Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4242

Appeal MA19-00830

City of Toronto

August 19, 2022

Summary: The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a proposal submitted by a named company in response to a specified RFP. After notifying the company as a third party, the city issued a decision granting partial access to the proposal withholding information under sections 8(1) (law enforcement) and 14(1) (personal privacy) of the *Act*. Although the requester did not challenge the city's decision, the third party appealed the city's decision to the IPC on the basis that the record is exempt under the exemption for third party information at section 10(1). In this order, the adjudicator upholds the city's decision to disclose the information it decided to disclose, and dismisses the appeal.

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

Orders Considered: Order MO-3058-F.

OVERVIEW:

[1] This order determines the issue of access to portions of a winning proposal for a water-treatment facility project for the City of Toronto (the city). The city received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the complete response to a specified RFP (request for proposal) by a named company, including the costs portion of the proposal (time and task matrix), from August 21, 2010 to the date of the request.

[2] After notifying the named company as a third party, the city issued a decision granting the requester partial access to the proposal withholding information under sections 8(1) (law enforcement) and 14(1) (personal privacy) of the *Act.*

[3] The third party, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC), and a mediator was appointed to explore resolution.

[4] The requester did not appeal the city's access decision. Therefore, portions of the proposal that the city has withheld under sections 8(1) and 14(1) are not at issue in this appeal.

[5] During mediation, the appellant objected to the disclosure of any portion of its proposal, because it claims that the mandatory third party information exemption at section 10(1) of the *Act* applies. The requester maintained their interest in pursuing access to the portions the city decided to disclose.

[6] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry by inviting representations from the appellant, initially. I received representations from the appellant, which I shared with the city and the requester. I then invited and received representations from the city and the requester.

[7] In this order, I find that the mandatory exemption at section 10(1) does not apply, and dismiss the appeal.

RECORD:

[8] The information remaining at issue in this appeal consists of the portions of a 269- page proposal (including a video) that the city has decided to disclose to the requester.

[9] The portions of the proposal that the city withheld under sections 8(1) and 14(1) (pages 67-172 and 253-260, in full, and pages 7, 8, and 264, in part) are not at issue in this appeal.

DISCUSSION:

Does the mandatory third party information exemption at section 10(1) apply to the information at issue in the proposal?

[10] The appellant claims that the mandatory exemption at sections 10(1)(a), (b), and (c) of the *Act* applies to the information at issue in this appeal. The city and the requester argue that it does not.

[11] Section 10(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[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:

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

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

c. 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

[14] The types of information listed in section 10(1) have been discussed in prior orders. The ones that are relevant in this appeal are:

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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.

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[3]

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.[4]

Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.[5]

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

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

Representations of the parties

[15] The appellant submits that the proposal contains trade secrets, and scientific, technical, commercial, and financial information. It states that examples include proprietary processes and tools described in its approach to the work, discussions of intellectual property and its use in the work, information on costs, salaries, and fee structure, the confidentiality of which is fundamental to its ability to be competitive in the market place; and other similar information meeting the requirements of the *Act*.

[16] The city submits that the information at issue does not contain scientific information, however, it acknowledges that there may be technical, commercial, and financial information contained in the proposal.

[17] The requester submits that it is unable to make representations on whether the information in the proposal meets the definitions of "trade secrets" and "scientific, technical, commercial, and financial information" for section 10(1) because of the appellant's vague representations.

Analysis and findings

[18] Based on my review of the proposal and the representations of the parties, I find that the information at issue contains technical, commercial, and financial information. The information at issue is portions of the winning proposal for a water-treatment facility project for the city. It contains information such as the appellant's corporate profile and structure, a cost outline for the project, and information about the construction, operation or maintenance of water pumping stations. Therefore, I find that the information at issue contains technical, commercial, and financial information within the meaning of section 10(1) of the *Act*, and part 1 of the three-part test under section 10(1) has been met.

[19] Because I have found that the information at issue contains technical, commercial, and financial information, it is not necessary, in the circumstances of this appeal, for me to determine whether the information at issue also contain trade secrets and scientific information, as argued by the appellant. As I explain below, the appellant has not satisfied me that Part 3 of the test (harms) is met.[9]

[20] Part 1 of the three-part test under section 10(1) has been met. I must now consider whether the appellant supplied the information at issue in the proposal, in confidence, to the city.

Part 2: supplied in confidence

[21] The requirement that the information have been "supplied" to the institution

[9] Moreover, my analysis under Part 3 would not be different in the circumstances even if I were satisfied that the information at issue is a trade secret or scientific information.

reflects the purpose in section 10(1) of protecting the informational assets of third parties.[10]

[22] 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.[11]

[23] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[12]

[24] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[13]

Representations of the parties

[25] The appellant submits that it supplied the information at issue in confidence to the city. It submits that it is not standard practice for any municipality to make priced proposals containing confidential business information available to external parties, and it did not have any reason to expect that the city would do so in this case. The appellant submits that if it had known that its information would be made public, it would not have provided the information.

