Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4175

Appeal MA20-00179

Township of Guelph & Eramosa

March 14, 2022

Summary: The Township of Guelph & Eramosa received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* for the chassis and body specifications and drawings in relation to the successful bid under a specified Request for Quotes. Following notification of an affected party, the township granted full access to responsive records. The affected party filed an appeal with the Information and Privacy Commissioner of Ontario, arguing that the records qualified for exemption under section 10(1) (third party information). In this order, the adjudicator finds that the records are not exempt under section 10(1) and upholds the township's decision. She orders the records disclosed to the requester and dismisses the appeal.

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

Orders Considered: Orders MO-1706 and PO-2435.

OVERVIEW:

[1] The requester submitted a request to the Township of Guelph & Eramosa (the township) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the specifications of the custom pumper (the pumper) for the successful bid under a specified Request for Quotes (the RFQ). Subsequently, the requester clarified that the request was for access to the chassis and body specifications and drawings of the pumper in the successful bid.

[2] After notifying a party whose interests may be affected by disclosure (the first notified affected party), and receiving its response, the township issued a decision n

granting access in full to the specifications and drawings.

[3] The first notified affected party (now the appellant) appealed the township's access decision to the Information and Privacy Commissioner of Ontario (IPC). It took the position that the records qualified for the mandatory exemption under section 10(1) (third party information) of the *Act*.

[4] The appeal was assigned to a mediator. The township notified a second affected party (the affected party) of the appeal. After receiving its position on disclosure, the township maintained its access decision.

[5] No further mediation was possible and this appeal was transferred to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*.

[6] An adjudicator was assigned to this appeal and he decided to conduct an inquiry. He commenced his inquiry by sending a Notice of Inquiry, setting out the facts and issues in the appeal to the township and the affected party.). The township submitted representations, which were shared with the appellant and the affected party. The appellant submitted representations, which were adopted by the affected party. He then sought representations from the requester and the township. While the township declined to submit additional representations, the requester submitted representations, which were shared with the appellant and the affected party. The appellant submitted reply representations, which were again adopted by the affected party. The requester then submitted sur-reply representations, and subsequently the appellant and the affected party both submitted representations in sur-sur-reply. The representations of the parties were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[7] This appeal was then transferred to me to continue with the adjudication of the appeal. After reviewing all file material and representations, I sought and received additional clarification of the records from the township before issuing this order.

[8] In this order, I agree with the township that the mandatory exemption at section 10(1) of the *Act* does not apply to the records. On that basis, I uphold the township's decision, dismiss the appeal and order the township to disclose the records to the requester.

RECORDS:

[9] The records at issue form part of the bid submission by the appellant in response to the RFQ. The pages of the bid submission at issue consist of 31 pages of specifications (specifications) and one page of drawings (drawings), all withheld in full (collectively the records).

DISCUSSION:

[10] The sole issue in this appeal is whether the mandatory exemption for third party information at section 10(1) of the *Act* applies to the records.

[11] 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;
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> (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
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> (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.

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

[13] For section 10(1) to apply, the 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

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[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

3. 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.

[14] Overall, the township submits that the appellant has not satisfied all of the requirements of the three-part test set out in section 10(1) of the *Act*. It specifically submits that the records were not supplied to it "in confidence" and the appellant has failed to establish that disclosure of the records could reasonably be expected to lead to the harms set out in section 10(1) of the *Act*. Accordingly, the township submits that the exemption for third party information set out in section 10(1) of the *Act* does not apply.

[15] In contrast, the appellant and the affected party submit that the mandatory exemption applies to the records as they were supplied with a reasonable and objective expectation of confidence, and because their disclosure could reasonably be expected to prejudice the appellant's competitive position, interfere with the appellant providing similar information in the future, and result in undue gain to the appellant's competitors. Accordingly, they submit that the records satisfy all three parts of the test under section 10(1) of the *Act*.

[16] The requester submits that the records are public knowledge and that on that basis, it should be granted access to them. It also asks me to review a previous appeal filed with the IPC.[3]

Part one: Do the records contain technical, commercial or financial information?

[17] As explained below, I find that the records contain technical and commercial information and therefore, they meet part one of the section 10(1) test.

[18] Past IPC orders have defined the types of information listed in part one of the test. The types of information raised in this appeal are:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
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> *Financial information* is information relating to money and its use or distribution. The record must contain or refer to specific data. Some

[3] This appeal was resolved at mediation and no order was issued by the IPC.
[4] Order PO-2010.
[5] Order P-1621.

> examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[6]
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> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[7]

Representations of the parties

[19] The appellant and the affected party submit that the records contain technical and/or commercial information. They submit that the records consist of design specifications and engineering drawings for the pumper. They also submit that the records contain the terms upon which the appellant is prepared to contract with the township for the supply of the pumper specified in the RFQ.

