

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3705

Appeal MA16-229

Toronto Transit Commission

December 12, 2018

Summary: The appellant made a request under the *Act* to the TTC for evaluations and scoring information relating to a specific Request for Proposal (RFP). The TTC granted the appellant partial access to the records. The TTC withheld portions of the records under the mandatory exemptions in sections 10(1) (third party information) and 14(1) (personal privacy) and the discretionary exemption in section 11 (economic and other interests). The appellant appealed the TTC's access decision and confirmed its interest in pursuing access to the information subject to the TTC's section 10(1) and 11 claims. In this order, the adjudicator upholds the TTC's decision. The adjudicator finds that section 10(1) does not apply to the scoring information at issue and orders the TTC to disclose it to the appellant. However, she finds that the pricing information at issue is exempt under section 10(1) and that the public interest override in section 16 does not apply to it.

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 (c) and 16.

Orders and Investigation Reports Considered: Orders MO-1706, MO-3058-F, MO-3246 and PO-2853.

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Transit Commission (the TTC) for the following information:

Full evaluations and detailed scoring of each response to [a specific Request for Proposal (RFP)], supply of CAD/AVL System and Implementation Services.

[2] After locating responsive records, the TTC notified the successful proponent of the RFP process pursuant to section 21 of the *Act* (the successful proponent). The TTC provided the successful proponent with an opportunity to provide representations on the application of the mandatory third party commercial information exemption in section 10(1). The TTC received submissions from the successful proponent and issued an access decision to it and the appellant, granting the appellant partial access to the responsive records. The TTC advised the parties it withheld portions of the records from disclosure under the mandatory exemptions in sections 10(1) (third party commercial information) and 14(1) (personal privacy) of the *Act*. The TTC disclosed certain portions of the records relating to the successful proponent to the appellant.

[3] The appellant appealed the TTC's decision.¹ The appellant took issue with the TTC's application of sections 10(1) and 14(1) to withhold portions of the records. In addition, the appellant advised that it sought access to the information relating to the other proponents in the RFP process.

[4] During mediation, the TTC notified additional affected parties pursuant to section 21 of the *Act*. These affected parties also submitted representations to the TTC. After reviewing these representations, the TTC issued a revised access decision and attached a revised Index of Records. In its decision, the TTC raised the application of the discretionary exemptions in sections 11(c) and (e) (economic and other interests of the institution) in addition to its sections 10(1) and 14(1) claims. The TTC disclosed additional portions of the records to the appellant because some of the affected parties consented to their disclosure.

[5] Upon review of the TTC's revised index, access decision and disclosure, the appellant confirmed it does not pursue access to the information withheld under section 14(1). As such, this information is no longer at issue in this appeal. However, the appellant confirmed its interest in the information withheld under sections 10(1), 11(c) and (e).

[6] At the end of mediation, two general categories of information remained at issue: scoring information relating to the unsuccessful proponents contained in Records 1 to 3, pricing information relating to the unsuccessful proponents in Record 3 and pricing information relating to all proponents in Records 4 to 7.

[7] Mediation did not resolve the appeal and the file moved to the adjudication stage of the appeal process. I began my inquiry by inviting the TTC and six affected parties to respond to a Notice of Inquiry, which outlined the facts and issues in this appeal. The TTC and three affected parties submitted representations.

¹ The successful proponent did not appeal the TTC's decision.

[8] In its representations, the TTC advised it no longer relies on section 11 to withhold portions of the records. As such, section 11 is no longer at issue in this appeal. The TTC issued a revised access decision to the parties confirming its position. The information the TTC intends to disclose to the appellant is also subject to the affected parties' section 10(1) claims, so the TTC has not disclosed it to the appellant.

[9] I then sought and received representations from the appellant in response to the TTC and affected parties' representations, which were shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations and raised the possible application of the public interest override in section 16 to the records. Accordingly, section 16 was added as an issue in the inquiry.

