Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3376

Appeal MA15-271

City of Hamilton

November 9, 2016

Summary: The City of Hamilton (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of the successful proposal relating to the city's purchase of refuse packers, as well as any contract and/or purchase orders relating to same. The city issued a decision granting access to the records. A third party appealed on the basis that the exemption for third party information at section 10(1) of the *Act* applies to the records. The adjudicator upholds the city's decision and orders disclosure of the records to the requester.

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

Orders Considered: Orders MO-2093, PO-2435, and MO-3058-F.

BACKGROUND:

[1] The City of Hamilton (the city) received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following information:

> A complete and unredacted copy of the proposal accepted by the City of Hamilton related to the following purchase order or contract issued by the City of Hamilton, along with a complete copy of such issued purchase order or contract:

Contract Number: [a specified contract number was provided]

Supply and Delivery of Four 33 Cubic Yard and Two Cubic Yard Dual Stream Automated/Manual Side Loading refuse Packers

[2] The city identified 56 pages of records responsive to the request and, prior to making its decision, notified an affected party of the request, in accordance with section 21(1) of the *Act*. The affected party objected to disclosure of the records on the basis that they are exempt from disclosure pursuant to the mandatory exemption for third party information at section 10(1) of the *Act.*

[3] The city subsequently issued a decision to the requester and the affected party, granting the requester full access to the records. However, the city did not release the records with the decision, allowing 30 days for the affected party to appeal in accordance with section 39(1) of the *Act*.

[4] The affected party, now the third party appellant, appealed the city's decision to this office. During mediation, the appellant advised the mediator that it consented to the disclosure of certain records on certain conditions. The appellant did not consent to the disclosure of the remaining records, on the basis that they relate to another affected party's interests. The mediator contacted the latter affected party, who objected to the release of certain records relating to it.

[5] Also during mediation, the city and the mediator discussed the fact that information about other third parties appears in the records. The city, however, maintained that its decision remained to disclose the records in full to the requester.

[6] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I invited representations from the third party appellant, who did not file representations. I also invited representations from six additional affected parties whose information appears in the records. Two the affected parties (including the affected party who had objected to disclosure during mediation) advised that they had no objection to the disclosure of their information; the remaining four affected parties did not file representations. I did not consider it necessary to invite representations from the requester.

[7] In this order, I find that section 10(1) does not apply to the records, and I order that they be disclosed to the requester.

RECORDS:

[8] There are 56 pages of records at issue, which are listed on a Record Index prepared by the city and provided to the requester, the appellant and this office. The records consist of:

- the proposal submitted by the appellant to the city, including supporting documentation;
- correspondence and emails relating to the proposal, including the city's letter awarding the contract to the appellant; and
- a purchase order.

ISSUE:

[9] The only issue in this appeal is whether the mandatory exemption for third party information at section 10(1) of the *Act* applies to the records.

DISCUSSION:

[10] Section 10(1) of the *Act* 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;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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

[12] For section 10(1) to apply, the party or parties resisting disclosure 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;

---

[1] *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.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[13] As will be seen below, I have concluded that while Parts 1 and 2 of the test are satisfied for some of the information at issue, Part 3 is not satisfied for any of the information and, as a result, section 10(1) does not apply to any of it.

Part 1: type of information

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

> *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.[3]
>
> *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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]

[15] All of the records at issue relate to a commercial transaction between the city and the appellant. On that basis, I find that the records contain commercial information. Some of the supporting documentation sets out equipment specifications, which I also find is technical information.

[16] I find, therefore, that Part 1 of the test is satisfied.

Part 2: supplied in confidence

[17] In order to satisfy this part of the test, the party with the burden of proof, in this case the appellant, must establish that the information was "supplied" to the institution

---

[3] Order PO-2010.
[4] Order PO-2010.
[5] Order P-1621.

"in confidence".

Supplied

[18] 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.[6] 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.[7]

[19] 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.[8]

[20] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[9] The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[10]

[21] The winning proposal in this case, along with terms contained in a subsequent email, were the basis of the commercial arrangement between the appellant and the city. From my review of the materials before me, it is apparent that the parties did not enter into a separate contract. Previous orders of this office have found that in such circumstances, the successful proposal setting out the bid terms and conditions is not information that is "supplied" within the meaning of section 10(1).[11] In Order MO-3058-F, Assistant Commissioner Sherry Liang, in deciding an appeal where a separate contract was entered into, stated the following:

> I distinguish the circumstances before me from those where a winning proposal becomes, on acceptance, the basis of the commercial

---

[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[9] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[10] *Miller Transit*, above at para. 34.
[11] See, for example, Orders MO-2093 and PO-2435.

