Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3756

Appeal MA17-336

Region of Peel

April 24, 2019

Summary: This order deals with the third party appellant's appeal of the region's decision to disclose records in full and in part relating to its agreements, financial statements and proposals with a named organization in regard to the operation of homeless shelters. The third party appellant argues that the mandatory third party information exemption applies to deny access. In this order, the adjudicator upholds the region's decision, in part, and orders that the proposals and the service agreement be disclosed.

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

Orders and Investigation Reports Considered: Orders MO-2283, MO-3395-I, PO-3782, and MO-2669-R.

BACKGROUND:

[1] The Region of Peel (the region) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act),* which was later clarified by the region and the requester as follows:

> Copies of agreements between the Region of Peel and [named organization] since 2013 to operate the four homeless shelters in Peel;
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> Copies of all yearly financial records in relation to this agreement from 2011 and onward; and

> Copies of all proposals since 2011 to the Region of Peel from [named organization] to operate or bid on the four shelters.

[2] Pursuant to section 21 of the *Act*, the region notified an affected party (the named organization) and sought its views regarding disclosure. After considering the affected party's representations, the region issued an access decision granting full access to 743 pages of the responsive records (out of 745 pages), and partial access to the remaining two pages.

[3] The affected party, now the third party appellant, appealed the region's decision to this office. It argues that the mandatory third party information exemption at section 10(1) applies to withhold all 743 pages at issue.

[4] During mediation, the third party appellant advised that it does not consent to the disclosure of any of the records while the original requester advised that he is pursuing access to all of the records that the region had granted him access to. The original requester did not appeal the information that the region withheld from the two pages.

[5] As mediation did not resolve this appeal, it was moved to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

[6] I invited the third party appellant to provide representations. It declined to provide any representations, but relied on its earlier submissions to the region dated May 5, 2017. Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, the third party appellant's submissions were shared with the original requester. Subsequently, the original requester provided representations in response to the issues set out in the Notice of Inquiry and to the third party appellant's submissions.

[7] In this order, I uphold the region's decision, in part, and order that the proposals and the service agreement be disclosed.

RECORDS:

[8] The records at issue are the following:

- the current service agreement (2013) between the region and the third party appellant, including schedules, appendices, and amendments (the "service agreement");
- the financial statements of the third party appellant in regard to the operation of homeless shelters in the Region of Peel for the years ending March 31, 2011, 2012, 2013, 2014, 2015, and 2016 (the "financial statements"); and

- three proposals in response to the Request for Proposal (RFP) Document No. 2012-347P, Document No. 2013-200P, and Document No. 2014-085P (the "proposals").

DISCUSSION:

[9] The sole issue in this appeal is whether the mandatory third party information exemption applies to the records at issue.

[10] 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,
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> > (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;
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> > (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.

[11] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[2]

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

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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.

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[13] To satisfy the first part of the section 10(1) test, the third party appellant must show that the records reveal information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

[14] Past orders of this office have defined financial and commercial information as follows:

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

[15] Adopting these definitions, from my review of the records at issue, I find that they contain information that qualifies as commercial and financial information for the purposes of section 10(1) of the *Act*. More specifically, I find that the financial statements contain financial information as they relate to money and its use or distribution while the proposals and the service agreement contain commercial information as they relate to the selling of services. I note that the third party appellant submits that the financial statements contain financial information while the service agreement and the proposals contain commercial information. I also note that the original requester did not address this issue in his representations. Accordingly, the first

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

part of the test for the application of section 10(1) has been met.

[16] I will now consider the second part of the test.

Part 2: supplied in confidence

Supplied

[17] 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]

[18] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[7]

[19] The third party appellant submits that the region played no role in the creation of the financial statements or the proposals. It submits that it authored the proposals in response to the RFP Documents. The third party appellant also submits that a part of the financial statements (specifically the Independent Auditor's Reports) was prepared and authored by KPMG LLP, Chartered Accountants save for its cooperation in providing KPMG LLP with access to its financial statements. It submits that the other part of the financial statements is the product of its monitoring the revenue and expenses of the homeless shelters subject to the service agreement.

[20] Although the original requester provided representations, his representations did not address the "supplied" component of the second part of the test.

Proposals and financial statements

[21] In the circumstances of this appeal, I am satisfied that the proposals and financial statements were "supplied" by the third party appellant to the region. The information contained in the financial statements was supplied to the region pursuant to section 5.1 of the service agreement, and sections 4, 11 and 12 of Schedule E of the service agreement. The information contained in the proposals was authored by the third party appellant, and supplied to the region in response to the RFP Documents. Accordingly, I find that the proposals and financial statements were "supplied" for the purposes of section 10(1).

