

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-4320

Appeal MA20-00165

City of Toronto

January 24, 2023

**Summary:** The City of Toronto received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the city's contract with a named company for the provision of construction consulting services. The city identified responsive records and notified the named company (the third party) of the request. The third party objected to disclosure. The city decided to grant the requester partial access to the responsive records, withholding some information pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*. The third party appealed to the IPC on the basis that the information that the city decided to disclose is exempt under the mandatory third party information exemption in section 10(1) of the *Act*. The requester did not appeal the decision.

In this order, the adjudicator finds that the third party information exemption in section 10(1) does not apply to the records that the city decided to disclose 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)(a)-(c).

### OVERVIEW:

[1] This order disposes of the issues arising from a request submitted to the City of Toronto (the city) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to records relating to specified amendments to purchase orders issued by the city to a named company and referred to in the city's staff report on a specified contract including requests, submissions,

negotiations, notes, minutes of meetings, contracts and agreements and correspondence with the named company. By way of background, the named company won a contract for the provision of construction consulting services for a wastewater process upgrade.

[2] The city identified the company named in the request (the third party) and gave them notice of the request under section 21(1) of the *Act*. The city's initial search located approximately 30,000 pages of responsive emails and the city sought clarification from the requester about this aspect of the request.

[3] The city also located 116 pages of responsive records comprising an agreement, correspondence, purchase orders and purchase order amendments and invited the third party to make representations on disclosure.

[4] The third party objected to disclosure of the 116 pages of responsive records. The city issued a decision to the requester granting partial access to the 116 pages of records, withholding pages 26 and 39 pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*.

[5] The third party, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC) on the basis that the information that the city decided to disclose is exempt under the mandatory third party information exemption in section 10(1) of the *Act*. The requester did not appeal the city's decision.

[6] A mediator was assigned to explore possible resolution. During mediation, the city revised its access decision and granted the requester access to information on pages 26 and 39 of the responsive records.

[7] As the requester did not appeal the city's original decision to seek access to the information withheld by the city, the application of the personal privacy exemption in section 14(1) to the information disclosed by the city is not an issue in this appeal.

[8] The appellant confirmed that it objects to the disclosure of the information relying upon the mandatory third party information exemption in section 10(1) of the *Act*. The requester confirmed that they wish to pursue access to all records that the city has decided to disclose. As a mediated resolution was not achieved, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry.

[9] I decided to conduct an inquiry, which I began by inviting and receiving representations from the city on the issues set out in a Notice of Inquiry.<sup>1</sup> I also invited the appellant to submit representations on the Notice of Inquiry and to respond to the

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<sup>1</sup> In the Notice of Inquiry, I invited the parties to make representations on the possible application of the personal privacy exemption in section 14(1). However, as the original requester did not appeal the city's decision, this issue is not within the scope of this appeal.

city's representations, which were shared in accordance with section 7 of the IPC *Code of Procedure* and *Practice Direction 7*.

[10] The appellant did not provide representations within the time limit given for doing so and has not requested an extension of time. I determined that I had the information I needed to adjudicate the appeal and closed my inquiry without inviting further representations from the parties.

[11] In this order, I find that the three part test for the application of the mandatory third party information exemption in section 10(1) of the *Act* is not met and the exemption does not apply to the records at issue in this appeal that the city decided to disclose. Accordingly, I uphold the city's decision and dismiss the appeal.

## **RECORDS:**

[12] The records at issue are the 116 pages that the city has decided to disclose comprising an agreement, fee schedule and task matrix and purchase orders and purchase order amendments (except for pages 26 and 39, which the city decided to withhold)

## **DISCUSSION:**

[13] The sole issue to be decided in this appeal is whether the third party information exemption in section 10(1) of the *Act* applies to the pages of the records that the city decided to disclose to the requester.

[14] The third party information exemption in section 10(1) is mandatory and I will therefore consider whether it applies to the records at issue in this appeal. In the absence of representations from the appellant, I have reached my determination based upon the city's representations, my review of the records and the circumstances of the request.

[15] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.<sup>2</sup> 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.<sup>3</sup>

[16] Section 10(1) states:

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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.).

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

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; or
- (d) reveal information supplied to or the report of a reconciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[17] 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.

