Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3530

Appeal MA16-123

Regional Municipality of Peel

November 27, 2017

Summary: At issue in this appeal is a request for access to information contained in a Pricing Summary. The Regional Municipality of Peel took the position that the information should be disclosed to the requester. The appellant appealed the access decision asserting that its information contained in the Pricing Summary qualified for exemption under section 10(1) (third party information) of the *Act*. The Adjudicator upholds the region's decision and orders that the information at issue be disclosed to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1)(a) and 10(1)(c).

Orders Considered: Orders PO-2384, PO-2435, PO-2453 and PO-3311.

Cases Considered: *The Queen (Ont.) v. Ron Engineering*, [1981] 1 S.C.R. 111. and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139.

OVERVIEW:

[1] The Regional Municipal of Peel (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to a copy of an identified current contract and associated Request for Tender (RFT) information for Transportation Services for Long Term Care Residents Receiving Dialysis.

[2] The appellant explains in its representations that non-urgent patient transfer (patient transfer) businesses are responsible for transporting patients between health care facilities. It states that this is a critical part of the delivery of health care in Ontario, involving infants, patients requiring dialysis or radiation treatment, palliative, bariatric, disabled and frail passengers.

[3] The region identified records responsive to the request and notified a number of parties whose interests may be affected by disclosure of the responsive records. The region then issued an access decision, granting partial access to the responsive records, relying on section 10(1) (third party information) of the *Act* to deny access to the portion it withheld.

[4] An affected party (the appellant) appealed the region's access decision, asserting that section 10(1) applied to some information that the region was prepared to disclose.

[5] A number of matters were resolved at mediation. At the close of mediation, only access to the withheld information in a record described as a "Pricing Summary" in the region's index of records remained at issue in the appeal.

[6] I sent a Notice of Inquiry to the appellant and the region setting out the facts and issues in the appeal. The appellant provided extensive representations and asked that they all be withheld due to confidentiality concerns. In its representations, the appellant only objected to the release of information it described as Pricing Components.

[7] In response to the Notice of Inquiry, the region advised in a letter that:

> … the document described as "Pricing Summary" does not meet the three-part test under section 10 of the [*Act*].
>
> The [region] is an accountable and transparent government, especially when the information sought relates directly to government expenditure of taxpayer money. Therefore [the region] supports full disclosure of these records.

[8] I then sent the original requester a Notice of Inquiry along with the region's letter and the appellant's non-confidential representations. The original requester did not provide responding representations.

[9] In this order, I uphold the region's decision and dismiss the appeal.

RECORD:

At issue in this appeal is the withheld portion of a document described in the index of records as "Pricing Summary".

DISCUSSION:

Do the mandatory exemptions at sections 10(1)(a) and/or (c) apply to the withheld portion of the Pricing Summary?

[10] The information at issue in this appeal is a contained in a document entitled "Pricing Summary" which contains a comparison of the pricing components of the bidders under the tender at issue in this appeal, including those of the appellant, the successful proponent. There does not appear to have been a contract created after the tender but rather the acceptance of the tender led to the creation of the contractual arrangement. The billing appears to have occurred by way of purchase order, a copy of which the region disclosed to the original requester.

[11] Sections 10(1)(a) and (c) of the *Act* state:

> 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 …

[12] 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]

[13] For section 10(1) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or commercial or financial information; and

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[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) and/or (c) of section 10(1) will occur.

Part 1: type of information

[14] 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
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[3]
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> *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]
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> *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.[6]

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[3] Order PO-2010.

[4] Order PO-2010.

[5] Order P-1621.

[6] Order PO-2010.

The appellant's submissions

[15] The appellant submits that this appeal arises from its position that certain Pricing Components in the Pricing Summary qualify for exemption under sections 10(1)(a) and/or (c) of the *Act*.

[16] It states that it has "serious concerns that the patient transfer business in Ontario has become inappropriately and dangerously commodified" and that:

> Our concerns are exacerbated by requests such as the Request - in which a competitor will use our unique and confidential information to manipulate its own pricing components when bidding on another opportunity - and do so at a level sufficient to "game" the system, and overcome any advantage that [the appellant] may have in quality and service standards and reasonable pricing. We say this with the knowledge that our competitors are the requesters in various recent requests to Ontario hospitals for patient transfer contracts and proposals, and we are currently involved in defending against the release of our confidential information.

[17] The appellant explains that like many businesses, the patient transfer business is one in which various resources are assembled and deployed in a manner that is both efficient and strategic. It submits that such services involve a variety of variables, some of which can be controlled by the service provider, and many of which cannot be so controlled.

