

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3093

Appeals MA13-278 and MA13-337

Regional Municipality of Waterloo

September 11, 2014

Summary: The Regional Municipality of Waterloo (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for records relating to the prequalification submissions for the general contractor for a proposed wastewater treatment plant. Access was denied to some of the information pursuant to the mandatory third party information exemption in section 10(1) and the mandatory personal privacy exemption in section 14(1) of the *Act*. This order upholds the region's decision under section 14(1) and partially upholds its decision under section 10(1). This order finds that some of the information is not responsive to the requester's request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, Sections 2(1) (definition of personal information), 14(1), 14(3)(d), 10(1)(a), and 10(1)(b).

Orders and Investigation Reports Considered: M-892, M-1106, MO-1811, MO-2494, MO-2801, MO-2856, MO-2884, MO-3058-F, and PO-3224.

OVERVIEW:

[1] The Regional Municipality of Waterloo (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for records relating to the prequalification submissions for the general contractor for a proposed wastewater treatment plant (WWTP or the project).

[2] Specifically the requester wanted:

1. all notes, evaluation meetings minutes, scorecards for all submissions received for the above noted project,
2. a copy of all submissions that were prequalified for this project.

[3] Following notification to ten third party companies whose information may be contained in the records, the region issued a decision to the requester granting partial access to the responsive records. The remainder of the information was withheld pursuant to the mandatory third party information exemption in section 10(1) and the mandatory personal privacy exemption in section 14(1) of the *Act*.

[4] The region stated that "one of the [third party] companies agreed to release its submission in its entirety. The others either objected to the release of their entire submission, or objected to the release of specific parts of the submission, or did not respond to the notice." It also stated that access to the submission for which consent was provided will be released in full and that "Access to the remaining submissions varies depending on the representations submitted" and depending on the region's own decision.

[5] The region also issued decisions to the third party companies stating that it decided to disclose their records in full or in part, as noted above. The region gave the third parties thirty days to appeal its decision.

[6] Following the thirty day appeal period, the region disclosed some records to the requester and stated that one of the third party companies (the third party appellant or the affected party) was exercising its right of appeal; therefore, its records could not be disclosed until the appeal is resolved.

[7] The requester appealed the region's decision and appeal MA13-337 was opened.

[8] As mentioned above, the affected party also appealed the region's decision and related appeal MA13-278 was opened. This order addresses the issues in both appeals.

[9] During mediation, the requester clarified his request stating that he is not seeking access to individuals' names and personal contact information or banking, insurance or mortgage information. He also stated that he is not seeking any information relating to the third parties that were not successful in the general contractor's prequalification process.

[10] In regards to the records consisting of the resumes, the requester clarified at mediation that he only wants access to the portions relating to the individuals' highest level of education, their qualifications and previous projects.

[11] As mediation did not resolve all of the issues in both appeals, the files were moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in these appeals, to the region, the eight third party companies that did not consent to disclosure of their records to the requester, and the affected party,¹ seeking their representations.

[12] I received representations from the region, the affected party and one third party company. The third party company objected to the disclosure of its information in the records.

[13] I sent a copy of the region's and the third party company's representations to the requester, along with a Notice of Inquiry seeking representations in response. The affected party objected to disclosure of its information in the records. The affected party's representations were not shared with the requester due to confidentiality concerns. The requester did not provide representations in response.

[14] In this order, I uphold the region's decision under section 14(1) and partially uphold its decision under section 10(1). I also find that some of the information is not responsive to the requester's request.

RECORDS:

[15] The region states that the records pertain to a prequalification exercise conducted by its Design & Construction Division related to a construction project at a specific WWTP. It states that:

Prequalification is a process to identify a group of companies that are deemed, through a structured evaluation, to be capable of completing a specific construction project. Prequalified companies are subsequently invited to submit a bid on a Request for Proposals (RFP), a separate process which normally results in a contract for services and related payments to the successful bidder. No contractual relationship exists between the Region and the prequalified companies prior to the issuance of a RFP.

Part 1 of the request pertains to records derived by a consultant working on behalf of the Region. The records consist of two draft sets of scoring tables, one final set of scoring tables, as well as email communications between Region staff and the consultant. Access to most of the records in Part 1 was granted with limited amounts of information withheld under two provisions:

¹ The third party company that filed the appeal in file MA13-278.