[10] The appellant also confirmed it does not pursue access to any information relating to itself. Therefore, the information contained in the records relating to the appellant is no longer at issue in this appeal.

[11] I then sought and received reply representations from the TTC and affected parties in response to the appellant's representations, which were shared in accordance with Practice Direction Number 7. The TTC and affected parties submitted representations.

[12] In the discussion that follows, I uphold the TTC's decision. I find that section 10(1) does not apply to the scoring information at issue and order the TTC to disclose it to the appellant. However, I find that the pricing information at issue is exempt under section 10(1) and that the public interest override in section 16 does not apply to it.

RECORDS:

[13] The records at issue are described as follows in the TTC's Index of Records:

Record No.	Description	TTC's Position
1	Attachment B – Materials and Procurement E	Disclose in full
2	Materials and Procurement Department Proposal Evaluation Forms	Disclose in part; portions withheld under section 14(1) are not at issue
3	Attachment C – Pricing Evaluation Summary	Disclose in part; pricing information and hourly rates relating to unsuccessful proponents withheld under section 10(1)

4	Attachment C – Pricing Evaluation Summary Table 1 – Core System Pricing Information	Disclose in part; pricing information withheld under section 10(1)
5	Attachment C – Pricing Evaluation Summary Table 2 – All-Inclusive Hourly Billing Rates	Disclose in part; hourly billing rates withheld under section 10(1)
6	Attachment C – Pricing Evaluation Summary Table 3 – Options	Disclose in part; pricing information withheld under section 10(1)
7	Schedule D – Pricing Information Form	Disclose in part; pricing information withheld under section 10(1)

[14] In its original access decision, the TTC disclosed portions of the records relating to the successful proponent to the appellant. Specifically, the TTC disclosed the successful proponent’s scoring information in Records 1 and 2, total pricing information and weighted pricing scoring information in Record 3 and total pricing information in Record 4. With the successful proponent’s consent, the TTC also disclosed portions of Record 7 to the appellant. Accordingly, these portions of the records are not at issue in this appeal.

[15] During the inquiry, the TTC withdrew its section 11 claim for Records 1 and 2 and intends to disclose Records 1 and 2 to the appellant in their entirety, with the exception of information withheld under section 14(1), which is not at issue in this appeal. However, the affected parties continue to take issue with the TTC’s disclosure of any information relating to them.

[16] Therefore, I will consider whether section 10(1) applies to all of the responsive records, with the exception of the information relating to the appellant and the information relating to the successful proponent the TTC disclosed to the appellant.

ISSUES:

- A. Does the mandatory exemption at section 10(1) apply to the records?
- B. Is there a compelling public interest in disclosure of the pricing information that clearly outweighs the purpose of the section 10(1) exemption?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1) apply to the records?

[17] The TTC claims the application of section 10(1) to withhold portions of Records 3 to 7. The affected parties claim all of the records are exempt under section 10(1) of the *Act*. This mandatory exemption 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;

[18] Section 10(1) is designed to protect the confidential informational assets of businesses or other organizations that provide information to government institutions.² 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.³

[19] Where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.⁴ Third parties who rely on the exemption in section 10(1) also bear the onus of proving that this exemption applies to the record or parts of the record.⁵ Consequently, in this appeal, the TTC and the affected parties share the burden of proving that the information at issue is exempt from disclosure under section 10(1).

[20] For section 10(1) to apply, the TTC and the affected parties must satisfy each part of the following three-part test:

² *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.).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁴ Section 42 of the *Act*.

⁵ Order P-203.

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the TTC 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) and/or (c) of section 10(1) will occur.

Part 1: Type of Information

[21] As noted above, to satisfy part 1 of the section 10(1) test, the TTC and the affected parties must show that the records contain information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

[22] The TTC did not make representations on the application of section 10(1) to the records. However, it states that it supports the affected parties' representations in relation to Records 3 through 7. The TTC did not apply section 10(1) to withhold Records 1 and 2 from disclosure.