[26] The city submits that because the appellant has been awarded the contract, the resulting contract contains information from the proposal, which would be considered negotiated, not supplied in confidence for the purpose of the *Act.* The city states that project parameters and contract provisions were provided by the city's Purchasing Materials Management Division as outlined in the RFP form, and the information at issue in the proposal was a response to the RFP.

[27] The requester submits that the information at issue was not supplied in confidence, and since the RFP was more than 11 years ago, any reasonable expectation of confidentiality has expired.

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[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] 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 PO-2020.

Analysis and findings

[28] The request is for the proposal submitted by the appellant in response to the city's RFP. There is no dispute that at least some of the information at issue also appears in the contract that was eventually entered into between the appellant and the city as a result of the RFP. Previous IPC orders have found that, in general, contents of a negotiated contract are considered "mutually generated" and do not meet the "supplied" requirement for section 10(1) of the *Act*.

[29] However, the record at issue before me is the winning proposal, not the contract between the city and the appellant. Where the record at issue is the proposal, the IPC's case law on the "supplied" test in relation to contracts is generally not applicable. In Order MO-3058-F, former Assistant Commissioner Sherry Liang stated that:

> I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But *the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract*. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue. (emphasis added).

[30] As noted, there is no dispute that some of the information at issue is contained in the contract between the appellant and the city. I also note that the record at issue is not the entire winning proposal, and the situation here is not the "'possible' subsequent incorporation of the proposal terms into the contract." It is clear that many of the terms would have been included in the final contract.

[31] In these circumstances, it seems at least arguable to me, that the information at issue in the proposal should be treated as mutually generated rather than supplied, and the city has argued this to be the case. However, I need not make such a determination in this appeal because I find below that the harms are not established for the purposes of section 10(1).

Part 3: harms

[32] 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.[14]

[33] 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.[15] 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.*[16]

Representations of the parties

[34] The appellant submits that disclosure of the information at issue could reasonably be expected to prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations. It states that disclosure of the information would result in similar information no longer being supplied to the city even where it is in the public interest that similar information continue to be so supplied. It further states that disclosure would also result in undue loss to it as the information at issue may be unduly used by others to gain unfair advantage over it on future project proposals.

[35] Both the city and the requester submit that the appellant has not provided evidence of any potential harms that could reasonably be expected to result from disclosure of the information at issue.

Analysis and findings

[36] To find that any of the section 10(1) harms could reasonably be expected to result from disclosure, I must be satisfied that there is a reasonable expectation of the specified harm. I can reach this conclusion either based on my review of the information at issue, the circumstances of this appeal, including the proposal as a whole, and/or the representations made by the appellant.

[37] Based on my review of the proposal and the representations of the parties, I find that the appellant has not established that disclosure of the information at issue in the proposal could reasonably be expected to result in the harms enumerated in sections 10(1)(a), (b), or (c) of the *Act*.

[38] The appellant argues that disclosure of the information at issue in the proposal could reasonably be expected to significantly prejudice its competitive position or

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[14] *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.

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

[16] Order PO-2435.

significantly interfere with its contractual or other negotiations; or result in undue loss or gain to it. It also argues that disclosure of the information would lead to similar information no longer being supplied where it is in the public interest that it continue to be so supplied. The appellant has not elaborated on or provided detailed evidence to support these assertions, rather the appellant merely repeats the wording of the harms as stated in the *Act*. As noted above, 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.*[17]

[39] The information at issue is portions of the winning proposal submitted by the appellant in response to the city's 2010 RFP for a water-treatment facility project. As noted previously, it contains information such as the appellant's corporate profile and structure, a cost outline for the project, and information about the construction, operation or maintenance of water pumping stations. In the absence of any detailed evidence from the appellant, I considered whether any of the stated harms from disclosure are evident on the basis of the information itself in the context of the surrounding circumstances. However, I am unable to draw any such conclusion from my review of the information at issue. Therefore, I am unable to conclude that disclosure of the information at issue in the proposal could reasonably be expected to result in the harms set out in sections 10(1)(a), (b), or (c) of the *Act*.

[40] All parts of the three-part test must be met for the mandatory exemption at section 10(1) to apply. Since the appellant has not established that there is a reasonable expectation of any of the section 10(1) harms resulting from the disclosure of the information at issue in the proposal, the third part of the test has not been met. Accordingly, I find that section 10(1) does not apply to the information at issue in this appeal.

ORDER:

1. I uphold the city's access decision, and dismiss the appeal.

2. I order the city to disclose the proposal to the requester in accordance with its access decision by **September 23, 2022** but not before **September 19, 2022**.

3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the proposal disclosed to the requester upon request.

Original signed by: August 19, 2022
Anna Truong
Adjudicator

[17] Order PO-2435.