1. Clause 10(1)(b) of *MFIPPA* - This exemption was applied to business references collected from third parties by the Region's consultant. The exemption primarily applied to parts of the email communications; some cells in the scoring tables also contain reference-related entries.

2. Clause 10(1)(a) of *MFIPPA* - This exemption was applied to the parts of the scoring tables which relate to bonding limits. This information was supplied by the third parties and imported into the scoring tables. The application of clause 10(1)(a) to this information was consistent with the decision on access on Part 2 of the request. Information pertaining to eight companies which did not pass prequalification was also withheld under this provision, but the information is no longer at issue in Appeal MA13-337.

Part 2 of the request relates to prequalification submission documents supplied by ten third party construction companies. Following receipt of the request, and in compliance with section 21 of *MFIPPA*, the ten companies were given a notification that their interests were affected by the request. Based on the responses of the third parties, and the subsequent absence of third party appeals by nine of the ten companies, two of the submissions were released to the Requester/Appellant in their entirety, and seven were released subject to the exemption of limited amounts of information under clauses 10(1)(a) and 14(3)(d) of *MFIPPA*:

1. Clause 10(1)(a) applied to records related to the companies' banking, bonding, insurance and WSIB [Workplace Safety and Insurance Board] information.
2. Clause 14(3)(d) applied to the staff resumes contained in the 7 submissions where consent to release was not given.

No part of the Third Party Appellant's submission has been released at this point.

[16] The records at issue are more particularly set out in the following chart provided by the region:

Record #	Pages at issue	Description	Decision of Region	Exemptions claimed
1	2 (part)	Affected party's corporate and financial information	Disclose	10(1)(a)
	3-17	Project Information	Disclose	10(1)(a)

	18-37 (part)	Resumes (education level, licenses, and previous projects)	Withhold	14(3)(d)
	49-54	WSIB Information	Withhold	10(1)(a)
	67-81	Construction jobs	Disclose	10(1)(a)
2	1-3 (part)	Email chain dated Jan. 2-3, 2013, re: contractor Prequalification	Withhold	10(1)(b)
	7 (part)	Redactions in column marked "Reference check" only	Withhold	10(1)(b)
	7 (part)	Remaining redactions in row pertaining to third party appellant	Disclose	
	9 (part)	Redactions in row pertaining to third party appellant	Disclose	
	10 (part)	Redactions pertaining to prequalified companies in column marked "Bonding Limit"	Withhold	10(1)(a)
	10 (part)	Remaining redactions in row pertaining to third party appellant	Disclose	
	15 (part)	Redaction in row pertaining to third party appellant	Disclose	
3	1-3 (part)	Email chain dated Jan. 16-28, 2013, re: contractor Prequalification	Withhold	10(1)(b)
4	4	Redaction in the column marked "Within Last 5-10 Years" only consist of comments from reference source	Withhold	10(1)(b)
	8	Redactions in the column marked "Reference Summary"	Withhold	10(1)(b)
5	1-4 (part)	Email chain dated Jan. 31 to Feb. 8, 2013, re: contractor Prequalification	Withhold	10(1)(b)
6	40-42	Submission Third Party (TP) #1	Withhold	10(1)(a)
7	18-24 (part)	Submission TP #2	Withhold	14(3)(d)

8	21-27 (part)	Submission TP #3	Withhold	14(3)(d)
9	36-47, 49-54 (part)	Submission TP #4		14(3)(d)
10	21-30 (part)	Submission TP #5	Withhold	14(3)(d)
	49-50		Withhold	10(1)(a)
11	11-17 (part)	Submission TP #6	Withhold	14(3)(d)
12	15-24 (part)	Submission TP #7	Withhold	14(3)(d)
	40		Withhold	10(1)(a)
	44 (part)		Withhold	14(3)(d)

[17] I have removed pages 7, 9, 10, and 15 from Record 3 in the chart as these pages are identical to pages 7, 9, 10, and 15 of Record 2.

[18] As well, pages 5, 7, and 11 of Record 4 are identical to pages 9, 10, and 15 of Records 2 and 3. I have removed pages 5, 7, and 11 of Record 4 from the chart.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?
- C. Does the mandatory third party information exemption at sections 10(1)(a) or (b) apply to the records?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[19] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[20] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.²

[21] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their

² Order 11.

dwelling and the contact information for the individual relates to that dwelling.

