

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4021

Appeal MA19-00063

The Regional Municipality of Durham

March 12, 2021

Summary: The region received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records submitted in response to a Request for Proposal for a food services contract. The responsive records consist mainly of a bid proposal submitted by the successful proponent. A small portion of the records relate to the bid the appellant submitted to the region. After notifying the successful proponent as a third party, the region granted the appellant partial access to the records, claiming that the mandatory third party information exemption under section 10(1) applied. The region also withheld portions of the records under the discretionary exemptions in sections 7(1) (advice or recommendations) and 11(c) (economic and other interests).

In this order, the adjudicator finds that most of the information withheld from the third party's bid proposal qualifies for exemption under section 10(1). However, the adjudicator orders the region to disclose the pricing information because she finds that this information does not qualify for exemption under sections 10(1) or 11(c). The adjudicator also orders the region to disclose the scores related to the appellant's and third party's bids because this information does not qualify for exemption under section 7(1). She finds the remaining bid information exempt under section 10(1) and that the public interest override in section 16 does not apply, and she upholds the region's decision not to disclose this information. Finally, the adjudicator orders the region to disclose portions of the records that relate to the appellant's bid.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), 10(1), 11(c) and 16.

Orders and Investigation Reports Considered: Orders MO-3258, MO-4005 and PO-4055.

OVERVIEW:

[1] This order under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) addresses a request to the Regional Municipality of Durham (the region) for records relating to a Request for Proposal (RFP) for a food services contract. The contract was for the daily provision and delivery of food supply services to several facilities owned by the region. The request submitted to the region sought access to:

- All contracts between the [region] and [the successful proponent]
- Proposal submitted by [the successful proponent]
- Scoring results and notes for [the successful proponent's and appellant's bids]
- Notes from site visits to [the successful proponent's and the appellant's facilities]

[2] The region located responsive records and notified the successful proponent (the third party) about the request. The region subsequently issued a decision letter to the appellant granting partial access to the responsive records, withholding portions of the appellant's bid as well as the successful proponent's bid. The region denied access to the remaining records under sections 7(1) (advice or recommendations), 10(1)(a) and (c) (third party information) and 11(c) (economic and other interests). The region also claimed that disclosure of portions of the bid proposal (record 1) would constitute an unjustified invasion of personal privacy under section 14(1) as it contained educational or employment information about the third party's employees.

[3] The appellant appealed the region's decision to this office and a mediator was appointed to explore resolution with the parties. During mediation, the mediator explored settlement with the appellant, region and third party. However, mediation did not resolve the appeal and the file was transferred to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry.

[4] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in this appeal to the region and the third party inviting their representations in support of their position that the records qualify for exemption under the *Act*. The representations of the parties opposing disclosure were provided to the appellant for a response.¹ The confidential portions of the third party's representations included an annotated copy of the records that contained notations and explanations in support of its position that certain information should not be disclosed to the appellant. The third party also identified information in its bid proposal and attachments (records 1 to 6)

¹ A complete copy of the region's representations and non-confidential portions of the third party's representations were shared in accordance with this office's confidentiality criteria set out in the *Code of Procedure and Practice Direction 7*.

that it consented to being disclosed to the appellant. This information has been removed from the scope of this appeal.

[5] I then sent a Notice of Inquiry inviting the appellant's representations. The appellant provided brief representations in response. The appellant raised the possible application of the public interest override in section 16. The appellant did not make any representations in response to the ministry's claim that some records qualify for exemption under sections 7(1) and 11(c). The appellant also did not confirm whether it continued to seek access to the information withheld under the mandatory personal privacy exemption under section 14(1). I subsequently wrote to the appellant to confirm that it was not seeking access to the information withheld under the mandatory personal privacy exemption under section 14(1) and the appellant confirmed that it was only seeking access to the records identified in the chart below.

[6] The appellant's brief representations were summarized in a letter I sent to the region and third party inviting their reply representations. The region did not provide reply representations, but the third party did.

[7] In this order, I find that most of the withheld information contained in the third party's bid proposal and documents attached to it qualifies for exemption under the mandatory third party information exemption under section 10(1) and that the public interest override in section 16(1) does not apply it. However, I order the region to disclose the pricing information found not exempt under sections 10(1) and 11(c). The region is also ordered to disclose the scores contained in the scoring sheets to the appellant as I find this information not exempt under section 7(1). Finally, I order the region to disclose portions of the records that relate to the appellant's own bid.