> arrangement between the parties, and no separate contract between the parties is created. In Order MO-2093, for instance, this office found that where a winning proposal governed the commercial relationship between a city and a proponent, and there was no separate written agreement, the terms of the winning proposal were mutually generated and not "supplied" for the purpose of section 10(1). In such a case, it is reasonable to view the winning proposal as no longer the "informational asset" of the proponent alone but as belonging equally to both sides of the transaction.

[22] I agree with this distinction and apply it to the records before me. Therefore, subject to the immutability exception, discussed below, I find that the records set out the terms of an agreement between the city and the appellant, and as such, the information in them was not "supplied" to the city within the meaning of section 10(1).

[23] Some of the information in the records, however, falls within the "immutability" exception as it was not susceptible to negotiations between the city and the appellant. For example, supporting documentation submitted with the proposal such as equipment specifications, promotional material, registration and licencing documents, lists of references and letters of recommendation are information that was not susceptible to negotiation. I find, therefore, that this information was "supplied" by the appellant to the city.

In confidence

[24] In order to satisfy the "in confidence" component of Part 2, the party 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.[12]

[25] 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

[12] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[13]

[26] As the appellant did not file representations, I have reviewed the records themselves to determine whether any of the information that was supplied to city was supplied "in confidence". A few product specifications are expressly marked confidential, and I find that the appellant would have had a reasonable expectation of privacy in respect of those records. However, the majority of the records bear no such mark. Absent any representations from the appellant about any expectation of confidentiality surrounding their provision to the city, I conclude that they were not supplied "in confidence".

[27] I conclude that the appellant supplied some product specifications to the city "in confidence". Therefore, Part 2 of the test is satisfied in respect of that information.

Part 3: harms

[28] The party resisting disclosure must demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but need not prove on the balance of probabilities that disclosure will in fact result in such harm. A party resisting disclosure must, however, provide evidence "well beyond" or "considerably above" a mere possibility of harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[14]

[29] The failure of a party resisting disclosure to provide this type of evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.

[30] In applying section 10(1) to government contracts, 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).[15]

[31] The appellant did not make representations. Four of the affected parties did not file representations, while two affected parties responded to the Notice of Inquiry by advising that they did not object to disclosure of the information relating to them.

[32] I have reviewed the records in light of the surrounding circumstances to determine whether disclosure could reasonably be expected to result in any of the

---

[13] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[15] Order P-2435.

harms listed in section 10(1). Although I have found above that only a few of the records satisfy the requirements of both Parts 1 and 2 of the test, I have nevertheless considered Part 3 for all of the records.

[33] During mediation, the appellant initially objected to the disclosure of any records, on the basis that they could be used by a competitor. However, the appellant then indicated that he consented to the disclosure of certain records on certain conditions. Since this consent is equivocal, I have assumed for the purposes of my analysis that the appellant objects to the disclosure of any of the records at issue. I understand the appellant's concerns to be related to the harms set out in sections 10(1)(a) and/or (c).

[34] I accept that disclosure of the records could serve as a guide to competitors, thereby reducing competitors' negotiating costs and possibly increasing the appellant's costs. However, I am not satisfied that this amounts to "significant" prejudice within the meaning of section 10(1)(a), or "undue" loss or gain within the meaning of section 10(1)(c). I agree with Commissioner Brian Beamish where he states in Order PO-2435:

> The fact that a consultant working for the government 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.[16]

[35] No other parties made any representations suggesting that disclosure of any of the information in the records could reasonably be expected to result in any of the harms set out in section 10(1), and from my review of the records, I am not satisfied that disclosure could reasonably be expected to result in such harm.

[36] I find, therefore, that Part 3 of the test has not been met. As a result, the exemption at section 10(1) of the *Act* does not apply to any of the records.

ORDER:

1. I uphold the city's decision to disclose the records at issue to the requester.

2. I order the city to disclose the records at issue to the requester by providing copies to the requester. The disclosure is to take place by **December 14, 2016** but not before **December 7, 2016**, and subject to the payment of the fee.

3. In order to ensure compliance with provision 2 of this Order, I reserve the right to require the city to provide me with copies of the records disclosed to the requester.

---

[16] See also Order MO-2093.

Original Signed by: November 9, 2016

Gillian Shaw
Adjudicator