

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3183

Appeal MA13-440

City of Burlington

April 17, 2015

**Summary:** The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Burlington (the city) for access to the names and bid prices for all of the proponents that responded to a particular RFP. The city identified a one-page record as responsive to the request and issued a decision granting access to the names of the proponents, but denying access to the corresponding total bid prices, claiming the application of the mandatory exemption in sections 10(1)(a), (b) and (c) (third party information) of the *Act*. In this order, the adjudicator does not uphold the application of the exemption in section 10(1) and orders the city to disclose to the appellant the total bid prices of each of the proponents.

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

**Orders Considered:** Orders MO-2283 and PO-1763.

### OVERVIEW:

[1] The City of Burlington (the city) issued an RFP for the Britannia Road Bridge Rehabilitation project. After the tender was awarded, one of the unsuccessful proponents submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the names and bid prices for all of the proponents that responded to the RFP.

[2] The city identified a one-page record as responsive to the request and issued a decision granting access to the names of the proponents. The city denied access to the corresponding total bid prices, claiming the application of the mandatory exemption in sections 10(1)(a), (b) and (c) (third party information) of the *Act*. The record also contained scoring information regarding each proponent, which the city identified as non-responsive to the request.

[3] The requester (now the appellant) appealed the city's decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant advised the mediator that the total bid prices for all RFP proponents (affected parties) is, or should be, public and ought to be treated in a similar fashion as all other public tenders. As a result, the appellant continues to challenge the city's claim that sections 10(1)(a), (b) and (c) of the *Act* apply to exempt the total bid prices from disclosure. The appellant also advised the mediator that he was not seeking access to the scoring information contained in the record.

[4] In response, the city explained that pursuant to its Procurement By-Law (69-2005), some information supplied by the affected parties is considered confidential. The city provided a copy of the relevant by-law and directed the mediator's attention to certain provisions.

[5] At this point during mediation, the city notified the affected parties under section 21(1)(a) of the *Act* to provide them with an opportunity to make their views on disclosure of their total bid prices known. Three of the affected parties responded. One affected party objected to the release of its total bid price, with no reasons provided. Another affected party did not object to disclosing its name and total bid price, so long as the city provided it too with the names and total bid prices of all of the affected parties. The third affected party also asked that the city provide it with the names of the other affected parties.

[6] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal sought representations from the city, the appellant and the affected parties. Representations were received from the city, the appellant and one of the affected/ parties, who provided its consent to share its total bid price. Representations were shared in accordance with this office's *Practice Direction 7*. The appeal was then transferred to me for final disposition.

[7] For the reasons that follow, I do not uphold the city's decision and I order it to disclose the total bid prices to the appellant.

## **RECORD:**

[8] At issue is the withheld "Total Price" information in one column of a one-page memo to the RFP evaluation team for the remaining 9 (of 11) bids for the Britannia Road Bridge Rehabilitation project.

## **DISCUSSION:**

[9] The sole issue in this appeal is whether the mandatory exemption in section 10 applies to the total bid prices of each affected party that is contained in the record.

[10] As stated, the city claims that sections 10(1)(a), (b) and (c) apply to the withheld information. 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.

[11] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.<sup>1</sup> 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.<sup>2</sup>

[12] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

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<sup>1</sup> *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.).

<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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**

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

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>3</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>4</sup>

*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.<sup>5</sup>

[14] The city submits that the record contains both commercial and financial information as it relates to the buying and selling of merchandise or services, or to money and its use. The appellant submits that the record contains information about “public funds/money.”

[15] I am satisfied that the information at issue, which is the total bid price of each affected party, constitutes “commercial information” for the purposes of section 10(1) of the *Act*. I make this finding because the information at issue consists of the total price quoted by each affected party for the selling of services to the city; namely its fee to conduct detailed visual structural condition assessments of the Britannia Road bridge.<sup>6</sup> Therefore, the first part of the three-part test in section 10(1) has been met.

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<sup>3</sup> Order PO-2010.

<sup>4</sup> Order P-1621.

<sup>5</sup> Order PO-2010.

<sup>6</sup> Sourced from the city's RFP-13-23.

