Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3700

Appeal MA17-479

Region of Peel

November 30, 2018

Summary: The appellant, a third party, appealed a decision by the Region of Peel to disclose information relating to a contract with the third party for modifications to a gas flaring facility at a landfill site. The appellant claimed that the records are exempt under section 10(1) (third party information) of the *Act*. In this order, the adjudicator finds that the exemption does not apply and orders disclosure of the records.

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: Order PO-3392.

OVERVIEW:

[1] A private corporation entered into a contract with the Region of Peel (the region) to provide modifications to a gas flaring facility at a landfill site within the region. Sometime afterwards, the region received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the project. Specifically, the request was for:

> Information relating to landfill gas flaring facility modifications [at a specified site and project number]; including:
>
> 1. A copy of all meeting minutes from all construction meetings.

2. Outline liquidation damages claimed against [named corporation #1].

3. Outline reasoning for accessing liquidation damages and a breakdown of cost incurred to the City used to calculate the liquidation of damages.

4. A copy of the [named consultant's] submittal tracking sheet (showing drawing submittals/approvals and major timeline achievements relating to this contract).

5. The timeline for submission of [named corporation #2's] drawings and subsequent return of approved drawings.

6. List of contract change orders complete with dates for this project.

7. Date of completion of concrete pads for the containers and flare.

8. Date of submission of building permit and receipt of final building permit approval.

9. Date of TSSA Engineering approval.

10. Date of ESA approval.

11. Date of power connection to site.

12. Reasoning/justification for temporarily closing the project on June 30, 2015 and the date this project reopened.

13. The dollar value still owed to [named corporation #1] as part of this contract.

14. Was there ever an official or unofficial request for delivery extension made by [named corporation #1] and if so, what was it and why was it not granted?

[2] The region notified the requester that it would grant access to 269 pages of responsive records, subject to notification of affected parties in accordance with section 21 of the *Act*.

[3] After it received representations from the affected parties, the region issued its decision to the requester, advising that it would grant partial access to the records. The region wrote that it would deny access to the personal information of certain identifiable individuals in the records in accordance with section 14 (personal privacy) of the *Act*.

[4] One of those affected parties is the corporation that entered into the contract with the region to do the work as general contractor. That corporation, now the appellant, appealed the region's decision to disclose any records relating to the project to the requester on the basis that section 10(1) of the *Act* applies to them.

[5] The appeal proceeded to mediation but the issues were not resolved. Accordingly, the appeal moved on to the adjudication stage of the appeal process, where an adjudicator conducts a written inquiry. As part of my inquiry, I received representations from the appellant and the region.

[6] For the reasons that follow, I uphold the region's decision to disclose the records and dismiss the appellant's appeal.

RECORDS:

[7] The records consist of 181 pages of meeting minutes, various correspondence including email chains, compliance and inspection certificates, invoices, change orders and proposals. The main contract itself was not identified as a responsive record and is not in issue.

DISCUSSION:

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

[9] Section 10(1) states:

> 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; or
> >
> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[10] 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]

[11] 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 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

[12] I find that the records meet the first part of the test because they contain three types of information contemplated by section 10(1): technical, commercial, and financial information.

[13] "Technical information" is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Engineering is an example of one such field. "Technical information," while difficult to precisely define, 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" has been discussed in prior orders as relating 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] "Financial information" has been defined as information relating to money and its use or distribution and must contain or refer to specific data.[5]

[14] The appellant made a bid to undertake work on a specified project for the region. As the successful bidder, the appellant entered into a contract with the region to do that work. Given the nature of the project - modifications to a gas flaring plant – I

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

find that the information includes technical information. The records at issue contain information regarding the engineering and construction of the project, which I find is technical information.

[15] Because the records relate to the provision of services and the payment for those services, I find that they contain commercial and financial information. The records also contain information regarding liquidated damages associated with delays in completion of the project, which I find is financial information.

[16] Given my finding that part one of the test is met, because the records contain technical, commercial and financial information, I must consider whether the next two parts of the above-noted three-part test are also met.

Part 2: supplied in confidence

[17] Part two of the three-part test itself has two parts: the appellant must have "supplied" the information to the region, and must have done so "in confidence", either implicitly or explicitly. Where information was not supplied to the region by the appellant, section 10(1) does not apply, and there is no need for me to decide whether the "in confidence" element of part two of the test is met.

[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]

[19] 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]

[20] 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" for the purpose of section 10(1). Past IPC orders have, in general, treated the provisions of a contract 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[8]

[21] 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

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[6] Order PO-2010.
[7] Orders PO-2020 and PO-2043.
[8] The Divisional Court approved this approach in *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.*).

inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible to change.[9]

[22] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that, as the supplier of the information, it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[10]

[23] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case must be 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 disclosure.[11]

Representations

[24] The appellant submits that it won the contract with the region after a public bidding process and, in turn, hired subcontractors to perform certain work on the project. It submits that its competitor and subcontractor has made the request for access to information for an improper purpose.