RECORDS:

[8] The records at issue are described in the chart below:

Record Number	Description of Record	Access Decision	Applicable Section(s)
1	Printed copy of the successful proponent's electronic bid proposal	Withheld	Sections 10(1) and 11(c)
2	Attachment #1 - Experience, Qualifications and Capacity	Withheld	Section 10(1)
3	Attachment #2 - Methodology and Work Plan	Withheld	Section 10(1)
4	Attachment #3 - Communications and Reporting	Withheld	Section 10(1)

5	Attachment #4 - Ongoing Health and Safety	Withheld	Section 10(1)
6	Attachment #5 - Ongoing Quality Assurance and Training/Education	Withheld	Section 10(1)
7	Standing Agreement between the region and third party ²	Partial disclosure	Sections 10(1) and 11(c)
8	Scoring sheet and notes for successful proponent, site visit notes and visitors rule sheet	Partial disclosure	Section 7(1)
9	Scoring sheet and site visit notes related to appellant's bid	Partial disclosure	Section 7(1)

ISSUES:

- A. Does the discretionary advice or recommendations exemption at section 7(1) apply to records 8 and 9?
- B. Does the mandatory third party information exemption at section 10(1) apply to records 1-8?
- C. Does the discretionary economic or other interests exemption at section 11(c) apply to the pricing information in records 1 and 7?
- D. Is there a compelling public interest in disclosure of the exempt records that clearly outweighs the purpose of section 10(1)?

DISCUSSION:

Issue A: Does the discretionary advice or recommendations exemption at section 7(1) apply to records 8 and 9?

[9] Record 8 consists of a five-page chart titled "Evaluation Score Sheet." The

² The portion of the standing agreement disclosed to the appellant contains the following description: This document constitutes a "Standing Agreement" between the parties noted above whereby Durham Region agrees to purchase, as and when required, any or all of the goods or services listed above and the vendor agrees to sell such items for the prices shown. No obligation exists for Durham Region to purchase any or all of the goods or services listed in this "Standing Agreement" until a specific purchase order is issued. The terms and conditions included in the related tender/quotation apply to this agreement.

scoring sheet contains numerical scores along with typewritten comments under the columns "Strengths" and "Weaknesses." Also included with record 8 is one-page note which appears to have been prepared by the evaluators after their site visit to the third party's business along with an information sheet the third party provided the evaluators during their site visit. Record 9 contains the scoring sheet and site visit notes the region populated when it evaluated the appellant's bid.

[10] The region takes the position that the scoring sheets contain advice or recommendations that qualifies for exemption under section 7(1), which states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[11] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.³

[12] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[13] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁴

[14] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[15] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations

³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

⁴ *John Doe v. Ontario (Finance)*, cited above, at paras. 26 and 47.

- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁵

[16] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply, as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁶

[17] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. The region claims, and I agree that none of the exceptions in sections 7(2) and (3) apply to the records. The appellant did not claim that any of the exceptions to section 7(1) apply.

[18] The region submits that the scoring sheets were created by an evaluation panel that is responsible for "giving recommendations to senior leadership and eventually Regional Council (via Council reports with recommendations) to guide Regional Council's ultimate decision in regard to awarding an RFP." The region goes on to state:

The evaluation panel has expertise in the service/delivery that Regional Council would not have. The employees on the panel work in the service or have financial credentials that the average employee or Regional Council member would not have. These individuals have read through proposals with the best of their abilities to consider how each business has responded to the criteria required for the proposed service. They use their expertise to evaluate the proposals for the business purpose of the Region based on that criteria. Once the proposals are evaluated, their recommendations for award form the basis for the recommendations to Council in their recommendation Report.

[19] The region submits that in this case, Regional Council was provided with a report, which included a recommendation that the contract be awarded to the company with the highest overall score. The region says that the scoring sheets were not provided with the report to council.

[20] The appellant's representations did not specifically address this issue.

⁵ Order P-1054

⁶ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

Decision and Analysis

[21] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁷

[22] For the section 7(1) exemption to apply, the information at issue has to constitute "advice" or a "recommendation." For the reasons that follows, I find that the information withheld from records 8 and 9 does not qualify for exemption under section 7(1).