## **Part 2: supplied in confidence**

[16] 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.<sup>7</sup> 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.<sup>8</sup>

[17] 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.<sup>9</sup>

[18] 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;
- 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.<sup>10</sup>

[19] The city submits that the total price information was supplied to it by the affected parties through a formal bidding process in response to a Request for Proposal. At the time the information was supplied, the city states, the affected parties had a clear and explicit expectation of confidentiality. The city argues that it has evidence of an expectation on the part of each vendor that their information would be kept confidential. In particular, the city discusses:

- its procurement by-law, which states that in non-tender situations only the successful company’s name will be disclosed after the award, pricing information will remain confidential, and that the confidentiality of information received in the course of duty must be respected;

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<sup>7</sup> Order MO-1706.

<sup>8</sup> Orders PO-2020 and PO-2043.

<sup>9</sup> Order PO-2020.

<sup>10</sup> Orders PO-2043, PO-2371 and PO-2497.

- its procurement services operational procedures, which mandate that the strict confidentiality of RFP documentation be maintained;
- both procurement services staff and evaluation team members who work with tenders and non-tenders (i.e. RFPs) are required to demonstrate a clear expectation of confidentiality surrounding third party vendor information.
- the RFP itself, which cross-references the procurement by-law; and
- the fact that it accepts proposals only if on time, sealed and clearly marked.

[20] The appellant advises that it has worked with numerous public agencies across the province and all of them, other than the city, have disclosed the type of information that is the subject matter of this request. The appellant argues that the city's purchasing department's policies and procedures should not take precedence over the *Act*, and the public's right to obtain the information at issue.

[21] Although the record is an internal memorandum created by the city, I am satisfied that the total bid prices of the affected parties contained in the record was originally "supplied" by the affected parties to the city as part of their responses to the RFP. As previously stated, 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.<sup>11</sup> In this case, I am satisfied that disclosure of the total bid prices would reveal information that was supplied by the affected parties.

[22] With respect to whether the total bid prices were supplied "in confidence" for the purpose of section 10(1), I am satisfied that the information in the record at issue was supplied "in confidence" for the purposes of section 10(1) of the *Act*. I accept the position taken by the city that at all times it both maintained the confidentiality of the information, and conveyed to the affected parties an expectation of confidentiality through its RFP process.

[23] All of these circumstances lead me to conclude that the total bid prices of each of the affected parties were supplied explicitly with a reasonably-held expectation of confidentiality between the affected parties and the city. Consequently, I find that the information in the record at issue was "supplied in confidence" by the affected parties to the city, and the second part of the three-part test in section 10(1) has been met.

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<sup>11</sup> Orders PO-2020 and PO-2043.

### **Part 3: harms**

[24] The city takes the position that the harms contemplated in sections 10(1)(a), (b) and (c) apply to the total bid prices. 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.<sup>12</sup>

[25] 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.<sup>13</sup>

[26] 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).<sup>14</sup> 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*.<sup>15</sup>

#### ***Section 10(1)(b) information no longer supplied***

[27] The city submits that if it “reneges” on the expectation of confidentiality that was explicitly communicated in the process of issuing and receiving submissions in response to the RFP, future vendors will be discouraged from submitting bids to the city. The city states that evidence of this concern is apparent in the submissions it received from one of the affected parties during the mediation of the appeal. The affected party the city refers to left a voicemail for the city in which it stated that it objected to the release of any financial information pertaining to the submission in response to the RFP. It did not disclose the reason(s) why it objected to the disclosure of the information at issue.

[28] The city goes on to argue that without receiving pricing information from future vendors, it would be impossible for it to evaluate the financial merits and impacts of vendors in relation to one another. It also submits that if similar pricing information was no longer supplied to the city, the quantity and quality of third party vendors would decline. The appellant’s representations did not address this subsection of section 10(1).

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<sup>12</sup> *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

<sup>13</sup> Order PO-2020.

<sup>14</sup> Order PO-2435.

