a result, I find that the first part of the section 10(1) test has been met.

Part 2: supplied in confidence

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

[39] 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.[10] 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.[11]

[40] 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.[12]

[41] 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

[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] Order PO-2020.

- 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.[13]

Representations

[42] The city submits that the information at issue was supplied by the affected party through the request for tender process. It submits that the information that has been severed consists of information that the affected party provided for the purposes of having the city evaluate the bid. It further submits that all of the pages are marked as "confidential" and the first page contains a statement attesting to the affected party's intent that the exempted portions of the records were prepared for a purpose that would not entail disclosure. The city also submits that financial details under the "No show" and "Cancellation" heading and some information under the "Financial Offer" heading of the response of the affected party were supplied in confidence as part of a negotiation and not accepted by the city.

[43] In his representations, the appellant does not specifically address whether the information at issue was supplied in confidence to the city by the affected party.

Finding

[44] Based on my review of the records and having considered the circumstances of the current appeal, I am not satisfied that the majority of the portions of the records at issue were supplied to the city by the affected party within the meaning of section 10(1) of the *Act.*

[45] First, dealing with the purchase orders, these are records that were clearly prepared and issued by the city. Therefore, I find that the information which they contain cannot be considered to have been supplied by the affected party within the meaning of the second part of the section 10(1) test, and the exemption at section 10(1) cannot apply to them. This is in keeping with the reasoning in previous orders issued in this office; for example, in Order PO-3347, Adjudicator Justine Wai found that purchase orders issued by a hospital to a third party were not supplied within the meaning of section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), which is the provincial equivalent to section 10(1).

[13] Orders PO-2043, PO-2371 and PO-2497.

[46] Second, with respect to the remaining information, the portions of the affected party's tender submission, the clarification document and its enclosed letter, I find that, together with the RFT issued by the city and the purchase orders, these records, taken as a whole, make up the terms of the commercial arrangement between the city and the affected party for the provision of Para Transpo taxi services. In my view, the collection of these records amounts to a contract, albeit not a formalized one.

[47] The original request was specifically for any contracts entered into by the city with respect to Para Transpo services and in its representations the city itself states clearly that the records that were located are responsive to that request:

> …the contract is comprised of the RFT package that the city releases to interested bidders, the response of the successful bidder, and the purchase orders

[48] It is well established that 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.[14]

[49] Therefore, agreed-upon essential terms of a contract or agreement are generally considered to be the product of a negotiation process and not "supplied," even if the "negotiation" amounts to acceptance of the terms proposed by the third party.[15]

[50] Previous orders have considered circumstances that are similar to those present in the current appeal. Specifically, previous orders have considered circumstances in which the parties did not create a formal contract after the institution's acceptance of the proposal or tender from a third party but rather deemed the winning proposal or tender and the subsequent purchase order to be the contract. In Order MO-2093, Adjudicator Steve Faughnan considered the application of section 10(1) to a successful bid document that was produced by an affected party in response to a request for proposal [RFP] issued by the City of Hamilton. In that decision, Adjudicator Faughnan found that:

> The bid document governing the bid process for [specified tender/RFP], in which A was the successful bidder, provides that if the successful bidder has not complied with its terms, the City may cancel the agreement.

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[14] 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 and 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.).

[15] Orders PO-2384 and PO-2497.

> Although the City advises that there was no subsequent formal written agreement entered into with A, there was no evidence provided to refute an assumption that A is conducting business with the City in accordance with the terms of the bid.
>
> This indicates to me that, except for the information that I have found to be "immutable", the remaining information consists of the basic bid terms and conditions for A's bid (including the value added warranty service add-ons that A provided in the bid)…. These terms and conditions were accepted by the City when the tender was successful and an agreement was formed based upon those terms and conditions. This agreement was not, however, reduced to writing.
>
> Based on the authorities reproduced above, and my review of the representations and the records, I conclude that this information was mutually generated through the process of negotiation. As a result, I find that it was not "supplied" for the purpose of part 2 of the section 10(1) test.

[51] In Order PO-3347, referred to above, Adjudicator Wai followed the reasoning outlined by Adjudicator Faughnan in Order MO-2093. In Order PO-3347, the requester sought access to "a copy of the winning proposal, contract, and/or agreement for the RFP" for the provision of orthopaedic drills to a hospital. Adjudicator Wai found that the winning submission and numbered purchase order identified by the hospital as responsive to the request was deemed by the parties to be the "contract" and was, therefore, not "supplied" by the affected party to the hospital within the meaning of section 17(1) of the provincial *Act.* As a negotiated agreement between the hospital and the affected party, she concluded that it did not meet the "supplied" requirement of part 2 of the section 17(1) test.

[52] I agree with the reasoning expressed in both Orders MO-2093 and PO-3347 and adopt them for the purposes of this appeal.