[23] Record 8 consists of a five-page chart titled "Evaluation Score Sheet." The scoring sheet contains numerical scores along with typewritten comments under the columns "Strengths" and "Weaknesses" for various categories and requirements identified in the RFP. Also included with record 8 is a one-page note, which appears to have been prepared by the evaluators after their site visit along with an information sheet that appears to have been provided to them by the third party during their site visit. Record 9 contains the scoring sheet the region populated when it evaluated the appellant's bid, along with the evaluators' notes related to their visit to the appellant's site.

[24] The region submits that the withheld information in records 8 and 9 contains recommendations by the evaluation panel that suggest a course of action that are to be ultimately accepted or rejected by the Regional Council. However, I have reviewed the records and I find that they do not outline any suggested course of action.

[25] In my view, the scores and comments contained in the scoring sheets do not amount to "advice" or "recommendations." I find that disclosure of this information would not permit the drawing of accurate inferences as to the nature of the actual advice or recommendations provided to the decision-makers, the members of the Regional Council. Though the information in the scoring sheets represents the evaluators' analysis of various criteria, the analysis is based on "objective information" or factual information, such as the proponents' business practices in matters such as maintenance, bookkeeping, health/safety and quality assurance. As a result, the evaluators' population of the scoring sheets is the result of their organization of information extracted from the third party's and appellant's bid proposals.

[26] I also find that the notations the evaluators made during their site visit fall short of constituting "advice" or "recommendations" for the purpose of section 7(1). The notations made by the evaluators record their observations without suggesting a course

⁷ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

of action that is to be ultimately accepted or rejected by the decision-makers.

[27] For the reasons stated above, I find that the exemption at section 7(1) does not apply to the withheld information in records 8 and 9. However, I will go on to consider whether the mandatory third party information exemption under section 10(1) applies to the withheld information in record 8, as some of the information in this record appears to be extracted from the third party's bid proposal.

[28] Given that section 7(1) does not apply to the withheld portions of record 9 (which contains information about the appellant's bid) and the region has claimed no other exemptions and no mandatory ones apply, I am ordering the region to disclose this information to the appellant.

B: Does the mandatory third party information exemption at section 10(1) apply to records 1-8?

[29] The region and the third party take the position that the withheld information contained in records 1 to 8 qualifies for exemption under sections 10(1)(a), (b) and/or (c). These sections state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(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

[30] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.⁸ 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

⁸ *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.*).

parties that could be exploited by a competitor in the marketplace.⁹

[31] For section 10(1) to apply, the institution and/or the third party 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

[32] The region and the third party submit that the withheld information consists of commercial, financial or trade secret information. In support of its position, the region states:

In this case, the information contained within the pricing components of the RFP submissions is commercial and financial information that indicates competitive information of the third party. This information when confidential, allows the third party to keep its costs low and competitively bid on projects that the Region requires to serve its citizens. It reveals specific information about their pricing in a unit form. This is information that allows them to remain competitive and gives the Region the best pricing for contracts for tax dollars.

[33] In the non-confidential portion of the third party's representations, it described the withheld information as "...highly confidential information about our business practices, trade secrets, organizational strengths and competitive position."

[34] The appellant's representations did not address this part of the test under section 10(1).

[35] The withheld information which the region and third party claims contain commercial¹⁰ or financial information¹¹ is found in:

⁹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

¹⁰ Commercial information has been defined in previous orders as 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

- the third party's bid proposal (record 1);
- attachments to the bid proposal (records 2 to 6);
- standing agreement (record 7); and
- score sheet, site visit notes and rule sheet (record 8).

[36] Based on my review of the records, I am satisfied that the withheld records contain commercial or financial information as the records contain information about the third party's business facilities and operations. The records also contain prices which are quoted in the pricing form submitted with the bid proposal and agreement between the third party and the region.

[37] Accordingly, I find that the first part of the three-part test in section 10(1) has been met.

Part 2: supplied in confidence

[38] Part two of the three-part test itself has two parts: the record at issue must have been "supplied" to the region by the appellant, and the appellant must have done so "in confidence", implicitly or explicitly. If the information was not supplied, section 10(1) does not apply, and there is no need to decide the "in confidence" element of part two (or part three) of the test.