[23] The affected parties submit the records contain their commercial and financial information.

[24] 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.⁶ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷

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.⁸

[25] The records at issue consist of the withheld information contained in a scoring summary form (Record 1), various proposal evaluation forms (Record 2), pricing evaluation summaries (Record 3) and pricing information such as the costs of various products and hourly billing rates for certain types of employees (Records 4 through 7).

⁶ Order PO-2010.

⁷ Order P-1621.

⁸ Order PO-2010.

[26] Based on my review of the records, I find that the numerical scores, ranking, evaluator comments and related scoring information is not the type of information contemplated by section 10(1) of the *Act*. Order PO-2853 addresses the application of part 1 of the section 17(1) [the provincial equivalent to section 10(1) of the *Act*] test to scoring information. In that order, the adjudicator found that the scoring records

... do not contain the type of information listed in section 17(1) [the provincial equivalent to section 10(1) of the *Act*]. These records address the [institution's] evaluation of the proposal submitted in response to the RFPs. What differentiates these records from the others, however, is the fact that [they] do not contain the actual commercial or financial information that was submitted by the affected party in its proposal. Rather, they simply describe the scoring process and the proposals in general, non-specific terms without reproducing the actual commercial and financial information that the [institution] received in response to the RFP.

I adopt this analysis for the purposes of this appeal. Upon review of the records, I find that the pass/fail scores, the evaluator's comments, the ranking and the scores assigned to the various components of the bids by the affected parties is not the affected parties' commercial or financial information within the meaning of part 1 of the test. These portions of the records address the TTC's evaluations of the bids submitted in response to the RFP. The scoring information at issue describes the scoring process and the evaluator's comments describe the bids in general, non-specific terms and do not reproduce the actual information the TTC received in response to the RFP.

[27] To be more specific, I find that Record 1 does not contain the affected parties' information within the meaning of part 1 of the section 10(1) test. The record consists of a summary of the scores for each proponent at the different stages of the review process. None of the information contained in Record 1 contains the information the TTC received in response to the RFP.

[28] Similarly, I find that Record 2 does not contain the affected parties' commercial or financial information within the meaning of part 1 of the test. Record 2 contains a number of proposal evaluation forms that outline the evaluation criteria, the scores (both the value and a pass/fail component) and the rationale for the scores. I have reviewed the rationale or evaluator's comments in Record 2; I find they do not reproduce the actual information submitted by the affected parties in response to the RFP. Rather, the comments consist of general and non-specific information about the affected parties and/or their submissions.

[29] Record 3 is a pricing evaluation summary. I agree with the affected parties that the pricing information and the hourly rates in Record 3 are commercial and financial information relating to the affected parties. However, I find the scoring information does not contain the affected parties' information within the meaning of part 1 of the section 10(1) test.

[30] Record 4 consists of various tables containing the “Core System Pricing Information” for each proponent. Record 4 contains the pricing information for various elements of the affected parties’ submissions. Based on my review, I find the information at issue is commercial and financial information relating to the affected parties. The pricing information relates to the selling of and pricing of the system and services that are the subject of the RFP.

[31] Record 5 is a table of the “All-Inclusive Hourly Billing Rates” for each proponent. I agree with the affected parties that these rates are commercial and financial information regarding the provision of services to the TTC.

[32] Record 6 also contains commercial and financial information relating to the affected parties. Record 6 contains a number of tables relating to various options for the different components of the affected parties’ submissions. The information at issue consists of pricing information relating to these components. Based on my review, I agree with the affected parties that this pricing information is commercial and financial information regarding the selling and pricing for the system and services that are the subject of the RFP.

[33] Finally, I am satisfied that Record 7 contains commercial and financial information relating to the affected parties. Record 7 consists of a number of Pricing Information Forms relating to the affected parties.