[53] In the current appeal, I accept that both parties to the agreement, the affected party and the city, consider the collection of records that were deemed to be responsive to the request to be the "contract" for the provision of Para Transpo Taxi services. In my view, the majority of the information contained within them sets forth the agreed upon essential terms of the contract or agreement. In keeping with the reasoning outlined in the orders described above, I find that this information amounts to the product of a negotiation process between the parties. Accordingly, I find that the majority of the remaining information, specifically, that found on pages 7, 10, 11 and 13 of the affected party's tender submission and page 21 of the clarification document, is negotiated information that cannot be considered to have been "supplied" by the affected party to the city within part 2 of the section 10(1) test.

[54] There are two exceptions to this general rule that a contract will not normally qualify as having been "supplied" for the purpose of section 10(1). They 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.[16]

[55] None of the parties have raised the possible application of either of these exceptions to part 2 of the section 10(1) test. I have reviewed the information which I have found not to qualify as having been "supplied" and find that neither the immutability nor the inferred disclosure exceptions apply. Accordingly, I find that part 2 of the test for the application of section 10(1) has not been met for the portions of information on pages pages 7, 10, 11 and 13 of the affected party's tender submission and page 21 of the clarification document. As all three parts of the test must be met for section 10(1) to apply, it is not necessary for me to determine whether the harms outlined in part 3 have been established for this information. Accordingly, I conclude that none of this information is exempt from disclosure under the mandatory exemption at section 10(1) of the *Act*.

[56] There are a few portions of the withheld information which I find might be considered to have been "supplied" within the meaning of part 2 of the section 10(1) test. Specifically, they are portions found on pages 14 and 15 of the affected party's tender submission and on pages 1, 2, and 45 of the clarification document. The city's representations on these portions are brief. As noted above, it submits only that:

> …financial details under the "No show" and "Cancellation" heading and some information under the "Financial Offer" heading of the response of the affected party were supplied in confidence as part of a negotiation and not accepted by the city.

[57] I have reviewed both the RFT, the successful tender submission and the clarification document and in the absence of more detailed representations, it is difficult for me to discern which portions of the severances on these pages were those that were proposed by the affected party in its submissions, but not accepted by the city. However, based on my review of this information, I accept that it is reasonable to conclude that, at minimum, some of this information was "supplied" by the affected party to the city within the meaning of part 2 of the section 10(1) test as it was proposed, but ultimately did not form part of the essential terms of the negotiated agreement. Accordingly, with respect to the portions of the information at issue on pages 14 and 15 of the affected party's tender submission and on pages 1, 2, and 45 of

[16] Orders MO-1706, PO-2384, PO-2435 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*.

the clarification document, without making a final determination on whether or not it was supplied in confidence within the meaning of part 2 of the section 10(1) test, I will go on to determine whether disclosure of this information could reasonably be expected to result in the harms contemplated by part 3.

Part 3: harms

[58] This part of the test for exemption under section 10(1) is based on a conclusion that disclosure of the information at issue may result in one of the harms described in that section. As noted above, information of third parties is exempt if disclosure "could reasonably be expected to" lead to those harms.

[59] This office has stated that 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.[17]

[60] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*. 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.[18]

Representations

[61] The city submits that the affected party is best placed to provide the detailed and convincing evidence required by part 3 of the section 10(1) test as it is the most familiar with the taxi business and how disclosure of the information at issue may reasonably harm its business. However, it submits that inferences about the operation and structure of the affected party's business may be drawn by the appellant if the financial offer details and no shows/cancellations figures contained in the affected party's tender submission, the clarification document and exempted portions of the letter attached to the clarification document were disclosed.

[62] The city also submits that disclosure of the exempted information could reasonably be expected to result in similar information no longer being supplied to the city and submits that it needs to continue to receive detailed information from companies about their organizational and management approach to providing city services.

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[17] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[18] Order PO-2020.

[63] As noted above, the affected party made no submissions on the appeal and, therefore, did not specifically address whether any harm would result in the disclosure of any of the information at issue.

[64] The appellant takes the position that the city has failed to provide details with respect to the harms outlined in section 10(1)(a), (b) and (c).

Finding

[65] Having carefully reviewed the portions of the records at issue that may have not formed part of the negotiated agreement between the city and the affected party, I am not persuaded that disclosing this information could reasonably be expected to result in any of the harms described in section 10(1) of the *Act*.

[66] In my view, neither the city nor the affected party have provided sufficient evidence to demonstrate how disclosure of this information could cause the type of harms described in section 10(1). As stated in previous orders, it is not sufficient for the parties to merely provide generalized statement of possible harm. In my view, that is all I have been provided by the city.

[67] Accordingly, I find that part 3, the harms component, of the section 10(1) test has not be established with regard to the information that might not have formed part of the agreed upon essential terms of the contract.

[68] As none of the information at issue has met all three parts of the test, as required by section 10(1), I find that section 10(1) does not apply to exempt it from disclosure.

C. Do portions of the records contain valuable government information that is exempt under the discretionary exemption at section 11 of the *Act*?