[39] For the purposes of this order, I will describe the information the parties resisting disclosure in the following categories: (1) unit price information; and (2) remaining information in the records.

Unit price information

[40] The only portions of the standing agreement (record 7) withheld from the appellant are the unit prices for specific items available for the region to purchase from the third party. The unit prices represent the total all-inclusive daily cost per item. The portion of pricing form (page 2, record 1) already disclosed to the appellant states that the stated prices are "to include the total all-inclusive costs to be charged based on specifications and scope of work" identified in the RFP, including any costs to deliver the product and services to the region's facilities.

(Order PO-2010). The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information (Order P-1621).

¹¹ Financial information has been defined in previous orders as 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 (Order PO-2010).

[41] There is no dispute that the prices quoted in the pricing form submitted with the bid proposal (page 2, record 1) are the same prices reflected in the standing agreement (record 7).

Remaining information in the records

[42] The remaining information at issue consists of:

- Descriptions of the third party's business, facilities and operations contained in the bid proposal (record 1);
- the attachments that describe the third party's experience, methodology, work plans, communications, health/safety, quality assurance and training/education (records 2 to 6);
- the standing agreement (record 7); and
- the score sheet, site visit notes and rule sheet (record 8).

Representations of the parties

[43] Most of the representations submitted by the parties focus on their position as to whether the withheld pricing information was supplied in confidence to the region.

[44] The parties resisting disclosure submit that the third party supplied the withheld pricing information to the region. In its representations, the region states:

The information was directly supplied to the Region as part of the required components of the RFP. The information is immutable, in that the third party supplies the information and the Region does not change it. The Region is supplied with specific details of prices that [are] used to create the contract. The prices are not changed or negotiated by the Region. The Region is not in any way negotiating this information; it is simply supplied to us.

[45] The appellant argues that the withheld pricing information does not meet the "supplied" test and refers to Orders MO-3258.¹²

[46] In Order MO-3258, Adjudicator Diane Smith found that unit pricing information contained in invoices and the addenda to contracts between a third party and an

¹² The appellant also refers to *Aecon Construction Group v Information Privacy Commissioner of Ontario*, 2015 ONSC 1392, which upheld Order PO-3311. This case is often cited, along with *Boeing Co.* for holding that except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not, therefore, considered to be "supplied."

institution formed part of the contract, and was not supplied. She rejected the argument that because the contract was awarded in response to an RFT, where generally the lowest overall bid is accepted, the information was supplied by the third party and not mutually generated. Adjudicator Smith found that the unit pricing information before her was "part of a competitive process", "was susceptible to negotiation", and that the immutability exception did not apply to the pricing information. As a result, the pricing information at issue in Order MO-3258 was ordered disclosed.

[47] The third party argues that the reasoning in Order MO-3258 should not be applied in the circumstances in this appeal and states, in the non-confidential portion of its representations, that:

In the present case, the unit pricing information supplied in confidence by [the third party] to the Region in its response to the Region's Request for Proposal (RFP) was explicitly not susceptible to negotiation. As stated on page 2 of the Standing Agreement (record 7) "Prices shall be held firm for the first year of the contract."

Since the unit pricing information contained in the Records at issue was not susceptible to negotiation, it is subject to the immutability exception to the general rule and must therefore be deemed to be "supplied."

Therefore, Order MO-3258 does not support the appellant's position that [our] unit pricing information, that was supplied to the Region in confidence, should be disclosed to the appellant. [Emphasis in Original]

Analysis/Findings

[48] 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.¹³

[49] 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.¹⁴

[50] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a

¹³ Order MO-1706.

¹⁴Orders PO-2020 and PO-2043.

single party.¹⁵

[51] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.¹⁶ 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.¹⁷

[52] The parties resisting disclosure submit that the immutability exception applies to the withheld pricing information at issue in the pricing form (page 2, record 1) and the standing agreement (record 7) and I will address that withheld information first.

Was the withheld pricing information supplied in confidence to the region?

[53] Having reviewed the representations of the parties along with the records, I find that the contractual relationship between the region and third party arose when the region accepted the third party’s bid. In turn, I find the prices quoted in the pricing form (page 2, record 1) submitted with the bid became a term of the contract.

