

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4313

Appeal MA21-00365

Township of Alnwick/Haldimand

December 30, 2022

**Summary:** The Township of Alnwick/Haldimand (the township) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for “body and chassis specifications, and truck drawing” for a successful bid under a specified Request for Proposals (the RFP). The city denied access to the record pursuant to sections 10(1)(a) (third party information) and 11(a) (economic interests) of the *Act*. At mediation, the township disclosed several pages of the record with the consent of the successful bidder; however, consent from another third party (the affected party) was not obtained and the drawings forming part of the successful bid remain at issue in this order. In this order, the adjudicator finds that both section 10(1) and 11(a) exemptions do not apply to the drawings. Accordingly, she allows the appeal and orders the drawings disclosed to the appellant.

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

### OVERVIEW:

[1] By way of background, the record at issue in this appeal is the successful bidder’s submission in response to a Request for Proposals (the RFP) by the Township of Alnwick/Haldimand (the township) for a rescue vehicle. Remaining at issue in this order are the drawings that were part of the successful bid submission.

[2] The township received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for “Chassis and body specifications, and truck

drawing for awarded RFP [specified RFP number].”

[3] The township issued a decision denying access to the record pursuant to sections 10(1)(a) (third party information) and 11(a) (economic interests) of the *Act*.

[4] The appellant appealed the township’s decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC).

[5] During mediation, the township notified two third parties under section 21(1) of the *Act* and granted partial access to the record, specifically pages 1 to 8, with the consent of one of the third parties (the successful bidder). As the other third party (the affected party) did not provide consent for the remaining pages of the record and the successful bidder deferred to the affected party, the township continued to withhold pages 9 to 12 of the record (the drawings).

[6] After reviewing the released pages of the record, the appellant advised the mediator that they wanted access to the drawings. At the request of the appellant, the mediator notified the affected party but was unable to obtain their consent.

[7] No further mediation was possible and this appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry.

[8] As the adjudicator assigned to this appeal, I decided to conduct an inquiry into this matter. I began by inviting representations from the township and the affected party on the issues set out in a Notice of Inquiry. While I received representations from the township on the application of the section 10(1) mandatory exemption only,<sup>1</sup> I did not receive representations from the affected party.

[9] In this order, I find that both section 10(1) and 11(a) exemptions do not apply to the drawings. On that basis, I allow the appeal and order the township to disclose the drawings to the appellant.

## **RECORD:**

[10] The record at issue in this appeal is the successful bidder’s submission in response to the RFP. The pages remaining at issue in this order are pages 9-12 of the record, which consists of drawings (the drawings).

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<sup>1</sup> I sought representations from the township on the issues of the section 10(1) mandatory exemption (third party information) and the section 11(a) discretionary exemption (economic interests).

## **DISCUSSION:**

### **Preliminary Issue**

[11] I note that the township claimed section 11(a) in its decision to also withhold the drawings. However, during the inquiry, the township did not submit representations or evidence to support its claim that the drawings should be withheld under this exemption. As section 11(a) is a discretionary exemption and the township did not provide representations in support of it, I will not be addressing its possible application in the remainder of this order.

### **Does the mandatory exemption at section 10(1) for third party information apply to the pages at issue?**

[12] The township submits that section 10(1) applies to the drawings because they were drawn by the affected party, who was part of the RFP process. It also submits that the affected party did not consent to the release of the drawings.

[13] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>2</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>3</sup>

[14] 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,

(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; or

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

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<sup>2</sup> *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.*).

<sup>3</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

(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.

[15] For section 10(1) to apply, the party arguing against disclosure 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;
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.

[16] Assuming, without deciding, that the first two parts of the section 10(1) test have been established, I consider whether part three of the test has been established.

***Part three: Could disclosure of the drawings result in the harms listed in section 10(1)?***

[17] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace,<sup>4</sup> while section 10(1)(b) seeks to prevent similar information from no longer being supplied by private sector organizations to institutions.

*Representations of the township*

[18] The township submits that the record was part of an RFP process and when that occurs, only the total proposal price is released. It explains that submissions in response to RFPs are not typically released. The township also submits that the drawings are proprietary and it does not feel comfortable releasing a document that may be subject to intellectual property protections, like a patent.

[19] The township also confirmed that the drawings were included in the successful bidder's RFP submission and that the successful RFP bid submission formed the contract between the township and the successful bidder. It also confirmed that there is no separate contract between the parties.

*Analysis and findings*

[20] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide detailed evidence

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<sup>4</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.<sup>5</sup>

[21] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>6</sup> However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.<sup>7</sup>

[22] In applying section 10(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).<sup>8</sup>

[23] In this appeal, the township and the affected party are the parties resisting disclosure of the drawings. However, only the township has submitted brief representations, which do not directly address the 'harms' part of the section 10(1) test; the affected party has not submitted any representations.

[24] Based on my review of the drawings and the brief representations of the township, it is my view that I have not been provided with sufficient evidence to establish that the harms listed in section 10(1) could reasonably be expected to result from disclosure of the drawings. In addition, it is my view that the harms are not self-evident from my review of the drawings.

[25] I note that the drawings are visual representations of the specifications dictated by the township's stated specifications in its RFP document, where proponents were asked to indicate whether they could provide each specification. Presumably, the successful bidder would be the one who could deliver a large portion of these stated requirements. Also, it is likely that some of the specifications are industry standards. In addition, some details about the rescue vehicle would be visible upon seeing the rescue vehicle in person. Given the customized nature of the rescue vehicle requested by the township, I do not accept the township's representations that the drawings are proprietary, especially given that no further information has been provided with respect to this argument.

[26] Accordingly, I find that there is insufficient evidence to conclude that there is a reasonable expectation that the types of harms contemplated by section 10(1) of the

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<sup>5</sup> Orders MO-2363 and PO-2435.

<sup>6</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>7</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

<sup>8</sup> Order PO-2435.

*Act* may result from disclosure of the drawings.

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

[27] In conclusion, I find that the harms listed in section 10(1) could not reasonably be expected to result from disclosure of the drawings within the meaning of section 10(1) of the *Act*, and as a result, part 3 of the three-part test under section 10(1) is not met. As all three parts of the section 10(1) test must be met for the application of the exemption, I find that the mandatory third party information exemption at section 10(1) of the *Act* does not apply to the drawings.

**ORDER:**

[28] I allow the appeal and order the township to disclose the drawings (pages 9-12 of the record) to the appellant by **February 6, 2023** but not before **February 1, 2023**.

Original Signed by: \_\_\_\_\_  
Valerie Silva  
Adjudicator

\_\_\_\_\_ December 30, 2022