[22] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.³

[23] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[24] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

[25] The region states that:

Part 2 of the request relates to the prequalified companies' submissions. Parts of the submissions contain resumes of staff that would be responsible for the project if the company is ultimately chosen to perform the work. Generally, the resumes list educational or professional certifications obtained by the individuals and a summary of similar projects that the individual has been involved with.

Clause (b) of the definition of "Personal Information" in subsection 2(1) of *MFIPPA* includes, "information relating to the education... or employment history of the individual...". Based on this provision, much of the resume records comprise personal information of the companies' staff. The parts of the resumes which include identities of the company staff and position titles held by those individuals relates to business, rather than personal activities, and would fall within the exception to the personal information definition contained in subsection 2(2.1). Names and position titles of staff contained in all of the affected companies' submissions (with the exception of the Third Party Appellant's submission), were previously disclosed to the Requester/Appellant by virtue of being listed in other non-exempt parts of the prequalification submission records.

[26] The third party company that did provide representations stated that the resumes contain personal and private information.

³ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[27] As stated above, the affected party provided confidential representations objecting to disclosure of its information.

Analysis/Findings

[28] Although section 2(2.1) provides that the title or designation of the individuals in the resumes is not personal information, the requester has not sought this information specifically.

[29] The requester is seeking disclosure of the highest level of education, qualifications and previous projects of the company staff of the successful parties in the general contractor's prequalification process, which information is contained in the resumes at pages 18 to 37 of Record 1, pages 18 to 24 of Record 7, pages 21 to 27 of Record 8, pages 36 to 47 and 49 to 54 of Record 9, pages 21 to 30 of Record 10, pages 11 to 17 of Record 11, and pages 15 to 24, and 44 of Record 12.

[30] The region refers to the findings in Order MO-2856, where Adjudicator Daphne Loukidelis found that the qualifications of staff remain personal information, even if identities are severed from the resumes. In that order, she stated:

To begin, pursuant to section 2(2.1) of the *Act*, I find that the names, titles and designations of the affected party's employees on their resumes (or professional profiles) do not qualify as their "personal information."⁶ However, these same records also contain information relating to the employment or educational history of the affected party's employees. I find that the information contained in the profiles that relates to each individual's past job experience, affiliations and project experience fits within paragraph (b) of the definition of "personal information". This is consistent with a line of orders that have found that resumes typically include personal information as that term is defined in section 2(1).⁷

As stated, the [requester's] position is that the "qualifications" of the affected party's employees ought to be disclosed without the names of the individuals. As I understand the argument, severing the names would render the information unidentifiable; that is, it would no longer relate to an "identifiable individual", as required.⁸ However, even if the names are severed, the professional profiles contain sufficiently detailed information about each individual that it is reasonable to expect that they may be

⁶ Orders MO-2151, MO-2176 and MO-2283. This finding is consistent with other orders of this office that predated the amendments to the definition of "personal information" in 2006 that codified the distinction between personal and professional contexts.

⁷ See Orders P-727, MO-1444 and MO-2151.

⁸ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

identified. Accordingly, I am satisfied that the employment or education history of each employee whose profile appears in Appendix A or B qualifies as the personal information of individuals other than the [requester] for the purpose of section 2(1) of the *Act*.

[31] I adopt these findings of Adjudicator Loukidelis and find that the highest level of education, qualifications and previous projects are the personal information of the individual's whose resume it pertains to. Even without the names of the individuals in the resumes, this information would identify these individuals as the resumes contain sufficiently detailed employment and educational information about each individual that it is reasonable to expect that they may be identified. None of the records contain the personal information of the requester.

[32] In accordance with paragraph (b) of the definition of personal information in section 2(1), I find that the highest level of education, qualifications and previous projects reveal the educational and employment history of the individuals in the resumes at pages 18 to 37 of Record 1, pages 18 to 24 of Record 7, pages 21 to 27 of Record 8, pages 36 to 47 and 49 to 54 of Record 9, pages 21 to 30 of Record 10, pages 11 to 17 of Record 11, and pages 15 to 24, and 44 of Record 12.

[33] I will now consider whether the highest level of education, qualifications and previous projects listed in the resumes at issue are exempt by reason of the mandatory personal privacy exemption in section 14(1).

B. Does the mandatory personal privacy exemption at section 14(1) apply to the information at issue?

[34] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. In this appeal, neither paragraphs (a) to (e) of section 14(1) nor section 14(4) apply.