[54] As stated above, the provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.¹⁸ Previous decisions have found that 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.¹⁹

[55] In arguing that the immutability exception applies, the third party suggests that due to the term in the standing agreement that the prices quoted therein stay the same for the first year of the contract,²⁰ they should be treated as a fixed cost not susceptible

¹⁵ This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

¹⁶ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹⁷ *Miller Transit*, above at para. 34.

¹⁸ This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

¹⁹ *Miller Transit*, above at para. 34.

²⁰ The entire provision reads: Process shall be held firm for the first year of the Contract. For each subsequent year, including extensions to his Contract, the unit price changes will be applied annually

to negotiation. However, the materials before me indicate that in submitting bids, proponents consent to the terms, conditions and provisions set out in the RFP; this includes a term that the proponents agree to provide the deliverables set out in the electronic pricing form submitted with the bid. In my view, the region was free to accept or reject any proponent's bid, which is itself a form of negotiation, as established in past IPC orders, such as Order PO-2435. Therefore, to claim that the region's ability to accept or reject a bid does not amount to negotiation is incorrect.²¹

[56] In my view, Order MO-3258 holds that the form of the competitive bid process does not determine whether the contractual terms relating to price are "negotiated"; instead one must look to the specific process and fact situation to determine if the information at issue was subject to negotiation. The adjudicator in Order MO-3258 considered that the terms of the tenders to be received by the institution were set by the institution, which had the right to decide whether or not to accept the tender. In that case, the adjudicator found that although the tender contained pricing information originating from the third party, it formed part of the contract between the parties and was not, therefore, supplied.

[57] I adopt and apply the reasoning in Order MO-3258, which I note was recently applied in Orders PO-4055 and MO-4005, and find that the pricing information at issue in this appeal cannot be described as "immutable" or "non-negotiated". I find that the general rule applies and the unit pricing portions of the contract between the region and third party detailing what the region is to pay the third party in exchange for services should be treated as mutually generated, rather than "supplied" by the third party.

[58] Furthermore, I find that the unit prices the region agreed to pay the third party in exchange for products and services does not represent a fixed underlying cost, nor would disclosure of the unit prices permit accurate inferences to be made with respect to underlying non-negotiated confidential information. As noted above, the prices reflected in the third party's bid represent the total all-inclusive daily cost per item, which includes any operational or transportation costs to deliver products and services to the region's facilities. Therefore, I find that the immutability and inferred disclosure exceptions to the general rule do not apply.

[59] As I have found that neither exception applies, I find that the withheld pricing information was not "supplied" to the region under part 2 of the test in section 10(1).

[60] As a result, I do not need to determine whether this information also meets the

based on the level of inflation using the Ontario, All-items Consumer Price Index (CPI), Year over Year, published by Statistics Canada as available two months prior to the Contract expiry date.

²¹ Order PO-2435.

"in confidence" requirement of the test in part two, or the harms requirement in part three.

[61] Since all three parts of the test must be met for the information to qualify for exemption under section 10(1), and part two is not met, I find that section 10(1) does not apply to the pricing information on the pricing form submitted with the bid proposal (page 2, record 1) or where it appears in the standing agreement (record 7).

[62] I will go on to determine whether the pricing information qualifies for exemption under section 11(c) as claimed by the region, below.

Were the other records or information at issue supplied in confidence to the region?

[63] The parties resisting disclosure take the position that the third party supplied the information remaining at issue to the region *in confidence*.

[64] I am satisfied that remaining information contained in records 1 to 8, except the scores in the scoring sheet in record 8, meet the "supplied" requirement in part two of the test under section 10(1). This information consists of the information withheld in the attachments the third party attached to its bid proposal which describe various aspects of its business such as experience, methodology, work plans, communications, health/ safety, quality assurance and training/education (records 2 to 6).

[65] I am also satisfied that the comments in the "Strengths" and "Weaknesses" section of the scoring sheet and site visit notes contained in record 8 would reveal or permit accurate inferences with respect to information supplied by the third party. Accordingly, I find that this information also meets the "supplied" requirement of part two of the test under section 10(1).