[34] In conclusion, I find that the pricing information in Records 3 to 7 contains commercial and financial information relating to the affected parties. Therefore, part 1 of the test under section 10(1) is met for the pricing information in Records 3 to 7. I find the scoring information in Records 1, 2 and 3 does not contain the type of information listed in section 10(1) of the *Act*. Therefore, section 10(1) cannot apply to exempt the scoring information in Records 1 to 3 from disclosure. However, for the sake of completeness, I will consider whether the scoring information in Records 1 to 3 meets part 2 of the test.

Part 2: Supplied in Confidence

[35] 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.⁹

[36] Information may qualify as supplied under section 10(1) if it was directly supplied to an institution by a third party, or where disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.¹⁰

[37] In order to satisfy the *in confidence* component of part 2 of the section 10(1) test, the parties resisting disclosure must establish that the supplier of the information

⁹ Order MO-1706.

¹⁰ Orders PO-2020 and PO-2043.

had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹¹

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.¹²

[39] The affected parties submit they supplied the information at issue to the TTC in confidence.

[40] The successful proponent submits it directly prepared and provided Records 3 to 7 to the TTC "to allow [the] TTC to make an accurate inference of whether [the successful proponent] could successfully complete the requirements within the RFP." In addition, the successful proponent submits that none of the records were involved in any form of negotiation between itself and the TTC and was not "mutually generated."

[41] The successful proponent also submits that it supplied the information contained in the records to the TTC with both an explicit and implicit expectation of confidentiality. The successful proponent submits that it provided the records to the TTC in confidence and understood that the TTC would use them for the purposes of reviewing the RFP submissions.

[42] The successful proponent refers to the RFP which states that the TTC will hold all proposals in confidence and indicates that bidders must clearly identify the portions of their submissions that they consider proprietary or confidential. The successful proponent states it clearly marked all the proprietary and confidential information prior to its submission. In addition, the successful proponent notes that the pricing information in the records clearly states that written consent from the successful proponent is required prior to any disclosure of it. Given these circumstances, the successful proponent submits it communicated the information at issue with the understanding it was confidential and would be kept confidential.

[43] The successful proponent also states it has consistently treated the information at issue as confidential. It does not list the price of its products or services on its

¹¹ Order PO-2020.

¹² Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (SCDC).

website and this information is not readily available to the public.

[44] Based on my review of the records, I find that the disclosure of Records 1 and 2 would not reveal information supplied by any of the affected parties, nor would disclosure permit an accurate inference to be made as to any information supplied by the affected parties. As discussed above, Records 1 and 2 contain scoring information relating to the affected parties. The scoring information only contains the scores and comments made regarding the proposals. Based on my review, I find the scoring information would not allow an individual to indirectly determine any information supplied by the affected parties during the RFP process.

[45] For similar reasons, I find that the scoring information contained in Record 3 would not reveal information supplied by any of the affected parties.

[46] However, I am satisfied the pricing information contained in Records 3 through 7 was supplied by the affected parties to the TTC during the RFP process. Further, I find that the affected parties provided this information to the TTC with a reasonably held expectation that the information would be treated confidentially. Based on my review of the successful proponent's representations, I find that the pricing information supplied by the affected parties was communicated to the TTC on the basis it was confidential and that it was to be kept confidential. I am also satisfied that the pricing information was treated consistently by the affected parties in a confidential manner, not otherwise disclosed or available from sources to which the public has access and prepared for a purpose that would not entail disclosure (i.e. for the purpose of the TTC reviewing their bids).

[47] I note that the records at issue contain information supplied by the successful proponent. Therefore, the successful proponent's proposal was accepted by the TTC and its terms were likely then incorporated into a contract. The IPC has previously considered the application of section 10(1) or its provincial equivalent to winning RFP proposals. For example, in Order MO-1706, the adjudicator considered a winning proposal and found:

... it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution.

[48] In Order MO-3058-F, the adjudicator adopted the analysis in Order MO-1706, considered the IPC's consideration of winning proposals and stated,

I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than

"supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.