[18] It explains that a patient transfer business' pricing model must account for and balance the variables of fuel prices, wait times, cancellations, after-hours services, distance travelled, and in-vehicle supports (e.g., oxygen) and that there is no standard approach. It submits:

> These variables form a matrix that is at the core of our operations, and are the basis for our Pricing Components. If our competitor's pricing components were available to us, we could readily construct the core of their business model; so too if our pricing components were available to our competitors. If a pricing model was known to a competitor, it would be easy to undercut that pricing model in a given procurement process and do so in a way that preserves the overall model with sufficient adjustment to undercut the competitor …

[19] The appellant submits that it consents to the release of the base rate (which it had previously sought to withhold) as this "provides a baseline for determining the contract value, and provides fair disclosure of the cost of our services, without compromising our confidential information." It submits:

> To be clear, we have no issue with the release of generalized pricing information, such as the estimated value of this contract or, as noted above, the base rate and yearly increase. Such information would provide fair disclosure to the public of the cost of our services and would not present the significant harms [the appellant alleges in its representations]. Our concern is solely with the Pricing Components and the significant and undue harm they will cause us.

[20] The appellant submits that the combination of Pricing Components amounts to a trade secret. It explains:

> … The Pricing Components are the product of careful internal analysis and the weighing of risks. It reflects [the appellant's] method of accounting for the variables of patient transfer services activities. [The appellant's] Pricing Components are not generally known by its competitors, and have economic value from not being generally known. Moreover, it is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
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> …
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> The Pricing Components are a description of our approach to the delivery of the services. In our business, they are proprietary in the same way that a recipe is proprietary. …

[21] The appellant submits that the Pricing Components are also "commercial" information, as they relate to the buying and selling of services, and the structure of the appellant's business model. In addition, the appellant submits that the Pricing Components are also "financial" information, as they reveal the appellant's pricing practices and thereby relate to profit and the recovery of overhead and operating costs.

Analysis and finding

[22] I find that the Pricing Summary at issue in this appeal contains the appellant's commercial information because it relates to the buying and selling of Transportation Services for Long Term Care Residents Receiving Dialysis. However, I am not satisfied that the information that the appellant says amounts to a trade secret, meets the definition of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism", or otherwise meets the definition of a "trade secret" as contemplated by section 10(1). As I have found that the pricing summary contains commercial information, it is not necessary for me to determine whether it also contains financial information.

[23] Because I have concluded that the information remaining at issue in the pricing summary qualifies as "commercial" information, I find that the requirements of Part 1 of the section 10(1) test have been met.

Part 2: supplied in confidence

Supplied

[24] 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.[7]

[25] 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.[8]

[26] 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.[9]

[27] 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.[10]

[28] In *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.* (*Miller Transit*)[11], the Ontario Divisional Court explained the "inferred disclosure" exception in the following way at paragraph 33 of the decision:

> The inferred disclosure exception arises where information actually supplied does not appear on the face of a contract but may be inferred from its disclosure. The onus is on the party to show "convincing evidence that disclosure of the information …would permit an accurate inference to be made of underlying non-negotiated confidential information supplied

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[7] Order MO-1706.

[8] Orders PO-2020 and PO-2043.

[9] 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 (*Miller Transit*).

[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

[11] 2013 ONSC 7139.

by the affected party…": see *Order MO-1706, Peel District School Board*, [2003] O.I.P.C. No. 238, at paras. 52-53

[29] At paragraph 43 the court wrote:

> … It applies where contractual information gives rise to an inference, not that the very same information may be found in materials provided by a third party, but that other, confidential, information belonging to the third party may be gleaned by reference to contractual information. That is not the situation here: Miller Transit argues that contractual terms and information mirror documents provided by it to York Region.

[30] At paragraph 59 of Order PO-3311, addressing the provincial equivalent of section 10(1), Adjudicator Daphne Loukidelis elaborated upon the "inferred disclosure" exception in the following way:

> …. the "inferred disclosure" exception is one of two exceptions, along with "immutability," that may bring information otherwise found not to have been "supplied" back within the scope of part 2 of section 17(1). The "inferred disclosure" exception applies where contractual information gives rise to an inference, not that the very same information may be found in materials provided by a third party, but that other *non-negotiated* and confidential information belonging to the third party may be gleaned by reference to contractual information.[12]

[31] The "immutability" exception arises 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.[13]

[32] In Order PO-2384, again addressing the provincial equivalent of section 10(1), I explained the "immutability" exception in the following way:

> … [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may

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[12] Adjudicator Loukidelis cited *Miller Transit, supra* in support.

[13] *Miller Transit*, above at para. 34.

> be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

The appellant's representations

[33] The appellant argues that because of the nature of the RFT process giving rise to the Services Agreement, the information at issue was not negotiated and that the "inferred disclosure" and "immutability" exceptions arise in the circumstances of this appeal. The appellant states:

> In some procurement processes, a purchaser may be free to accept or reject a proposal, as it wishes. However, in the case of the RFT giving rise to this contract, that was not the case. The region issued a binding RFT, which included an irrevocability clause. That binding RFT created a contractual relationship under which the region was bound to award the contract to the highest scoring bidder pursuant to the evaluation methodology set out in the procurement documents (with pricing evaluated by objective formula), or to not award the contract at all. Moreover, the region was not able to make material changes to its requirements, or to allow bidders to make material changes to their bids, after the deadline for submission of bids. In effect, no negotiation was legally permitted.
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> In a binding RFT, if the region chose a bidder other than the highest-scoring bidder, then the region would be in breach of its common law procurement obligations (i.e., the doctrine of "Contract A"), as articulated in *R v. Ron Engineering and Construction (Eastern) Ltd.* (1981) 1 S.C.R. 111, as supplemented by subsequent case law and the obligations imposed on it by the Broader Public Sector Procurement Directive. The region has no alternative.
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> In addition, and pursuant to the same Supreme Court of Canada case law, (i) the region or hospital has no right to negotiate the core elements of a bidder's bid, including its pricing, in a binding RFT; (ii) a region or hospital cannot require a bidder to modify its approach to pricing in order to be awarded a contract in a binding RFT; and (iii) a region or hospital cannot reward a bidder for improving its pricing in a binding RFT. In each case,

> such action would breach the hospital's fairness obligations under case law. It would also constitute a breach of the Broader Public Sector Procurement Directive.
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> Put simply, regions and hospitals that issue binding RFT processes that contain an irrevocability clause are not negotiating with bidders because the nature of such processes requires that information that was supplied by [the appellant] (and other bidders) was not subject to change.
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> To prepare the form of contract, the region transposed our Pricing Components into the relevant sections or schedules to a form of contract. Our Pricing Components were incorporated as is, and without any capacity for negotiation by the region or by [the appellant] (given that this was a binding process). This was an automatic process, and not a negotiated one.

Analysis and finding

[34] 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 the third party. As stated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2* (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which provided the foundation of *MFIPPA*:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. (p. 315) [emphasis added]

[35] In *The Queen (Ont.) v. Ron Engineering* (*Ron Engineering*),[14] the Supreme Court of Canada was not dealing with an access to information request under *MFIPPA*. In any

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[14] [1981] 1 S.C.R. 111.

event, in this appeal, I am not dealing with a request for a finalized agreement, or a tender per se, but rather information in a Pricing Summary prepared for comparative purposes that appears to have been sourced from the appellant's tender which became the contract. As set out above, in its representations the appellant clearly stated that:

> To prepare the form of contract, the region transposed our Pricing Components into the relevant sections or schedules to a form of contract. Our Pricing Components were incorporated as is, and without any capacity for negotiation by the region or by [the appellant] (given that this was a binding process). This was an automatic process, and not a negotiated one.

[36] In my view, because the tender became the contract it became "negotiated" information, since its presence in the contract signifies that the other party agreed to it. I am bolstered in this regard by the determinations of Commissioner Brian Beamish in Order PO-2435 where he rejected the position taken in that appeal by the Ministry of Health and Long-Term Care that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Commissioner Beamish observed that the exercise of the government's option in accepting or rejecting a consultant's bid is a "form of negotiation." He wrote:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health Agency], to claim that the per diem amount was simply submitted and was not subject to negotiation.

[37] Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part 2 of the test to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other items, the record at issue in Order PO-2453 contained the successful bidder's pricing for various components of the service to be delivered, as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and

were not "supplied" pursuant to part 2 of the test under the provincial equivalent of section 10(1), Adjudicator Corban stated:

> Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

[38] I adopt the approach outlined in the authorities above in the case before me. In the circumstances of this appeal, I find that in choosing to accept the affected party's tender bid, the information, including pricing information contained in that tender bid, became "negotiated" information since by accepting the tender bid and it becoming the contract for services the region has agreed to it. The terms of the tender bid quotation submitted by the appellant effectively became the essential terms of a negotiated contract.

[39] I further find that the appellant has not established the application of the "inferred disclosure" or "immutability" exceptions.

[40] As set out above, the "inferred disclosure" exception arises where information actually supplied does not appear on the face of a contract but may be inferred from its disclosure. At issue in this appeal is information that appears in a tender that became the contract. Hence the "inferred disclosure" exception does not apply. I am also not satisfied that the "immutability" exception applies. The appellant's representations are qualified with the word "may" and the appellant fails to go through the extra step to explain how disclosing the withheld information would reveal the appellant's actual underlying non-negotiable costs.

[41] Accordingly, I find that the appellant has failed to provide me with sufficient evidence to establish that its information in the Pricing Summary was supplied for the purposes of Part 2 of the three-part section 10 test.

As all three parts of the test under section 10(1) must be met in order for the exemption to apply, I find that section 10(1) has no application to the appellant's information in the Pricing Summary. As a result, it is unnecessary to consider Part 3 of the test.

ORDER:

1. I uphold the region's decision and dismiss the appeal.

2. I order the region to disclose the withheld portion of the Pricing Summary at issue in this appeal to the requester by providing the requester with a copy by **January 8, 2018** but not before **January 3, 2018**.

3. In order to verify compliance with Order provision 2, I reserve the right to require the region to provide me with a copy of the Pricing Summary at issue in this appeal as disclosed to the requester.

Original Signed by: November 27, 2017

Steven Faughnan
Adjudicator