[66] However, I find that the scores the region's evaluators assigned to each category in the scoring sheet found in record 8 were not "supplied" by the third party to the region. As noted above, this information represents the evaluators' analysis of various criteria. As I have found that the scores in record 8 were not "supplied" to the region under part 2 of the test in section 10(1), I need not determine whether this information meets the "in confidence" requirement of the test in part two, or the harms requirement in part three.

[67] Since all three parts of the test must be met for the information to qualify for exemption under section 10(1), and part two is not met, I find that section 10(1) does not apply to the scores in record 8. As I found that the discretionary advice or recommendation exemption at section 7(1) does not apply to this information and no other exemption has been claimed and no other mandatory exemption could apply, I will order the region to disclose the scores to the appellant.

[68] I will now consider whether the remaining non-pricing information in records 1 to

8 was supplied "in confidence."

[69] In order to satisfy the "in confidence" component of part two, 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.²²

[70] The region and the third party take the position that the third party supplied the information remaining at issue to the region with an implicit or explicit expectation of confidentiality.

[71] In the non-confidential portions of its representations, the third party states:

This information was provided with a reasonable and objective expectation of confidentiality in part because:

- It was communicated to the [region] on the basis that it was confidential and that it was to be kept confidential;
- The information gathering process and rules were treated consistently by [the region] in a manner that indicated a concern for confidentiality;
- The information was not otherwise disclosed or available from sources to which the public has access; and
- The information was provided for a purpose that would not entail disclosure.

[72] The third party states that the region's "Information for Bidders"²³ directs prospective bidders to "identify any information in its proposal or documentation supplied in confidence for which confidentiality is to be maintained by the Region." The third party submits that it provided the following statement along with the bid it submitted to the region:

The information you are about to view, including but not limited to: specifications, assets, menus, appendices, employee info, service competencies, ingredient lists and supplier info, is the property of [the name of the third party company] and is provided to Regional Municipality of Durham personnel and affiliated staff on the understanding that such information shall remain strictly confidential. The contents of this

²² Order PO-2020.

²³ Section 3.5 of Parts 1 to 4 Information for Bidders.

document, in whole or in part, shall not be disclosed or used in any manner other than for the purposes of evaluating [our] response to the request for proposal.

[73] I confirm that the third party's bid materials contain the above-referenced statement. The appellant's representations did not address this part of the test under section 10(1).

[74] 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 disclosure²⁴

[75] Having regard to the records and the representations of the parties, I am satisfied that the third party supplied the remaining information withheld under section 10(1) *in confidence*. In making my decision, I took into consideration the third party's confidentiality statement and note that many of the records themselves bear the markings of this explicit expectation of confidentiality. In addition, I am satisfied that the information at issue was treated consistently by the third party in a manner that indicates a concern for confidentiality and that it was not prepared for a purpose that would entail disclosure. Finally, I was not presented with evidence to challenge the position of the parties resisting disclosure that the withheld information was not otherwise disclosed or available to the public.

[76] Having regard to the above, I accept that the third party held a reasonable expectation based on objective grounds that the information it supplied to the region would remain confidential. I find that the *in confidence* part of the second part of the three-part test in section 10(1) has been met. I will go on to determine whether disclosure of this information could reasonably be expected to give rise to the harms contemplated in sections 10(1)(a) and (c).

²⁴ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

Part 3: harms

[77] Given my finding, below, that sections 10(1)(a) and (c) apply to the remaining withheld information, it is not necessary for me to review the parties' arguments or make any findings on section 10(1)(b).

Representations

[78] The region and the third party take the position that the information remaining at issue qualifies for exemption under sections 10(1)(a) and (c), which state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency

[79] The region submitted representations in support of its position that section 10(1)(b) applies and commented that it would "defer to the third party's submissions" on the harms in sections 10(1)(a) and (c).

[80] In the non-confidential portions of its representations, the third party states that its industry:

.. is highly competitive and includes companies trying to gain advantage by any means, including dubious attempts to secure privileged information and using government oversight bodies to frustrate our efforts to remain on task of feeding [people] well.

[81] The third party goes on to explain that it has been in the industry for a significant amount of time and that many of its "methods, formulas, programs and techniques" are the result of its innovation. The third party also argues in the non-confidential portion of its representations that it "acts as its own manufacturer of most of its foods" which, along with other innovative processes, enables it to "execute on our economically essential, differentiated approach to [food] catering." The third party states:

The type of information that we are defending against disclosure [is] mainly trade secrets, used by [us], not generally known or used by our competitors, which provide [us] with fair and hard won economic value

based on [our] investment of resources and time in providing best in class solutions...