Upon review of the records, the adjudicator was satisfied that the information in the winning proposal as well as the information in the evaluation records that was derived from all of the proposals submitted to the institution was supplied within the meaning of section 10(1). The adjudicator was also satisfied that the information was supplied with a reasonably held expectation of confidentiality.

[49] Adopting the analysis in Order MO-3058-F for the purposes of this appeal, I find that the pricing information relating to the winning proponent was supplied to the TTC for the purposes of the RFP process.

[50] I note that previous orders of this office have found that where a bid document becomes the contract, it is considered to have turned into negotiated information "since its presence in the contract signifies that the other party agreed to it."¹³ However, in the case before me, there is no evidence the proposal submitted by the successful proponent was turned into the contract between itself and the TTC.

[51] Therefore, I find that part 2 of the test has been met for the pricing information at issue in Records 3 to 7. I will proceed to consider the harm in disclosure of this information below. However, the scoring information in Records 1 to 3 that I found not to have been supplied in confidence does not meet the part 2 test for the application of section 10(1). As such, the scoring information cannot be exempt under this exemption. As no other mandatory exemptions apply to this information and the TTC did not claim a discretionary exemption for it, I will order the TTC to disclose the scoring information to the appellant.

Part 3: harms

[52] The parties resisting disclosure must provide evidence about the potential for harm. In this case, the affected parties must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁴

[53] The failure of a party resisting disclosure to provide sufficient evidence

¹³ Order MO-3530 at para 36.

¹⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.

demonstrating a reasonable expectation of the harms contemplated in section 10(1) 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*.¹⁵

[54] 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 sufficient evidence to support the harms outlined in section 10(1).¹⁶

Representations

[55] The successful proponent submits that the disclosure of the information at issue would result in prejudice to its competitive position and result in undue loss to itself and gain to its competitors, thereby referring to sections 10(1)(a) and (c) of the *Act*. The successful proponent submits that the pricing information is unique, developed specifically in response to the RFP and is not generally known or made available to the public. Specifically, the successful proponent submits the pricing information can be used by competitors to undercut its cost for services in future RFP processes. The successful proponent submits that the records contain itemized costs of each aspect of the services and the factors that contribute to the total value of the project.

[56] The successful proponent asserts that the disclosure of this information would place its competitors in a more favourable light to secure future bids. The successful proponent submits the disclosure would allow a competitor to review and compare the pricing information in a winning bid and lower its prices when bidding on future RFPs. The successful proponent states the costs of services are a major factor in determining who will be awarded a particular project and the release of its costs associated with these services would place its competitors at an unfair advantage.

[57] In addition, the successful proponent submits that competitors could use the hourly wages of employees in key roles of the project to entice its employees to work for a competitor. The successful proponent asserts that losing key employees would pose a risk of great loss to the business that may be long-standing and hinder the business progress of the company.

[58] The successful proponent also refers to Order MO-3058-F, in which the adjudicator found that pricing information satisfied the section 10(1) test because a knowledgeable party could extrapolate the details to determine the actual values of various components of the proposal.

[59] Finally, the successful proponent submits that the disclosure of the information at issue would place it at a disadvantage with both prospective and existing customers. The successful proponent notes that existing customers may not have benefited from

¹⁵ Order PO-2435.

¹⁶ Order PO-2435.

the favourable pricing structure contained in its bid. Therefore, if the records are disclosed, the successful proponent submits that its existing customers may request renegotiations of their current contracts.

[60] Two other affected parties submitted representations in response to the Notice of Inquiry. The first affected party submits that section 10(1)(c) applies because it will suffer loss in the form of unawarded contracts due to competitor pricing undercuts. As an unsuccessful bidder, the first affected party submits it should not be required to reveal its competitive information.

[61] The second affected party claims the application of section 10(1)(a) and asserts that the disclosure of the pricing information contained in the records would reveal confidential financial information which could reasonably be expected to prejudice its competitive position significantly.

[62] The TTC did not make submissions on section 10(1) of the *Act*. Rather, the TTC advised it would adopt the affected parties' representations on the issue.