[18] Section 42 of the *Act* provides that where an institution refuses access to a record or part of a record, the burden of proof that a record or part of it falls within one of the specified exemptions in the *Act* lies upon the institution. Previous orders of the IPC have held that when a third party relies upon the exemption provided by section 10(1) of the *Act*, the third party shares with the institution the onus of proving that the exemption applies to the record (or part of it) that is at issue.<sup>4</sup>

[19] In this appeal, the city has decided to grant access to the information at issue and it is the third party appellant that opposes disclosure under the *Act*. As the party relying upon the exemption in section 10(1) and asserting that it applies to the

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<sup>4</sup> See for example, Order P-203 where the adjudicator considered the onus that lies on third parties relying on the exemption in the equivalent provision to section 10 in the provisional version of the *Act*.

information at issue, the appellant bears the burden of proof in this appeal.

[20] It is the city's position that the information at issue does not satisfy the three part test for the application of the third party exemption in section 10(1) of the *Act*. The city submits that the records include financial information but the majority of the records were generated by the city and could not therefore have been supplied by the appellant. The city also submits that much of the information contained in the records is publicly available and the appellant has not demonstrated that harm to its competitive position could reasonably be expected to result from disclosure, as the appellant asserted when it objected to the city disclosing it to the requester.

### **Analysis and findings**

[21] For the reasons that follow, I find that the third party information exemption in section 10(1) does not apply to the records that the city decided to disclose and that are in issue in this appeal. I am not satisfied that the information in the records was "supplied" by the appellant as required by the second part of the three part test in section 10(1).

[22] The second part of the test provides that the information at issue must have been "supplied in confidence" to the institution, either implicitly or explicitly. Information may qualify as "supplied" for the purposes of section 10(1) 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 that is directly supplied by a third party.<sup>5</sup>

[23] Previous orders of the IPC have held that 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).<sup>6</sup> The terms of a contract are generally treated as mutually generated rather than "supplied" by a third party.

[24] There are two exceptions to the general rule that contracts are not "supplied": 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.<sup>7</sup> The "immutability" exception applies where the contract information is supplied by the third party, but the information is not susceptible to negotiation.<sup>8</sup>

[25] From my review of the records, I find that they are not supplied by the appellant for the purposes of section 10(1). I find that the agreement for the construction

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<sup>5</sup> Orders PO-2020 and PO-2043.

<sup>6</sup> Orders MO-1706, PO-2371 and PO-2384.

<sup>7</sup> Order MO-1706.

<sup>8</sup> For example, financial statements. See Order PO-2384.

consulting services is the contract between the city and the appellant, which has been mutually generated and not "supplied" by the appellant, for the purposes of section 10(1).

[26] Similarly, I find that the fee schedule and the task time matrix is information that has been mutually generated by the parties as an amendment to the agreement. This information includes the city's fee calculation methodology from its RFP and the appellant's proposal to amend fee calculations in the contract. From my review of the records, I am satisfied that this information forms part of the contract and is not supplied by the appellant to the city.

[27] In the absence of any representations from the appellant, there is no reasonable basis for me to conclude that the general rule by which records containing the terms of a contract are not "supplied" for the purposes of section 10(1) should not apply. Accordingly, I am not satisfied that either the "inferred disclosure" or the "immutability" exception applies to the agreement.

[28] From my review of the purchase orders, I find that they have been created by the city for the purchase of the appellant's services pursuant to the contract. I therefore find that the purchase orders were generated by the city and they were not "supplied" to the city for the purposes of section 10(1).

[29] As I find that the information was not "supplied" by the appellant, it is not necessary for me to consider whether the records meet the "in confidence" requirement of the second part of the test or the harms requirement in part three.

[30] As noted above, for the third party information exemption to apply, the party resisting disclosure must establish that all three parts of the test in section 10(1) are met. I am not satisfied that the information in the records was supplied by the appellant and find that the exemption does not apply to the records at issue.

[31] Accordingly, I dismiss this appeal and uphold the city's decision.

## **ORDER:**

1. I dismiss this appeal and uphold the city's decision to grant partial access to the 116 pages of responsive records (with the exception of pages 26 and 39).
2. By **February 28, 2023** but not before **February 23, 2023**, I order the city to disclose the 116 pages of responsive records (except for pages 26 and 39).
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 records disclosed pursuant to provision 2.

Original signed by: \_\_\_\_\_

January 24, 2023 \_\_\_\_\_

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Katherine Ball  
Adjudicator