[35] In the circumstances, it appears that the only exception that could apply is section 14(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy. This section reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[36] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[37] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.⁹

[38] In the circumstances, it appears that the presumption at section 14(3)(d) could apply. This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

relates to employment or educational history.

[39] The region submits that this section applies to the employment and educational history contained in the resumes of staff in the prequalification submissions where consent was not provided.

[40] The third party company that did provide representations stated that disclosure of the information in the resumes would harm it due to the extremely competitive nature of its business.

Analysis/Findings

[41] Information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 14(3)(d) presumption.¹⁰

[42] Information contained in resumes¹¹ and work histories¹² falls within the scope of section 14(3)(d).

⁹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

¹⁰ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.

¹¹ Orders M-7, M-319 and M-1084.

¹² Orders M-1084 and MO-1257.

[43] As the information at issue is contained in resumes and reveals the employment and educational history of individuals other than the requester, I find that section 14(3)(d) applies.

[44] Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2).¹³

[45] Accordingly, I find that pages 18 to 37 of Record 1, pages 18 to 24 of Record 7, pages 21 to 27 of Record 8, pages 36 to 47 and 49 to 54 of Record 9, pages 21 to 30 of Record 10, pages 11 to 17 of Record 11, and pages 15 to 24, and 44 of Record 12 are exempt under the mandatory personal privacy exemption in section 14(1).

C. Does the mandatory third party information exemption at sections 10(1)(a) or (b) apply to the records?

[46] 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;

[47] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹⁴ 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.¹⁵

¹³ *John Doe*, cited above.

¹⁴ *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.).

¹⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[48] The region requests that I uphold its decision on access made in the request under Appeal MA13-337. The region takes no position with respect to third party appeal MA13-278.

[49] The region submits concerning section 10(1)(a) that:

...the prequalification submissions generally include records concerning the affected companies banking, bonding, insurance and Workplace Safety and Insurance Board (WSIB) information. Where the affected companies objected to the release of all or part of this information, or did not respond to notification, the information was withheld under clause 10(1)(a). This exemption also applied to the evaluation scoring tables with respect to one column which imported bonding related information from the submissions...

The banking, bonding, insurance and WSIB information was deemed to be commercial information since the subject information relates to, and is a core requirement for the operation of a construction-related business. It was further accepted that the information was supplied by the affected companies in confidence. Finally it was accepted that the release of the information to a requester who is clearly a business competitor of the third parties could reasonably cause harm to the competitive position of the affected third parties.

[50] The region submits concerning section 10(1)(b) that:

[This section] was deemed to apply to parts of the records which related to business references obtained by the region's consultant from organizations and institutions which had previous experience on similar projects conducted by the companies being assessed for prequalification. The exemption also applied to communications between the region's consultant and Design and Construction Division staff which related to business references.

The region states that the three conditions necessary for the application of clause 10(1)(b) are met:

1. Business reference information consists of commercial information relating to the conduct of previously completed projects under the control of the organizations providing the references.
2. Business references are implicitly provided in confidence by the referee. The party which provides the reference information must feel assured that the information is communicated in confidence and

subsequently handled with the utmost care and confidentiality by the receiving institution. If this confidentiality is not upheld, then the continued flow of frank, complete and accurate business references would be critically impaired.

3. The collection of third party business-related references is commonplace for public institutions responsible for major projects. References are an important element of protecting the public interest where substantial amounts of public monies are expended on essential public infrastructure (the [name] WWTP contract was approximately \$3.8 million). If inaccurate business references lead to the selection of an inadequate proponent for the project, then the risk of completion delays, cost overruns or substandard build quality is significant, and these outcomes will cause adverse impacts on the public interest.

[51] The third party company that provided representations states that it supplied its information for the municipal tender prequalification in confidence to the region. It submits that disclosure of its commercial and financial information would cause harm to it. It also states that disclosure of its previous projects for private organizations would affect its current client base and affect its competitive abilities in the marketplace.

[52] As stated above, the affected party provided confidential representations. However, its representations were general representations and did not address the application of section 10(1) to the particular type of information at issue in each record.

Analysis/Findings

[53] As stated above, the requester is only interested in information related to the affected party, the successful party in the general contractor's prequalification process. He is not seeking access to individuals' names and personal contact information or the affected party's banking, insurance or mortgage information.

[54] 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

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

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.¹⁶

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.¹⁷

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.¹⁸

¹⁶ Order PO-2010.