[82] The third party's confidential representations describe specific incidents that it believes demonstrate that its competitors sought to obtain its confidential information or compromise its business interests. The third party submits that these incidents demonstrate that disclosure of the withheld information could reasonably be expected to give rise to the harms contemplated in sections 10(1)(a) and (c).

[83] As referenced above, the confidential portions of the third party's representations also included a copy of the records containing notations and explanations made by the third party in support of its position that certain information should not be disclosed to the appellant.

[84] In its reply representations, the third party summarizes its position, as follows:

Disclosure of the information at issue would provide its recipient with a window into [our] operations and marketing strategy that [we have] spent many years perfecting on [our] own. This would equip the recipient of such information with a springboard to compete with [us] without having to make the same investments.

Findings on sections 10(1)(a) and (c): prejudice to competitive position and undue loss or gain

[85] The parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.²⁵

[86] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²⁶ The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or 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*.²⁷

²⁵ *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

²⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

²⁷ Order PO-2435.

[87] Substantial portions of the third party's bid in record 1 contains information identifying various individuals who work or manage the third party's business, including information about their past work experience and their responsibilities at the third party's business. As noted above, this information was removed from the scope of the appeal. The third party also consented to the release of some information contained in the bid on the basis that it was widely circulated or referred to an obsolete business practice.

[88] The information remaining at issue consists of the portions of records 1 to 6 the third party identified in the annotated copy of the records provided with its representations. Also remaining at issue are the comments in the "Strengths" and "Weaknesses" section of the scoring sheet, information sheet, and site visit notes contained in record 8.

[89] Having regard to the confidential and non-confidential representations of the parties along with the records themselves, I find that disclosure of this information could reasonably be expected to significantly prejudice the competitive position of a person, group of persons or organization or result in an undue loss or gain under sections 10(1)(a) and 10(1)(c).

[90] In making my decision, I accept the third party's evidence that its industry is highly competitive and am satisfied that disclosure of the information at issue could reasonably be expected to provide a competitor with information that would reveal specific processes and operations unique to its business.

[91] Having regard to the above, I find that disclosure could reasonably be expected to result in significant prejudice to the third party's competitive position, and result in undue loss to it with corresponding undue gain to its competitors, for the purpose of sections 10(1)(a) and 10(1)(c).

[92] Accordingly, I find that this information meets part 3 of the three-part test and uphold the region's decision to withhold this information from the appellant under section 10(1).

Summary

[93] I find that the pricing information on page 2 in record 1 and in the standing agreement at record 7 was not supplied to the region by the third party and that, accordingly, the supplied requirement of part 2 of the test is not met. I also found that the scores in record 8 did not meet the supplied requirement. As all three-parts of the test under section 10(1) must be satisfied for the third party information exemption to apply, this information does not qualify for exemption under section 10(1).

[94] I will go on to determine whether the pricing information in records 1 and 7 qualify for exemption under the discretionary advice or recommendation exemption in section 11(c) claimed by the region. However, I will order the region to disclose the

scores in record 8 to the appellant as the region did not claim any other discretionary exemption applies to this information and I find that no other mandatory exemption could apply.

[95] I find that the third party supplied the remaining withheld information at issue in records 1 to 6 and 8 to the region in confidence and that disclosure of this information to the appellant could reasonably be expected to result in the harms contemplated by sections 10(1)(a) and (c). Accordingly, I find that this information qualifies for exemption under section 10(1) as all parts of the three-part were met. As a result, I uphold the region's decision to withhold this information from the appellant.

C: Does the discretionary economic or other interests exemption at section 11(c) apply to the pricing information in records 1 and 7?

[96] The region argues that the withheld pricing information in the pricing form (page 2, record 1) and standing agreement (record 7) qualifies for exemption under section 11(c), which states:

A head may refuse to disclose a record that contains, information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution[.]