<sup>15</sup> *Ibid.*

*Analysis and Finding*

[29] I am not persuaded that disclosure of the total bid prices of the affected parties could reasonably be expected to result in similar information no longer being supplied to the city in the future, as contemplated in section 10(1)(b). In my view, companies seeking to do business with public institutions such as the city must understand that certain information regarding how the institution meets its financial obligations will be made public.<sup>16</sup>

[30] Further, in Order MO-2283, Assistant Commissioner Brian Beamish addressed the possible application of section 10(1)(b) to information submitted by third parties in response to an RFP issued by the City of Oshawa (the city) for the construction of a sports and entertainment facility. The city and one affected party in that case took the position that disclosure of the information at issue would result in the information no longer being supplied as contemplated by section 10(1)(b). In that order Assistant Commissioner Beamish stated:

In effect, the City is taking the position that companies will no longer provide the type of information that is necessary in order for the City to evaluate expressions of interest and proposals. In other words, companies will consciously submit incomplete or inadequate bids if they believe that certain information in these bids could become public. In my view, this is an exaggerated and entirely hypothetical proposition. Given the scope of projects put up for public bid, and the value of those projects, detailed and convincing evidence is required that companies will withdraw from the bidding process. That has not been provided.

[31] I agree with the reasoning outlined by Assistant Commissioner Beamish and adopt it for the purposes of this appeal.

[32] In my view, a consulting contract to rehabilitate a bridge for a municipality is potentially profitable and, in keeping with the reasoning in Order MO-2283, requires detailed and convincing evidence to demonstrate that future bidders could reasonably be expected to either withdraw from, or not participate in, the bidding process for such contracts. The affected parties in this case provide no evidence to support the city's claim. I also find that the city's representations on the possible application of section 10(1)(b) are general and highly speculative and do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*.<sup>17</sup>

[33] Consequently, as all three parts of the three-part test in section 10(1) must be met, I find that the total bid prices are not exempt under section 10(1)(b).

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<sup>16</sup> For example, see Order MO-2274.

<sup>17</sup> See note 12.



***Sections 10(1)(a) and 10(1)(c) prejudice to competitive position/undue loss or gain***

[34] With respect to the application of section 10(1)(a), the city submits that disclosure of the record could significantly prejudice the competitive position of each bidder by revealing the total bid price that were “compiled in the course of preparing unique and proprietary responses” to the RFP. The city relies on Order PO-2676, in which Adjudicator Jennifer James held that pricing information could potentially be used to enable competitors to undercut submitting vendors during future bids.

[35] The city goes on to state:

Disclosure of the record could interfere significantly with the contractual or other negotiations of the City that were established under the same Procurement By-law and associated business practices. Breaking with the City’s Procurement By-law and associated procedures will undermine the foundation of trust upon which RFP procurement services have operated in the past, and continue to do so today.

[36] Concerning the application of section 10(1)(c), the city submits that disclosure of the total bid prices could result in undue loss or gain to all prospective third party vendors in two ways:

1. Those who submitted total prices with the expectation of confidentiality may have submitted lower than market rates in order to secure agreements with the city, given the budgetary constraints of a public sector organization. If made public, other potential customers may expect similarly reduced rates, resulting in undue loss to the vendor; and
2. Unsuccessful bidders are interested in the total bid prices submitted by competitors in order to position themselves in a more advantageous position when bidding on future RFPs, causing them undue gain based on price alone.

[37] In addition, the city argues that significant time and costs are expended by third parties in the preparation of RFP bids, in which total price information is initially described and summarized. Disclosure of the total prices, the city states, will expose aspects of the proprietary RFP development process, which can be exploited by competitors who wish to profit from another party’s investment of time and labour.<sup>18</sup>

[38] I also note that the city made the argument in its representations that disclosure of the records could result in:

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<sup>18</sup> Relying on Orders PO-1860 and PO-2467.

- the city incurring additional and unexpected costs as service agreements evolve due to future bidders underestimating costs; and
- damage to the city's reputation, as disclosure of third party information in non-compliance with its own procurement by-law would cast doubt on its intended role as a fair and objective partner in the procurement process.

[39] The appellant reiterates that the city's purchasing department's policies and practices should not take precedence over the application of the *Act*. He states that the information he seeks is public information, and that the public has a right to access it. The appellant also submits that as a bidder, the disclosure of the total bid prices of each affected party does not affect or compromise its business, trade secrets, intellectual property or confidentiality. The appellant argues that the city has not proven how the release of the information being requested will compromise or affect any of the affected parties' businesses, trade secrets or confidentiality.