[69] The city submits that the records contain valuable government information that is exempt under sections 11(c) and (d). Those sections read:

> A head may refuse to disclose a record that contains,
>
> (c) information whose 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;

[70] 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*,[19] 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.

[71] For sections 11(c) or (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.[20]

[72] 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 11.[21]

[73] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[22]

[74] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[23]

Representations

[75] The city submits that although the information that it has severed under section 11(c) and (d) does not belong to the city, its disclosure could reasonably be expected to prejudice its economic interests and harm its financial interests. Specifically, it submits that in order to provide cost effective and efficient Para-Transpo service, it requires detailed responses from proponents to effectively manage and assess its contract with the successful bidder. It submits that if it were to disclose detailed pricing information,

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[19] vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).
[20] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[21] Orders MO-1947 and MO-2363.
[22] Order MO-2363.
[23] Orders MO-2363 and PO-2758.

"the city's supply chain would be placed at risk as release of this information may result in the city receiving fewer bids on future opportunities."

[76] The appellant submits that the city failed to provide sufficient information to establish a reasonable expectation of harm to support their claim that sections 11(c) and (d) apply to exempt portions of the information at issue from disclosure. He submits that the city did not provide precise information on how the disclosure of taxi fares or administrations fees might reveal a secret formula and how such information would permit another competitor to gain the upper hand in the bidding process the next time the city seeks proposals for the service.

Analysis and findings

[77] I find that the city has failed to provide me with sufficiently detailed evidence to establish that disclosure of the information at issue could reasonably be expected to result in the harm contemplated by the exemptions at either section 11(c) or (d).

[78] The responsive records reflect an agreement for which the terms have been accepted and finalized. There are no ongoing negotiations with other potential bidders that are susceptible to interference which could prejudice the city's economic interests or competitive position or prove to be injurious to its financial interests. The representations that were provided are speculative at best, and do not describe in sufficient detail how the disclosure of the specific information at issue in this appeal could reasonably be expected to result in the harm envisioned by section 11(c) or 11(d).

[79] The city's speculative concerns appear to be based on future agreements for the provision of Para Transpo services. In my view, the agreements to provide services are based on numerous variables that are subject to change, and this fact undermines the city's argument that knowledge of the terms of this agreement could adversely affect its interests in negotiating another, or renegotiating the same contract.

[80] The city's general concern that the disclosure of certain information contained in the affected party's response to the RFT would result in the city receiving fewer responses in the future is similar to concerns raised by other institutions in previous appeals. In Order MO-1706, Adjudicator Bernard Morrow addressed a similar argument made by a school board with respect to the disclosure of information contained in a proposal and contract for cold beverage vending between the school board and an affected party. In that order, Adjudicator Morrow found that section 11(d) did not apply to exempt the information at issue. He stated:

> The Board suggests that disclosure of the information at issue will cause prospective venders to not participate in tender, request for proposal or invitation to propose processes and a subsequent contracting process. In

> making this argument the Board asserts that the tender, request for proposal or invitation to propose process is understood to be a confidential process. The Board only discloses the final cost, price or revenue-generating amount submitted by the successful bidder to the public. The Board suggests that if the information at issue is disclosed potential vendors will not participate in the process, in turn, reducing the number of potential partners and driving up its cost of entering into purchase agreements.
>
> The Board presents a conclusion that is laden with speculation. I have no evidence that prospective vendors will not provide this information to the Board in the future or that they will not submit proposals in the future. … In addition, the suggestion that the pool of potential vendors would be reduced, thus increasing the Board's costs of entering into similar arrangements, is self-serving at best. In this type of vending and pouring agreement it is the vendors that are competing for the Board's business and absorbing the costs, not the Board. The Board does not incur any costs; on the contrary, it only reaps the financial benefits of the relationship.

[81] As Adjudicator Morrow found in Order MO-1706, I find the city's arguments in this appeal are speculative. The city suggests that parties would refuse to negotiate or enter into agreements with the city if information like that at issue is disclosed. I do not accept this argument. As stated in Order MO-1706, vendors are competing for the city's business, and not the other way around. I am not satisfied that disclosure of the information that is at issue could reasonably be expect to result in these vendors refusing to do business with the city, and thereby result in injury to the city's financial interests.

[82] Moreover, as noted above, in order to establish that the exemption at section 11(c) or (d) applies, the city must demonstrate that disclosure "could reasonably be expected to" lead to the specified result. Evidence amounting to speculation of possible harm is not sufficient. In the circumstances of this appeal, in my view, the generalized and speculative statements made by the city in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers Compensation Board),* cited above.

[83] Accordingly, I find that the information at issue does not qualify for exemption under either section 11(c) or (d).

ORDER:

1. I order the city to provide the appellant with a complete copy of the records by **July 30, 2014** but not before **July 24, 2014**.

2. I order to verify compliance with this order I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant pursuant to Order Provision 1.

Original Signed By: June 24, 2014
Catherine Corban
Adjudicator