[97] In support of its position, the region argues that:

- its by-laws²⁸ specify that its employees or officials cannot divulge the prices paid or quoted to the region for goods or services unless authorized by council or the price reflects the total bid price or is already stated in a public report;
- disclosure of the pricing information at issue could hamper future "costs effective procurement processes"; and
- future bidders may not quote their "best price" out of fear that their pricing information would be disclosed to competitors which, in turn, harms the region's "advantage in the market place."

[98] The appellant's representations did not address this issue.

[99] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected

²⁸ Purchasing By-law #68-2000 (as amended by By-law #59-2003).

under the *Act*.²⁹

[100] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.³⁰

[101] For section 11(c) to apply, the region must provide detailed evidence about the potential for harm to its economic interests. 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.³¹

[102] I have considered the region's evidence and I am not persuaded that disclosure of the pricing information at issue could reasonably be expected to prejudice the institution's economic interests or competitive position. The region argues that disclosure of the pricing information at issue could result in a more competitive bidding process. However, previous decisions from this office have found that the fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.³² I agree with and adopt that reasoning in this appeal.

[103] Accordingly, I find that the discretionary exemption at section 11(c) does not apply to the pricing information remaining at issue. As the parties resisting disclosure have not claimed that any other exemption could apply to this information, I order the region to disclose the withheld pricing information in pricing form (page 2, record 1) and standing agreement (record 7) to the appellant.

D: Is there a compelling public interest in disclosure of the records found exempt that clearly outweighs the purpose of section 10(1)?

[104] The appellant argues that the public interest override in section 16 applies in this appeal. Section 16 states:

²⁹ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

³⁰ Orders P-1190 and MO-2233.

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

³² Orders MO-2363 and PO-2758.

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.

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

[106] The *Act* is silent as to who bears the burden of proof in respect of section 16. This 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.³³

[107] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.³⁴ Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.³⁵

[108] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".³⁶ The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[109] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.³⁷

[110] The appellant takes the position that the monies the region agreed to pay the third party should be publicly available. The appellant also argues that disclosure would "shed light on [the region's] operations and procurement process and ... make sure

³³ Order P-244.

³⁴ Orders P-984 and PO-2607.

³⁵ Orders P-984 and PO-2556.

³⁶ Order P-984.

³⁷ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

there was a fair process.”

[111] The third party’s arguments regarding the public interest override focus on the pricing information that I found above is not exempt under sections 10(1) and 11(c).

[112] The region’s submissions did not specifically address this issue.

[113] The information that I found exempt under section 10(1) consists of information describing various aspects of the third party’s business and operations, such as its experience, methodology, work plans, communications, health/safety, quality assurance and training/education. Based on my consideration of it, I am not satisfied that disclosure of the information I found exempt under sections 10(1)(a) and (c) responds to the public interest concerns raised by the appellant, which relate to the transparency and accountability of the region as a municipal institution.

[114] In any event, the type of information that would shed light on the expenditures by the region is being disclosed through this order. In addition, I am not satisfied that disclosure of the information I found exempt would shed light on the region’s procurement activities as the information relates to the third party’s business.

[115] Even if I was satisfied that a compelling public interest existed, it is my view, based on the information remaining at issue and the representations of the parties, that this interest would not outweigh the purpose of sections 10(1)(a) and (c), which is to protect from disclosure the confidential information of third parties that could be exploited by a competitor in the marketplace.³⁸

[116] Having regard to the above, I find that the public interest override in section 16 does not apply to the information that I found exempt under sections 10(1)(a) and (c). I uphold the region’s decision to withhold this information from the appellant.

ORDER:

1. I uphold the region’s access decision in part under section 10(1), but order it to disclose to the appellant the records that are not exempt under sections 7(1), 10(1) or (11(c)), by **April 19, 2021**, but not before **April 12, 2021**.

For the sake of clarity, highlighted copies of records 1 to 6 is provided to the region with its copy of this order. The region is to withhold the highlighted portions of the record, which consists of exempt information and information that has been removed from the scope of this appeal.

³⁸ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

2. The region is to provide a complete copy of records 7 and 9 and disclose the scores contained in record 8 to the appellant.
3. In order to verify compliance with this order, I reserve the right to require the region to provide me with a copy of the records disclosed pursuant to order provisions 1 and 2.
4. The timeline noted in order provision 1 may be extended if the region is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting time extension request.

Original Signed by: _____

Jennifer James
Adjudicator

_____ March 12, 2021