¹⁷ Order PO-2010.

¹⁸ Order PO-2010.

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.¹⁹ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²⁰

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.²¹

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employer/employee relationships. Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute²²
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,²³

but not to include:

- names, duties and qualifications of individual employees²⁴
- an analysis of the performance of two employees on a project²⁵
- an account of an alleged incident at a child care centre²⁶
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation²⁷

¹⁹ Order PO-2010.

²⁰ Order P-1621.

²¹ Order PO-2010.

²² Order P-1540.

²³ Order P-653.

²⁴ Order MO-2164.

²⁵ Order MO-1215.

²⁶ Order P-121.

²⁷ Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[56] Based on my review of the information at issue, I find that the records contain commercial information related to the selling of services to the region. The records also contain financial information related to the pricing of these services.

[57] Therefore, part 1 of the test has been met for the records.

Part 2: supplied in confidence

Supplied

[58] The requirement that the information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.²⁸

[59] 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.²⁹

In confidence

[60] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.³⁰

[61] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure³¹

²⁸ Order MO-1706.

²⁹ Orders PO-2020 and PO-2043.

³⁰ Order PO-2020.

³¹ Orders PO-2043, PO-2371 and PO-2497.

[62] I will now review each record separately.

Record 1

[63] Record 1 is the affected party's submission to the region.

[64] At issue in page 2 is the legal organization of the affected party, listing the year of incorporation and the names of the President, Secretary and Treasurer. Also on this page is the annual value of the affected party's work for the past five years.

[65] As the requester is not seeking access to individuals' names, the names of the affected party's officers is not at issue.

[66] Pages 3 to 16 are a list of the affected party's similar past projects, listing the contact information for the consultant that hired the affected party along with the details of the project's value and timeline.

[67] Pages 67 to 81 are a list of previous jobs performed by the affected party, including the value of each job.

[68] Based on my review of the information at issue, I find that the information at pages 2, 3 to 16 and 67 to 81 that contains information about the affected party's past projects, as well as its annual gross income, was supplied in confidence to the region.

[69] Page 17 includes details of the staffing information for the proposed project. I also find that this information has also been supplied in confidence.³²

[70] I find that the information at the top of page 2 listing the year of incorporation of the affected party is information that would be publicly available and, therefore, not supplied in confidence.

[71] Pages 49 to 54 are the affected party's WSIB Certificate of Clearance and CAD-7 Calculations.

[72] Page 54 is a Certificate of Clearance from the WSIB for the affected party. A Certificate of Clearance is:³³

... a document issued free of charge by the Workplace Safety and Insurance Board (WSIB). It provides you assurance that the contractor or subcontractor:

³² See Order MO-2494.

³³ See Order MO-2801 and section 141.2 of the *Workplace Safety and Insurance Act, 1997*.

- is registered with the WSIB
- has filed all premium remittance forms and reconciliation forms, and
- has paid all premiums owing to the WSIB based on payroll reported.

[73] The WSIB website indicates that these certificates can be viewed online. I find that this page was prepared for a purpose that would entail disclosure. Therefore, I find that it was not supplied in confidence to the region and section 10(1) does not apply to this information. As no other exemptions have been claimed for this page, I will order it disclosed.

[74] Pages 49 to 53 are CAD-7 Calculations forms also issued by the WSIB. These forms contain information related to the WSIB premiums paid by the affected party. I find that this information was supplied in confidence and that part 2 of the test has been met for pages 49 to 53. I will consider whether part 3 of the test is met for these pages below.

Record 2

[75] Pages 1 to 3 are emails. None of the information severed from these pages concerns the third party companies that were successful in the prequalification process. I will order this information withheld as it is not responsive to the request.

[76] Page 7 is a chart. Only the last row of the chart concerns a successful third party company, the affected party. Information has been severed from the columns headed "Annual Value of Work", "Projects of Interest", "Staffing Information", and "Reference Check". The region has only claimed that section 10(1) applies to the "Reference Check" column.

[77] Page 9 is a chart. At issue is a list of some of the projects completed by the affected party in the last ten years.

[78] Page 10 is another chart. At issue is information related to the annual volume of work and the percentage of the affected party and other successful third party companies' bonding limit. The region has only claimed that section 10(1)(a) applies to the bonding limit percentage.

[79] Page 15 is also a chart. At issue is the information as to whether the affected party made a request for prequalification and the type of supplementary information that was provided to the region.