[20] The township concedes that the records meet the first part of the three-part test under section 10(1) of the *Act*. It accepts that the records contain technical information, which was prepared by a professional, and that they describe the specifications and drawings of a vehicle.

[21] The requester did not make representations on this part of the test.

Analysis and findings – the records contain technical and commercial information

[22] Based on my review of the records, I am satisfied that the records reveal technical and commercial information; however, I do not find that they contain financial information.

[23] The township, appellant and the affected party all agree that the records contain technical information. I agree. The records are about the construction and operation of the pumper being described in the bid submission and belong to an organized field of knowledge.

[24] The appellant and the affected party also submit that the records contain commercial information because they contain the terms upon which the appellant is prepared to contract with the township for the supply of the pumper specified in the RFQ. Based on my review of the records, I agree that they also contain commercial information because they outline how the appellant can provide the township with the specifications requested in the RPQ and the terms under which it is willing to contract to supply the

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[6] Order PO-2010.
[7] Order PO-2010.

pumper to the township.

[25] Moreover, for the sake of completeness, I have also considered whether the records contain financial information. Based on my review of the records, I find that they do not contain financial information because they do not contain any numerical information that corresponds to finances. While the records outline commercial terms, these terms are not specifically associated with any specific dollar amount.

[26] Accordingly, as the records contain technical and commercial information, I find that part 1 of the test under section 10(1) of the *Act* has been met.

Part two: Were the records supplied in confidence?

[27] The appellant and the affected party share the position that the records were *supplied in confidence*, while the township submits that, while the records were supplied, this was not done in confidence. As explained below, I find that the appellant did not supply the records to the township.

[28] Part two of the two-part test itself has two parts: the appellant must have *supplied* the records to the township, and must have done so *in confidence*, either implicitly or explicitly. I begin with the first part of the two-part test – *supplied*.

[29] 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.[8]

[30] 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.[9]

Representations of the parties

[31] The township submits that while the records were *supplied* to it, this was not done *in confidence* based on an objective view of the matter.

[32] The township refers to past IPC decisions, including Order PO-3764, which found that records contained in responses submitted as part of a public procurement process are *supplied* where the records are not the product of any negotiation and remain in the form original provided by the affected party to the institution. It explains that the appellant supplied the records to it in response to the RFQ. It also explains that the records were not the product of negotiation between itself and the appellant, and that the records remain in the form originally provided.

[33] When I sought clarification from the township about the records, it confirmed that the appellant's response to the RFQ, which includes the records, became the contract between the township and the appellant, meaning that there was no separate contract

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[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.

between the parties. To confirm, the record at issue is what became the contract between the township and the appellant.

[34] The appellant and the affected party submit that the appellant supplied the records to the township with a reasonable expectation that they would be held in confidence by the township. The appellant notes that the township concedes that the records were *supplied*. It submits that the specifications and the drawings were not negotiated (or susceptible to negotiation) when the appellant submitted its response to the RFQ. Accordingly, the appellant submits that the records fit squarely within the "immutability" exception to the general rule that the contents of a contract are negotiated, rather than supplied.[10]

Analysis and findings – the records were not supplied to the township

[35] As explained below, I find that the appellant did not supply the records to the township.

[36] I begin my analysis by considering whether the records were *supplied* by the appellant to the township, in light of the fact that the appellant's response to the RFQ became the contract between the township and the appellant.

[37] Previous IPC orders have found that except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" for the purpose of section 10(1).[11] 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.[12]

[38] 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.[13] 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.[14]

[39] I accept that the appellant provided a bid submission in response to the township's RFQ and that this submission included the records, namely, the specifications and the

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[10] See e.g. IPC Order PO-2497, upheld on judicial review in *Canadian Medical Protective Association v. John Doe*, 2008 CanLII 45005 (Div. Ct.).
[11] Orders MO-1706, PO-2371 and PO-2384.
[12] Orders PO-2018, MO-1706; 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*).
[13] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[14] *Miller Transit*, above at para. 34.

drawings. However, at some point, the township accepted the appellant's bid submission, including the specifications and the drawings, and the bid submission became the contract between the township and the appellant. As stated above, the township confirms that there is no separate contract for the supply of the pumper from the appellant to the township. As the appellant's bid submission in response to the RFQ became the contract, the principle that the contents of a negotiated contract does not meet the *supplied* requirement applies here.

[40] Previous IPC orders have considered the application of section 10(1), or its provincial equivalent, to RFP bid submissions.[15] I am mindful that previous IPC orders have also held that information in a third party's bid submission, in response to an institution's solicitation of bids that remains in its original form and is not the product of negotiations, qualifies in some circumstances as having been supplied for the purposes of section 10(1).[16] I do not adopt this approach in this appeal, primarily because the appellant's bid submission, which included the specifications and the drawings, became the contract between the appellant and the township.