[63] The appellant disputes the harms claimed by the affected parties. The appellant submits that most of the information is in the public domain and the information "which is not becomes quickly stale once exposed to 'public air' through the RFP response process." The appellant provided a copy of a public "Staff Report Action" created by the TTC dated February 25, 2016 which provided a limited amount of information regarding the RFP process and decision to award the contract to the successful proponent.

Findings

[64] I have found that part 2 of the test has been met for the pricing information relating to the affected parties in Records 3 to 7.

[65] Record 3 contains the total pricing information and hourly rates for each proponent. However, as stated above, the TTC disclosed the total pricing information relating to the successful proponent in its original access decision to the appellant. Therefore, this portion is not at issue in this appeal. The TTC did not disclose the hourly rate information relating to the successful proponent to the appellant. This portion, as well as the pricing information and hourly rates relating to the unsuccessful proponents remain at issue.

[66] Record 4 contains itemized costs for each aspect of the services to be provided by each proponent. I note that the TTC disclosed the total cost in relation to the successful proponent to the appellant. Therefore, this information is not at issue in this appeal.

[67] Record 5 contains a list of the hourly billing rates each proponent will charge for the different types of positions required for the project. Similar to Record 4, Records 6 and 7 contains itemized costs for each aspect of the services to be provided by each proponent in relation to various options offered for the project.

[68] Based on my review of the parties' representations and the information that remains at issue, I am satisfied that the disclosure of the pricing information could reasonably be expected to result in the harms contemplated by sections 10(1)(a) and (c). I find support for this finding in Order MO-3246, in which the adjudicator found as follows:

... I am prepared to withhold the information in the Schedule of Personnel and Hourly Rates in Records 1 and 2. A number of decisions have considered the application of section 17(1) (the provincial equivalent to section 10(1)) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records.¹⁷ I accept the appellant's submission that disclosure of this information could reasonably be expected to prejudice the appellant's competitive position or cause undue loss to the appellant because its competitors can use the information in the hourly rates and cost breakdown to underbid the appellant in future RFP processes. I find that the information in the records and the appellant's representations establish the harms in section 10(1)(a) and (c) to this financial information.

Adopting this analysis, I find that the pricing information that remains at issue as well as the successful proponent's representations establish the harms in sections 10(1)(a) and (c). As stated above, the pricing information at issue consists of very detailed and specific itemized costs for every aspect of the services to be provided by the proponents. I accept that the pricing information, including the hourly rates for the various services to be provided as well as the itemized costs for the project, could, if disclosed, be used to the advantage of competitors and disadvantage of the affected parties.

[69] Based on my review of this information, I am satisfied its disclosure could reasonably be expected to prejudice the competitive position of the affected parties or cause undue loss to them because their competitors could use the information in the hourly rates and the itemized cost summaries to underbid them in the future. I am satisfied that the pricing information at issue is unique to each affected parties. This information was developed for the purpose of this particular RFP and is not publicly known. Therefore, I find that the disclosure of the pricing information that remains at issue could reasonably be expected to result in the harms contemplated by sections 10(1)(a) and (c).

[70] In conclusion, I find that all three parts of the test have been met for the pricing information, with the exception of the portion relating to the winning proponent in Record 3. Accordingly, this information is exempt from disclosure under section 10(1) of

¹⁷ Orders P-166, P-610, M-250, PO-1791 and PO-1932.

the *Act*.

Issue B: Is there a compelling public interest in disclosure of the pricing information that clearly outweighs the purpose of the section 10(1) exemption?

[71] Section 16 states,

An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[72] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the information at issue. Second, this interest must clearly outweigh the purpose of the exemption.