[80] Based on my review of the information at issue in pages 7, 9, 10 and 15, I find that it was all supplied in confidence to the region by the affected party during the

prequalification process. I will consider whether part 3 of the test applies to this information.

Record 3

[81] Pages 1 to 3 are emails. None of the information severed from these pages concerns the third party companies that were successful in the prequalification process. I will order this information withheld as it is information that is not responsive to the request.

Record 4

[82] Page 4 of this record is a chart. The information at issue does not concern a successful third party. I will order this information withheld as it is information that the requester is not interested in receiving.

[83] Page 8 of Record 4 is a chart. At issue in this page is the information in the column titled "Reference Summary". This information is a brief summary of the reference checks done for each prequalification submission. Some of the information at issue reveals information about unsuccessful third party companies and is not at issue and I will order this information withheld. I find that the responsive information in this record was supplied in confidence by the references for each third party company.

Record 5

[84] Pages 1 to 4 of Record 5 consist of an email chain. Only one line on page 4 is about a successful prequalification bidder. This information just lists the name of a general contractor on a project and I find that it was not supplied in confidence and I will order it disclosed. The remaining information in this record is not responsive and I will order it withheld.

Record 6

[85] Page 40 is a CAD-7 Calculations form issued by the WSIB. This form contains information related to the WSIB premiums paid by a successful bidder. I find that this information is immutable and was supplied in confidence and that part 2 of the test has been met for page 40. I will consider whether part 3 of the test is met for these pages below.

[86] Page 41 lists the WSIB definitions for 2012. I find that this page contains information that is available from sources to which the public has access. Therefore, this page was not supplied in confidence and I will order it disclosed.

[87] Page 42 of this record is a Certificate of Clearance from the WSIB for a successful prequalification bidder. For the same reason as set out above for page 54 of Record 1, I find that this page was not supplied in confidence to the region and section 10(1) does not apply to this information. As no other exemptions have been claimed for this page, I will order it disclosed.

Record 10

[88] Page 49 of Record 10 is a letter to all customers of a successful third party about a WSIB Clearance Certificate. Page 50 is the Clearance Certificate. For the same reasons as set out above for page 54 of Record 1, I find that these pages were not supplied in confidence to the region and section 10(1) does not apply to this information. As no other exemptions have been claimed for these pages, I will order them disclosed.

Record 12

[89] Page 40 of Record 12 is a CAD-7 Calculations form issued by the WSIB. This form contains information related to the WSIB premiums paid by a successful bidder. I find that this information is immutable and was supplied in confidence and that part 2 of the test has been met for page 40. I will consider whether part 3 of the test is met for these pages below.

Conclusion re: part 2

[90] I have found the following information is not responsive to the request:

- The names of individuals
- Information concerning any company that was not successful in the prequalification process, which includes the severed information concerning these companies at:
 - pages 1 to 3 of Records 2 and 3.
 - pages 7, 9, 10, and 15 of Record 2.
 - pages 4 and 8 of Record 4.
 - pages 1 to 4 of Record 5, except for the second sentence in the first email on page 4 of Record 5.

[91] I have found the following pages of the records contain information that meets part 2 of the test under section 10(1) as it was supplied in confidence:

- Record 1, pages 3 to 17, 49 to 54, and 67 to 81.
- Record 2, pages 7, 9, 10, and 15.
- Record 4, page 8.
- Record 6, page 40.
- Record 12, page 40.

I will now consider whether this information meets the test in part 3.

Part 3: harms

[92] To meet this part 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.³⁴

[93] 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.³⁵

[94] 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 10(1).³⁶

[95] 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*.³⁷

[96] I will now review each record at issue.

³⁴ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

³⁵ Order PO-2020.

³⁶ Order PO-2435.

³⁷ Order PO-2435.

Record 1

[97] Page 2 of Record 1 contains the annual value of the affected party's work for the past five years. These five figures are global rounded-off figures. The region has claimed that section 10(1)(a) applies to exempt this information. As stated above, the affected party did not provide representations on the application of the harms test set out in section 10(1) to this or any other specific type of information.

[98] The same type of information was considered in Order PO-3224 concerning the value of work undertaken by a construction company, the same type of company as the affected party and other third party companies whose information is at issue in this appeal.