Service agreement

[22] With respect to the service agreement, I note that the third party appellant made

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[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.

no submissions with respect to it being "supplied" to the region.

[23] This office has repeatedly found that the contents of a contract between an institution and a third party will not qualify as having been "supplied" for the purpose of section 17(1) [the provincial equivalent of section 10(1)] because contracts are presumed to be mutually generated, while proposals submitted by third parties to institutions are presumed to be "supplied."[8] This office has applied this general rule even in situations where the contracts are preceded by little or no negotiation. The Divisional Court has repeatedly upheld this office's general rule that contracts are mutually generated.[9]

[24] Applying this reasoning, I find that the service agreement is a contract that was mutually generated by the third party appellant and the region. As noted above, the third party appellant did not make any submissions that the service agreement was "supplied". As such, I find that it was not "supplied" for the purpose of the *Act*.

[25] There are two exceptions to the above general rule. They 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] The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[11]

[26] As stated above, the third party appellant did not provide submissions on whether either exception applies to the information contained in the service agreement. The third party appellant did not argue that the information in the service agreement was information that it supplied to the region that was not susceptible to negotiation. Based on my review of this record, and in the absence of specific representations on this issue, I do not find that I have sufficient evidence to satisfy me that disclosure of the information would permit the accurate inference of underlying non-negotiated confidential information supplied by the third party appellant. As neither of the exceptions to the general rule on contracts were made out by the third party appellant, I find the service agreement was not supplied for the purposes of section 10(1). As such, it does not qualify for exemption under section 10(1) and should be disclosed to the original requester.

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[8] See Order MO-3058-F for discussion of this general rule.
[9] See *Miller Transit* paras 26 and on, and more recently, *Accenture Inc. v Ontario (IPC)* 2016 ONSC 1616 at paras 40-42 and 50.
[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[11] *Miller Transit*, above at para. 34.

[27] I will now consider whether the financial statements and the proposals were supplied "in confidence" to the region.

In confidence

[28] In order to satisfy the "in confidence" component of the second part of the test, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[12]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure[13]

[30] The third party appellant submits that the records are not otherwise disclosed or available from sources to which the public has access. It explains that it has no public disclosure obligation under the statute by which it was created. The third party appellant submits that the records were prepared for a purpose that would not entail disclosure. It explains that the financial statements were disclosed to the region to satisfy its contractual obligations under the service agreement, but they were not appended to nor do they form a part of the service agreement. It also submits that it had a reasonable expectation that its internal financial documents be held in confidence by the region as they are documents created without the input of a public body such as the region. The third party appellant further submits that it has a reasonable expectation of non-disclosure due to its familiarity with the *Act*. It points out that the RFP Document No. 2013-200P states that the region is subject to the *Act* with respect to the collection, use, disclosure, retention and protection of confidential and sensitive information under the region's custody or control. It also points out that the same RFP Document No. goes on to state the service agreement and associated documents may be required by law to be made available to a requesting member of the public subject

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[12] Order PO-2020.
[13] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

to the application of an appropriate exemption to disclose in the *Act* or a non-disclosure requirement in the *Act*.

[31] In his representations, the original requester submits that the proposals and the financial statements were not supplied "in confidence". He states:

> … the information supplied to the institution was not supplied in confidence. The information was agreed to by [the affected party] in the Request for Proposal that went out and the response was received by [the region]. In the RFP it was informed to all respondents that the information provided to the [region] is subject to the *Act*. By responding to the RFP, [the affected party] agreed to such. As well at no time during the RFP response did [the affected party] object or provide information that certain items should be exempt. In fact, [the affected party] knew about the disclosure under the *Act* and therefore implied their consent to the release. Whether it is financials, the proposals or responding materials, [the affected party] agreed to such release.

[32] Based on my review of the proposals and the financial statements, I find that they were supplied "in confidence" for the purposes of section 10(1). The third party appellant prepared the financial statements for the purpose of reporting its financial position to satisfy its contractual obligations under the service agreement. This purpose did not entail disclosure. I note that the financial statements were not appended to nor do they form a part of the service agreement. I also note that the RFP Document No. 2013-200P states that the service agreement and associated documents may be required by law to be made available to a requesting member of the public subject to the application of an appropriate exemption under the *Act* or a non-disclosure requirement under the *Act*. As such, I find that the third party appellant had a reasonable expectation that the proposals and financial statements would be treated confidentially by the region. Accordingly, I find that they were supplied "in confidence".