[73] The *Act* is silent as to who bears the burden of proof in respect of section 16. The onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.¹⁸

Representations

[74] The appellant submits that all records and pricing information from the vendors participating in this RFP should be made available to it. The appellant submits it is "highly unusual and suspicious" when this information is not publicly available because the TTC is publicly funded and there is a fiduciary responsibility to spend those funds in a fiscally responsible way. The appellant refers to potential bid rigging concerns raised in the City of Toronto's Auditor General Report on the procurement for road resurfacing contracts to highlight the importance of transparency and accessibility to information relating to RFP processes. The appellant also referred to other jurisdictions, including the City of Miami, that proactively disclose similar information to the public. The appellant asserts that the TTC should be more transparent in disclosing information relating to their operations and contract award processes.

[75] The TTC states that it takes concerns surrounding bid rigging and corruption in the procurement process seriously. The TTC agrees it is in the public interest to conduct fair procurement processes. However, the TTC submits it took steps to ensure that the procurement process that is the subject of this appeal was fair, including hiring an independent and impartial Fairness Monitor. The TTC provided the IPC with a copy of the Fairness Monitor's report which details the steps taken to review and monitor the RFP process and concluded that it was "open and fair and in accordance with the TTC

¹⁸ Order P-244.

procurement policy and the evaluation process methodology, criteria, scoring and weighting within the RFP.” The TTC asserts it conducted a fair procurement process.

[76] Given these circumstances, the TTC submits there is no compelling public interest in the information at issue that would override the purpose of the section 10(1) exemption to protect confidential commercial information.

[77] The successful proponent submits there is no compelling public interest in the information at issue. The successful proponent states that prior IPC decisions¹⁹ have found that a compelling public interest does not exist when another public process or forum has been established to address public interest consideration. In this case, the successful proponent submits that the TTC’s Fairness Monitor ensured that the procurement process was fairly administered.

[78] In addition, the successful proponent submits there is no evidence that the TTC participated in any of the bid riggings discovered in the City of Toronto’s Auditor General Report.

[79] Finally, the successful proponent submits that a significant amount of information, including the final contract costs and value, is already publicly available.

[80] The other affected parties assert there is no compelling public interest in the disclosure of the pricing information at issue that outweighs the purpose of the section 10(1) exemption. One affected party submits that the pricing information at issue would not enlighten the citizenry about the activities of their government or its agency nor is there any indication of any impropriety during the procurement process. Moreover, the affected party submits the information at issue will not shed light on an issue that has developed strong interest or attention in the community.

Findings

[81] The information that remains at issue consists of the pricing information, including the itemized costs for the project as well as hourly rates for various services, provided by the affected parties in response to an RFP.

[82] It is the appellant’s position that the information at issue should be disclosed to shed light on the TTC’s operations and procurement process.

[83] Based on my review of the records, I find there is no compelling public interest in the disclosure of the pricing information that clearly outweighs the purposes of the section 10(1) exemption. I find that the pricing information supplied by the affected parties would not shed light on the TTC’s operations nor would it shed light on the manner in which the TTC reviewed and evaluated each bid. Rather, the disclosure of the information at issue would merely reveal the confidential financial and commercial information of the affected parties, which section 10(1) is meant to protect.

¹⁹ Order PO-1688.

[84] I have found that the scoring information is not exempt under section 10(1) of the *Act* and will order the TTC to disclose it to the appellant. Based on what I will order the TTC to disclose, I find that the appellant will have access to information that will shed light on the TTC's operations and its procurement process. The scoring information in the records and the information that is publicly available will provide the appellant with information regarding the procurement process for this RFP. Therefore, I find that the information I will order to be disclosed as well as that currently available to the public will serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies. I find this information is sufficient to address the appellant's concerns about the fairness of the procurement process.

[85] Therefore, I find there is no compelling public interest in the disclosure of the pricing information that I have found to be exempt under section 10(1) and I uphold the TTC's decision to withhold this information.

ORDER:

I uphold the TTC's decision and dismiss the appeal. I order the TTC to disclose the records in accordance with its revised access decision dated April 27, 2017 by **January 23, 2019** but not before **January 18, 2019**.

Original Signed by: _____
Justine Wai
Adjudicator

December 12, 2018 _____