[25] The appellant submits that part two of the test is satisfied "given that the information in question was supplied in confidence". The appellant submits that the "inferred disclosure" exception applies to prevent disclosure because "disclosure of the information contained in the contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information that it supplied to the institution."[12]

[26] The appellant argues that the fact that it shared sensitive technical, commercial and financial information of a private corporation with the region creates an implied understanding of confidentiality and, further, that it was implied that this sensitive

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[9] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis*.
[10] Order PO-2020.
[11] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.
[12] *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII).

information would not be shared with the appellant's competitors, subcontractors, or others with interests adverse to its own.

[27] The region submits that section 10(1) does not apply to the records and that they should be disclosed in full. While the region's arguments focus on part three of the test in its representations, the region also submits that the appellant was made aware during the tender process that the contract and associated documents could be disclosed to the public in response to an access request. The region included with its representations a portion of the request for tender that became part of the parties' contract; it indicated that this information could be disclosed to a requesting member of the public. This argument goes to the "in confidence" component of part two of the test.

Analysis and Findings

[28] Above, I found that the records contain technical, commercial and financial information. Turning to the records themselves, however, I find that the appellant has failed to establish that it supplied the information in the records to the region for the purpose of part two of the test for exemption under section 10(1).

[29] The records contain certificates relating to the project prepared by external agencies such as the Workplace Safety and Insurance Board and the Electrical Safety Authority following site inspections. These certificates were generated by the various inspectors based on their own inspections or observations during a site inspection. I find that neither these certificates nor the information contained therein were supplied to the region by the appellant.[13]

[30] There are also 99 pages of records consisting of the minutes taken during 16 pre-construction and progress meetings. The minutes disclose that representatives of the region, the appellant, and of another affected third party company[14], attended the meetings. The meeting minutes were recorded by a representative of the other affected third party and distributed among attendees. In this context, I am not persuaded that these minutes were supplied to the region by the appellant, and, in fact, I find that they were not.

[31] The records also contain correspondence between the region and the appellant regarding items such as the construction schedule and project timeline, requests for extensions, liquidated damages associated with delays, and invoices. I find no support in the evidence before me to establish that correspondence from the region was supplied to the region by the appellant in confidence. With respect to the information contained in that correspondence, and in the appellant's replies to the region's correspondence, the appellant has not identified any particular content that it supplied

[13] See Order MO-3335 for a detailed discussion of whether information in inspection reports is "supplied" by the entity being inspected.
[14] The region notified this other company of the request and it consented to disclosure of the records.

to the region in confidence that could establish the requirements of part two of the test.

[32] The remaining records consist of change orders issued by the region, including proposed change notices issued on behalf of the region by the other affected third party company,[15] and proposals for compliance prepared by the appellant in response. The change orders and notices make reference to the fact that they are amendments to the main contract in which the region has requested upgrades, design changes or other modifications and adjustments to the work agreed upon in the parties' main contract. The change orders and notices and related correspondence contain the appellant's response and proposals for the requested amendments to the main contract (which, as noted above, is itself not at issue).

[33] As I indicated above, past orders have found that contracts are not "supplied" but rather reflect agreed-upon terms that are the result of negotiation between the parties.[16] In this context, once the region accepted the bid, the information in the contract became negotiated rather than supplied.[17]

[34] The appellant has offered no representations to support a finding that the change orders or notices and its proposals for compliance do not amount to a renegotiation of terms in the main contract. The change orders were clearly negotiated and are signed by both parties. The proposals are most likely negotiated as well, but even if they were not, the appellant has not satisfied part three of the test, discussed below. Regardless, without any representations from the parties to the contrary, and in keeping with the general view of these types of records as revisions to a contract, I find that the change orders and associated correspondence relating to amendments to the main contract are the result or product of a negotiation process between the region and the appellant and that they were not "supplied."[18]

[35] The appellant argues that the "inferred disclosure" exception to the general principle that contracts are not supplied applies to these records. Quoting the court in *Miller Transit*, the appellant submits that "disclosure of the information contained in the contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution."[19] However, in asserting that the "inferred disclosure" exception applies, the appellant does not identify any particular record, type of record or even information that is of concern. The appellant gives no other details or examples of information that could reasonably be inferred from the disclosure of the change orders or responding proposals, or indeed, any of the records at issue. Although it is possible that the appellant supplied information in emails or correspondence to the region, the appellant

[15] See footnote 14.
[16] Order PO-2384.
[17] Order PO-2384.
[18] See Order PO-3392, upheld in *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616; leave to appeal denied.
[19] *Miller Transit*, supra.

has provided no evidence to support a finding that any such information in its emails or correspondence was supplied in confidence; nor has it provided particulars as to specific confidential information that might be inferred from disclosure. Therefore, there is no basis upon which I could make a finding that the appellant's underlying confidential information could be inferred by disclosure of the records at issue.