[41] In Order MO-1706, Adjudicator Bernard Morrow stated:

> … [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.[17]

[42] In Order PO-2435 Assistant Commissioner Brian Beamish found that:

> If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS [Management Board Secretariat which issued the RFP] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry…to claim that the per diem amount was simply submitted and was not subject to negotiation.

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[15] Orders MO-1706 and MO-3058-F.

[16] Orders MO-1368, MO-1504 and PO-2637.

[17] This approach has been upheld by the *Divisional Court in Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
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> Further, upon close examination of each of these [named agreements], I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.
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> In summary, I find that the [named agreements] are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1) [section 10(1) of the municipal *Act*].

[43] I agree with and adopt Assistant Commissioner Beamish's approach. The specifications were requested by the township in its RFQ. The appellant's bid submission confirmed whether it could meet the township's requested specifications and included three additions to the requested specifications (as explained below), all of which was submitted for the township's consideration. Also, a specific provision in the RFQ states:

> Notwithstanding certain detail of specifications, goods of similar design and construction will receive consideration if, in the opinion of the using department, they are considered to be suitable for the intended application and generally conform to performance requirements. All bids on goods not fully meeting the specifications shall be accompanied by a statement fully outlining any departures from the specifications and fully describing the commodities offered, referencing Item number where appropriate. **This document [the RFQ (and response thereto)] shall form part of the Purchase Order Contract issued to the successful bidder**. [Emphasis added by me]

[44] Similarly, the drawings are a visual rendering of the pumper's specifications, as requested by the township and as could be provided by the appellant with the three additions to the requested specifications. In support of this, I note the following notation on the drawings: "In case of discrepancy between this drawing and the technical specifications, the technical specifications shall prevail."

[45] Accordingly, the specifications and the drawings do not represent a fixed or static product being offered by the appellant to the township. Rather, it is the appellant's proposal of what it can provide, based on the requirements outlined by the township in the RFQ, with three additions, for consideration by the township. The appellant's bid submission, which includes the specifications and the drawings, then became "part of the purchase order contract". All of this demonstrates that the records were subject to

negotiation.

[46] The parties have not claimed the application of the inferred disclosure exception and it is my view that there is nothing in the records themselves to establish that it applies to the records. The appellant and the affected party submit that the records fit squarely within the "immutability" exception to the general rule because the specifications and the drawings were not negotiated (or susceptible to negotiation) when the appellant submitted its response to the RFQ.[18] I disagree. The RFQ process involved the township outlining the specifications it required for the pumper and bidders indicating whether it could provide a pumper with such specifications. In response to the RFQ, the appellant outlined the pumper's specifications it could provide to the township, with three additions to the requested specifications, and provided a visual rendering of these specifications in the drawings as part of its bid submission. Accordingly, it is my view that the RFQ process itself was a form of negotiation between the parties. This is consistent with the finding in PO-2435, where "[t]he acceptance or rejection of a [party's] bid in response to [a request for proposals or quotations] is a form of negotiation."[19] Therefore, I find that neither exception to the general rule applies.

[47] Therefore, I conclude that the records, which form part of the contract between the township and the appellant, were mutually generated and the result of a negotiation process, and that they were, accordingly, not "supplied" within the meaning of that term in section 10(1). The contract came into existence because of the township's acceptance of the appellant's bid submission in response to the RFQ. I find that the records were not "supplied" for the purposes of section 10(1) and do not fall into either the "inferred disclosure" or "immutability" exceptions.

[48] In conclusion, I find the records were not *supplied* within the meaning of section 10(1) of the *Act*, and as a result, they were not *supplied in confidence* and part 2 of the three-part test under section 10(1) is not met.

[49] For the sake of completeness, I also note that a comparison between records and the township's RFQ package provided to proponents reveals that a large majority of the specifications in the appellant's bid submission is the same as the specifications in the RFQ, except for three discrete portions of the specifications. I simply note here that I would have also found that the appellant had not *supplied* the specifications (minus the three discrete portions) to the township because they were created by and originated with the township.

Conclusion – the mandatory exemption at section 10(1) does not apply to the records

[50] As all three parts of the section 10(1) test must be met for the application of the

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[18] See e.g. IPC Order PO-2497, upheld on judicial review in *Canadian Medical Protective Association v. John Doe*, 2008 CanLII 45005 (Div. Ct.).

[19] At page 7.

exemption, I find that section 10(1) does not apply to the records.

ORDER:

I uphold the township's decision to disclose the records to the requester and I order the township to disclose the records to the requester by **April 19, 2022** but not before **April 13, 2022**. I dismiss the appeal.

Original Signed by: March 14, 2022

Valerie Silva
Adjudicator