#### *Analysis and findings*

[40] In order for me to find that the section 10(1) exemption applies, the city and the affected parties must establish using detailed and convincing evidence that there is a reasonable expectation of one of the harms in sections 10(1)(a), (b) or (c) occurring upon the disclosure of the information at issue. In respect of the harm in section 10(1)(a), I must determine whether disclosure of the record could reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization. For the harm in section 10(1)(c), I must decide whether disclosure of the record could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

[41] I am not satisfied that disclosure of the total bid amount of each affected party could reasonably be expected to result in the harms contemplated by either section 10(1)(a) or (c). First, I note that the only affected party providing evidence in this appeal consented to disclose its total bid price. I have no other evidence before me from the affected parties concerning the harms contemplated by section 10(1)(a) or (c). Turning to the city's evidence, I accept that the disclosure of the total bid prices could provide future bidders with commercial information that might lead to them putting in lower bids in response to future RFPs. However, the fact that the successful proponent working for the city, or any other bidder for that matter, may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them, as contemplated by sections 10(1)(a) and (c).<sup>19</sup> I make this finding because I think it is highly unlikely that

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<sup>19</sup> See for example, Order PO-2435.

an institution would enter into a contract with a bidder based solely on accepting the lowest total price bid. I would imagine that there would be further discussion and negotiations regarding the details of the proposal between an institution and a bidder prior to, for example, a municipality accepting the proposal.

[42] The information at issue sets out only the total price of each affected party. In my view, this information does not provide insight into the commercial or technical methodology of each affected party or the possible unique design of their proposals, such that disclosure of the information could significantly prejudice their competitive position or provide an undue gain to competitors. I also find that the city's arguments regarding potential damage to its reputation as a result of the disclosure of this information is not sufficiently detailed and convincing and is speculative at best. Finally, I note that the record is approximately two years old. Considering this passage of time, I do not agree with the city's concerns about the harms under sections 10(1)(a) and (c).

[43] Consequently, as all three parts of the three-part test in section 10(1) must be met, I find that the total bid prices are not exempt under sections 10(1)(a) or (c), and I order the city to disclose them to the appellant.

[44] Having found that the total bid prices are not exempt under section 10(1) of the *Act*, I wish to make a few additional comments in response to some of the arguments made in the city's representations. First, I note that the city provided representations on its exercise of discretion. I remind the city that the exemption in section 10(1) is a mandatory exemption, which is upheld only if the three-part test is met, and that the head does not exercise discretion when claiming this exemption.

[45] Second, the city argues that the appellant is utilizing the *Act* to gain access to the commercial and financial information of its direct competitors in order to secure a private competitive advantage in future bidding processes. The issue of the reason for a party making an access request was addressed by Senior Adjudicator David Goodis in Order PO-1763. In that order, the institution stated that the appellant may have "another, non-public purpose to the request." Senior Adjudicator Goodis rejected that argument and stated that the purpose of the request:

. . . [H]as no bearing on whether access should be granted under the *Act*. Section 4(1) grants a right of access to records not subject to an exemption, without qualification. A requester is not required to justify, or provide reasons for, his or her request [see Order M-96, upheld on judicial review in O.S.S.T.F., District 39 v. Wellington (County) Board of Education (February 6, 1995), Toronto Doc. 407/93 (Ont. Div. Ct.), leave to appeal refused (October 16, 1995) Doc. M15357 (C.A.)]. The only limitation to this principle is that access may be refused where the institution is of the

opinion that the request is "frivolous or vexatious", a claim that the OLC has not made in this case. [emphasis added]

[46] The comments made by Senior Adjudicator Goodis are equally applicable in this appeal, and I remind the city that unless a request is frivolous or vexatious, the reason for the request is not relevant to whether an exemption, such as the one in section 10(1), applies to the information at issue.

**ORDER:**

1. I do not uphold the exemption in section 10(1) and I order the city to disclose the total bid prices of the affected parties to the appellant by **May 25, 2015** but not before **May 19, 2015**.
2. I reserve the right to require the city to provide a copy to this office of the information it discloses to the appellant.

Original Signed By:  
Cathy Hamilton  
Adjudicator

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April 17, 2015