[36] Given the lack of detailed support in the appellant's representations, I have no reasonable basis upon which to find that the appellant supplied the information in the records at issue to the region, or that such information was supplied "in confidence." I also have insufficient evidence before me to find that the inferred disclosure exception applies to the negotiated records such as the change orders.[20] As a result, I find that part two of the test for exemption under section 10(1) has not been satisfied.

[37] Since all three parts of the test must be met, this could end my review of the appellant's section 10(1) claim. However, since the appellant's representations focused on the harms it says could reasonably be expected to result upon disclosure of the records at issue, I will review part three of the test for the sake of completeness.

Part 3: harms

[38] To meet part three of the test, the party resisting disclosure must provide sufficient evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[21] The failure of a party resisting disclosure to provide the requisite 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.[22]

Representations

[39] The appellant argues that the prospect of disclosure of the records gives rise to a reasonable expectation that the harms specified in paragraphs (a) and (c) of section 10(1) will occur. The appellant submits that it negotiates with subcontractors for the supply of certain services necessary for its operations and that these negotiations result in rates with subcontractors that may vary from contract to contract. It says that disclosure to its subcontractors of information relating to its contract with the region would harm its competitive position in these negotiations. Because the appellant submits that the request was made by, or for the benefit of, a subcontractor in order to negotiate a higher payout from the appellant, disclosure would therefore "severely prejudice" the appellant.

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[20] I note that the inferred disclosure exception to the general principle that contracts are negotiated and not supplied has no relevance to the records that are not contracts.
[21] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[22] Order PO-2020.

[40] The appellant argues that disclosure will also significantly prejudice its competitive position as a winning bidder on several projects and as an active bidder on other projects for the region. It argues that disclosure will cause it undue loss by interfering with its contractual rights with its subcontractors who will seek higher payouts from the appellant. Consequently, the appellant says, it will be apprehensive about providing further technical, commercial or financial information to the region, if such information is readily disclosed to its competitors or other parties with interests adverse to it. The appellant also argues that disclosure will result in undue gain to competitors and subcontractors to its own detriment, and jeopardize years of work behind developing a trade and successful business practices.

[41] In its representations, the region addresses only part three of the test. It submits that the appellant has failed to provide detailed and convincing evidence to support a finding of a reasonable expectation that the harms described in section 10(1) would occur if the records were disclosed. The region takes the position that, since all three parts of the test must be met, and since the appellant has not met part three, the records are not exempt under section 10(1).

Analysis and findings

[42] Even if I were to find that some of the information was "supplied" to the region by the appellant in confidence, I nevertheless find that part three of the three-part test in section 10(1) has not been met.

[43] According to the appellant, the requester is a competitor and subcontractor who seeks access to the information in bad faith and in order to negotiate a larger payout for itself. The appellant states that disclosure will allow the requester to infer information regarding not just this project, but other bids by the appellant within the region as well as information about the appellant's business and therefore harm the appellant's competitive position. Beyond these assertions, however, the appellant has provided insufficient particulars to support a finding that disclosure of the records could reasonably be expected to result in any of the harms contemplated by section 10(1), which requires evidence about the potential for harm that is beyond the merely possible or speculative.[23]

[44] The region submits that the appellant has not provided sufficient representations to support its reliance on section 10(1) and that its representations regarding part three of the test consist of general assertions that amount only to speculation of possible harm. I agree with the region on this point.

[45] Based on my review of the content of the records, I find that they do not refer to the amounts paid by third parties to their subcontractors. The information in the records does not relate directly to those matters that are the subject of negotiations

[23] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paragraphs 52-54.

between the appellant and its subcontractors. The information in the records pertains to the main contract between the appellant and the region. Therefore, I am not persuaded that disclosure of this information could reasonably be expected to cause harm to the competitive or contractual position of the appellant, in relation to its subcontractors, or otherwise.[24]

[46] Without representations from the appellant that are specific to the records at issue and the surrounding circumstances, there is no support for a finding that the harms contemplated by section 10(1) – beyond the kind speculated by the appellant – could reasonably be expected to result from disclosure of the records at issue.

[47] Given the above, I find that the third part of the three-part test in section 10(1) has not been satisfied and that the records at issue do not qualify for exemption under section 10(1) of the *Act.*

ORDER:

1. I uphold the region's decision and dismiss the appeal. I order the region to disclose the records at issue to the requester by **January 8, 2019** and not before **January 3, 2019.**

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the region to provide me with a copy of the records disclosed to the requester.

Original Signed by: November 30, 2018
Jessica Kowalski
Adjudicator

[24] Order P-1539.