Part 3: harms

[33] To satisfy the third part of the test, the third party appellant must provide evidence about the potential for harm resulting from disclosure. It 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]

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[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

[34] The failure of a party resisting disclosure to provide such evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[15]

[35] The third party appellant submits that there is a reasonable expectation of harm to its competitive position if the records are disclosed. It submits that competitors may gain access to the records and use them to make accurate inferences regarding its financial position in respect of its ability to provide emergency housing services during future request for proposal processes. As a result, it submits that a government may award future service contracts to its competitors which may result in undue gain for other organizations.

[36] In addition, the third party appellant submits that there is a reasonable expectation of harm to the public interest if the records are disclosed. It submits:

> The integrity of the request for proposal process is premised on "blind bidding" in order to encourage participating parties to submit the most cost-effective proposals for services. If one party knows a competitor's financial position in advance of filing its submission in response to a request for a proposal for services then it is commercially reasonable for that party to submit a proposal that simply edges out a competing proposal and to retain the financial benefit rather than having those benefits passed on to the public through the most cost-effective pricing.
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> In order to avoid this less than optimal outcome, it is common for the rules governing requesting for proposal process to prohibit participating parties from engaging in price-fixing or collusion in order to ensure there is not only a winning bid but that the process is fair and maintains the public's confidence that public monies are truly being spent in the most cost-effective manner. Though disclosure of the Record would not necessarily result in the kind of collusion, the effect of disclosure would ultimately be the same and would undermine the public's trust in the entire request for proposal process.

[37] The third party appellant also submits that it is in the public interest for the region to partner with organizations like it to provide the non-profit management and charitable expertise necessary to operate these types of facilities.

[38] In his representations, the original requester submits that the third party

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[15] Order PO-2435.

appellant would not suffer any harms from the disclosure of the proposals and the financial statements. He argues that as the shelters are owned and financed by the region, the records about these shelters belong to the region.

[39] In addition, the original requester submits that disclosure of the proposals and financial statements would not harm or result in undue loss to the third party appellant as all financial information is held by the region and not the third party appellant. He also submits:

> … [The third party appellant] is paid a management fee to operate such shelters with all finances paid by [the region] and not the [third party appellant]. Therefore, there would be no loss to [the third party appellant].

[40] For the reasons stated below, I find that the third party appellant would not reasonably be expected to suffer any harms from the disclosure of the proposals. However, I do find that it is reasonable to expect that it would suffer harms from the disclosure of its financial statements.

[41] The third party appellant argues that there is a reasonable expectation of harm to its competitive position and the public interest if the proposals and the financial statements are disclosed. However, its representations do not provide details or evidence in support of these arguments with respect to the proposals. I find that its representations fall short of the sort of detailed evidence that is required to establish part three of the test. Instead, its representations amount to speculation of possible harms if the proposals are disclosed. From my review of the proposals, I find that harms are not inferable from the face of them. Accordingly, I find that the third party appellant has not established any of the harms that could reasonably be expected to result from disclosure of the proposals.

[42] As all parts of the three-part test must be met for section 10(1) to apply, I find that the proposals are not exempt under section 10(1). I will, therefore, order that they be disclosed to the original requester.

[43] With respect to the financial statements, I find that it is reasonable to expect that the third party appellant would suffer harm from their disclosure. The financial statements contain its revenue and expenditures statements, balance sheets, statements of operations and changes in fund balances, statement of cash flows, schedules of revenues and expenses and independent auditor's reports. I agree with the third party appellant that its financial statements are its informational assets. I note that it disclosed these records to the region to satisfy its contractual obligations under the agreements. I also note that they are not appended to nor do they form a part of that agreements. In my view, it is reasonable to expect that its competitors would gain an advantage over the third party appellant if these records were disclosed. The third party appellant's competitors would be able to make accurate inferences regarding its financial position, which normally would be kept confidential.

[44] I acknowledge that the original requester is not one of the third party appellant's competitors currently nor is he likely to be a competitor in the future. However, disclosure to one person is the equivalent to "disclosure to the world."[16]

[45] Furthermore, the financial statements do not relate to the running of the homeless shelters as surmised by the original requester. Instead the third party appellant's financial statements provide detailed information about its financial viability. Accordingly, I find that the financial statements are exempt under section 10(1).

ORDER:

1. I uphold the region's decision, in part. I order the region to disclose to the original requester the proposals and the service agreement by **May 31, 2019** but not before **May 27, 2019**.

2. With respect to provision 1, I reserve the right to require the region to provide me with a copy of the records ordered disclosed to the original requester.

Original signed by | April 24, 2019
Lan An
Adjudicator

[16] See MC-050034-1.