[99] In Order PO-3224, Adjudicator Catherine Corban stated:

The information at issue includes the approximate annual values of construction work executed by the appellant during the five year period prior to responding to the RFQ [Request for Qualifications] as well as the annual consolidated corporate revenues. I note that these figures are global figures that are very general in nature. They do not identify the number of projects completed in a year, the value of those projects or any other information. They are simply overall figures. Without further evidence detailing how the disclosure of these amounts could reasonably be expected to prejudice significantly the appellant's competitive position or result in it experiencing an undue loss, I find that neither the harms at section 17(1)(a) nor (c)³⁸ have been established for this information.

[100] I adopt this reasoning in Order PO-3224 and find that the annual value of work figures at page 2 of Record 1 do not meet part 3 of the test under section 10(1).³⁹ Therefore, I will order this information, which are global rounded-off figures, disclosed.

[101] The region claimed that section 10(1)(a) applies to the information about the affected party's past projects in pages 3 to 16, and 67 to 81 of Record 1. I find that these pages contain general information about projects undertaken by the affected party for government institutions and other organizations. This information is the type of information that is frequently made public by either the public institution or the contractor.

[102] In this regard, I adopt the analysis of former Assistant Commissioner Tom Mitchinson in Order MO-1811, where he rejected the section 10(1)(a) harm arguments

³⁸ Of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the equivalent to sections 10(1)(a) and (c) of *MFIPPA*.

³⁹ See also paragraphs 59 and 72 of Order MO-3058-F.

as they related to prequalification statements submitted by the affected parties for a particular tender process:

... As the appellant points out, this information is historic, and I am not persuaded that there is any reasonable possibility that a competitor could use the bottom-line total value of these past projects in a way that could prejudice the competitive position of the affected parties in a future selection, as required in order to fall within the scope of the section 10(1)(a) harm. While I can accept the City's and the affected parties' position that construction projects of this nature are highly competitive, it simply does not follow that disclosing the particular information at issue in this appeal, which, as the appellant points out, is frequently made public by either the public institution or the contractor, would compromise the interests of either affected party in bidding on future contracts of this nature.

[103] The region claimed that section 10(1)(a) applies to page 17, which contains a list of the titles of the affected party's staff that will be involved in the project, as well as the total number of employees working for the affected party. I find that I do not have detailed and convincing evidence that disclosure of this information, without the names of the involved individuals,⁴⁰ could reasonably be expected to cause the harms set out in section 10(1)(a). Therefore, I will order this page disclosed.

[104] Pages 49 to 53 are CAD-7 Calculations forms issued by the WSIB. These forms contain WSIB premium-related information for the affected party for the years 2002 to 2012.

[105] In Order MO-2884, concerning the application of part 3 of the test under section 10(1)(a) to WSIB CAD-7 forms, I found that CAD-7 Calculations forms could not reasonably be expected to disclose the approach the affected party takes to compete in the construction market, including the way it responds to contracting requests. I also found that this information is the type of information that would be provided as part of the bidding process and is the type of information that would change over time. I stated:

I find that disclosure of these pages of the records, which contain information on WSIB premiums ...from 2009, could not significantly prejudice the competitive position of the affected party; nor could it interfere significantly with the contractual or other negotiations of the affected party. This information is no longer current. This information could not now be used by the affected party's competitors to frustrate or

⁴⁰ The requester does not seek disclosure of individual names.

encumber its ability to successfully negotiate or manage other agreements.

[106] I adopt this reasoning and find that the WSIB CAD-7 forms at pages 49 to 53 of Record 1 do not meet part 3 of the test and are not exempt under section 10(1)(a).

Record 2

[107] Page 7 of Record 2 is a chart. Only the last row of the chart concerns a successful third party company, the affected party. Information has been severed from the columns headed "Annual Value of Work", "Projects of Interest", "Staffing Information", and "Reference Check". The region has only claimed that section 10(1)(b) applies to the "Reference Check" column.

[108] "Annual Value of Work", "Projects of Interest", and "Staffing Information"⁴¹ is the same information I have found not exempt under section 10(1) for Record 1. As stated above, I find that I do not have detailed and convincing evidence that disclosure of this information could reasonably be expected to cause the harms set out in section 10(1).

[109] The "Reference Check" column contains the details of the comments made when the region checked the affected party's references. As set out above, the region provided detailed representations on the application of section 10(1)(b) to this information. It also refers in its representations to Orders M-1106 and M-892. In Order M-1106, Adjudicator Donald Hale stated:

In my view, the disclosure of information of this sort could reasonably be expected to result in a reluctance on the part of referees to make candid and complete comments to institutions and that this source of information could potentially evaporate.

Similarly, I agree with the comments of Inquiry Officer Cropley in Order M-892 regarding the importance of the availability of complete reference information when the expenditure of public funds on projects of this sort is contemplated. I agree that it is in the public interest that such information continue to be supplied to institutions without fear of disclosure and possible recrimination.

[110] I adopt these findings in Orders M-1106 and M-892 and find that the information withheld under "Reference Check" on page 7 of Record 2 is exempt by reason of section 10(1)(b). Disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the institution where it is in the public

⁴¹ Once the names of individuals are removed from "Staffing Information".

interest that similar information continue to be so supplied. I find that the "reference Check" information on page 7 of Record 2 is exempt by reason of section 10(1)(b).

[111] Page 9 is a chart. At issue is a list of some of the projects completed by the affected party in the last ten years. This is the same information I found not exempt under section 10(1)(a) for Record 1. I find that I do not have detailed and convincing evidence that disclosure of this information could reasonably be expected to cause the harms set out in section 10(1).

[112] Page 10 is another chart. At issue is information related to the annual volume of work and the percentage of the affected party and other successful third party companies' bonding limit. The region has only claimed that section 10(1)(a) applies to the bonding limit percentage.

[113] I have already determined above for Record 1 that the annual volume of work is not exempt under section 10(1).

[114] Concerning the bonding limit in page 10, I have not been provided with representations on how this information could reasonably be expected to cause the harms set out in section 10(1). Nor is this information apparent from my review of the record.

[115] Page 15 is also a chart. At issue is the information as to whether the affected party made a request for prequalification and the type of supplementary information that was provided to the region. I have not been provided with representations on how this information could reasonably be expected to cause the harms set out in section 10(1), nor is this apparent from my review of the record. I find that this is general information that does not meet part 3 of the test under section 1(1) and I will order it disclosed.

Record 4

[116] Page 8 of Record 4 is a chart. At issue in this page is the information in the column titled "Reference Summary". This information is a brief summary of the reference checks done for each prequalification submission. This is the same type of information that I found exempt above at page 7 of Record 2. I adopt my analysis set out above for this information and find that the information at issue on page 8 of Record 4 is exempt by reason of section 10(1)(b).

Records 6 and 12

[117] Page 40 in each of Record 6 and Record 12 consists of CAD-7 Calculation forms issued by the WSIB. These forms contain information related to the WSIB premiums paid by a successful bidder. I found above at pages 49 to 53 of Record 1 that this type

of information is not exempt under section 10(1)(a), being the exemption claimed by the region. I adopt this analysis and find that page 40 of Record 6 is not exempt under the claimed exemption.

Conclusion

[118] I have only found that the following information is exempt by reason of meeting all three parts of the test under section 10(1):

- "Reference Check" information on page 7 of Record 2, and
- "Reference Summary" information on page 8 of Record 4.

ORDER:

1. I have found the following information in the records is not responsive to the request and I order it withheld:
 - The names of individuals.
 - Information concerning any company that was not successful in the prequalification process, which includes the severed information concerning the unsuccessful companies at:
 - pages 1 to 3 of Records 2 and 3,
 - pages 7, 9, 10, and 15 of Record 2,
 - pages 4 and 8 of Record 4, and
 - pages 1 to 4 of Record 5, except for the second sentence in the first email on page 4 of Record 5.
2. I uphold the region's decision that the information in the resumes at pages 18 to 37 of Record 1, pages 18 to 24 of Record 7, pages 21 to 27 of Record 8, pages 36 to 47 and 49 to 54 of Record 9, pages 21 to 30 of Record 10, pages 11 to 17 of Record 11, and pages 15 to 24, and 44 of Record 12 is exempt under section 14(1).
3. I uphold the region's decision that the following information concerning any company that was successful in the prequalification process is exempt under section 10(1):
 - "Reference Check" information on page 7 of Record 2, and

- "Reference Summary" information on page 8 of Record 4.
4. I order the region to disclose the remaining information at issue in the records to the requester by **October 16, 2014** but not before **October 9, 2014**.
 5. In order to verify compliance with order provision 4, I reserve the right to require the region to provide me with a copy of the records that are disclosed to the requester.

Original Signed By: _____
Diane Smith
Adjudicator

_____ September 11, 2014