

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4368

Appeal MA20-00149

City of Toronto

April 25, 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 a named company's response to a specified RFP. After notifying the named company (the third party) of the request, the city decided to grant partial access to the responsive records withholding certain information. The third party appealed, objecting to the city's decision on the basis that the mandatory third party information exemption applies to the information the city decided to disclose.

In this order, the adjudicator finds that the third party exemption in section 10(1) does not apply to the portions of the records that the city decided to disclose. The adjudicator 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*) for records relating to a named company's proposal for the provision of engineering services at a water treatment plant in response to a specified RFP (request for proposal).

[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 identified the third party's proposal submitted in response to the RFP as responsive to the request. The city notified the third party of its intention to grant the requester partial access to the proposal withholding some information on the basis of the mandatory personal privacy exemption in section 14(1) of the *Act*. The third party did not respond to the notification.

[3] The city subsequently issued a decision to the requester granting partial access to the proposal. The third party, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The original requester did not appeal the city's decision and the application of the mandatory personal privacy exemption in section 14(1) is therefore not an issue in this appeal.

[5] During mediation, the appellant advised that it objects to the city's decision to disclose its response to the RFP on the basis that the third party information exemption in section 10(1) of the *Act* applies to it. The requester advised that they wish to pursue access to the portions of the proposal that the city decided to disclose.

[6] As a mediated resolution was not achieved, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and, as the appellant is the party opposing disclosure of its proposal, decided to begin my inquiry by inviting representations from the appellant. In the Notice of Inquiry, I identified the issues to be decided to determine whether the third party information exemption in section 10(1) of the *Act* applies to the portions of the appellant's proposal at issue and invited the appellant to make representations.

[7] The appellant provided representations reiterating that it objected to the disclosure of its proposal. In accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*, the non-confidential portion of the appellant's representations was shared with the city and the original requester. I invited and received their representations addressing the issues in the Notice of Inquiry and responding to the appellant's representations.

[8] 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 portions of the appellant's proposal that the city decided to disclose. Accordingly, I uphold the city's decision to grant the requester partial access to the responsive records and dismiss the appeal.

RECORDS:

[9] The records at issue consist of the portions of the appellant's proposal for the

supply of engineering services in its response to the specified RFP to which the city has decided to grant the requester access. The records at issue comprise portions of the technical proposal (pages 1, 3-46, in full and page 2, in part), the appendices (pages 47-138, 325-414, 427-628, in full) and the fee proposal (pages 629-632 and 636-639, in full and pages 633-635, in part).

DISCUSSION:

[10] 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 portions of the appellant's response to the specified RFP to which the city decided to grant the requester access.

[11] For the reasons that follow, I disagree with the appellant's submission that the three part test for the application of the third party information exemption in section 10(1) is met. As I explain, I am not satisfied that the third part of the test is met as there is no reasonable basis for me to conclude that any of the harms specified in section 10(1)(a), (b) or (c) may result from disclosure of the information at issue.

[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] 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;

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

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.).

² See Orders PO-1805, PO-2018, PO-2184 and MO-1706.

(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.

[14] 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.

[15] 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.³

[16] In this appeal, the city has decided to grant access to the parts of the record that are 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 information at issue, the appellant bears the burden of proof in this appeal.

Parties' representations

[17] It is the appellant's position that the information in its proposal represents trade secrets, scientific, technical, commercial and financial information including proprietary processes and tools describing its approach to the work to be provided pursuant to the proposal. The appellant states in broad terms that the information also includes intellectual property and its use in the proposed work, together with information on its costs, salaries and fee structure. The appellant states that the confidentiality of this information is fundamental to its ability to be competitive in the marketplace.

[18] The appellant states that it supplied the information in the proposal to the city in confidence, that it is not standard practice for "any municipality to make priced proposals containing confidential business information available to external parties" and

³ 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*.

that it had no reason to expect that the city would do so. The appellant's position is that if it had understood that this information would be made public, it would not have provided it.

[19] The appellant submits that the disclosure of the information in the RFP response would prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations and the information no longer being supplied to the city even where it is in the public interest that it should be so supplied. Finally, the appellant states that the disclosure of the information would result in it suffering undue loss as it may be used by others to gain unfair advantage on future project proposals.

[20] The city's position is that the first part of the three part test for the application of section 10(1) is met. The city states that the appellant's proposal contains financial information in the form of fee schedules and pricing indices relating to the proposed work.

[21] The city's submission in respect of the second part of the three part test is that the appellant has failed to establish that the records at issue were supplied by the appellant in confidence. The city submits that the records at issue, which it describes as a purchase order and related amendments, are generally treated as mutually generated rather than supplied. The city states that the records at issue do not contain non-negotiated confidential information supplied by the appellant and it does not therefore meet the requirements of the "inferred disclosure" exception to the general rule that terms of a contract are considered to be the product of a negotiation process and not supplied for the purposes of section 10(1). The city cites a number of IPC orders in support of its position.

[22] Finally, the city submits that the appellant has not provided evidence of the type of harm that may result from the disclosure of the records. The city cites Order MO-4242, in which its decision to disclose portions of the appellant's response to a different specified RFP was upheld in the absence of evidence from the appellant supporting its assertion that disclosure of the records might give rise to a reasonable expectation of harm.

[23] The original requester's position is also that the appellant has failed to discharge its burden of establishing that all three parts of the test for the application of the exemption in section 10(1) are met. The requester states that the appellant has not identified information within the proposal that qualifies as "trade secrets" and "scientific, technical, commercial and financial information", but has objected to the disclosure of the entirety of the proposal to which the city granted access.

[24] In regard to the second part of the test, the requester similarly submits that the appellant's representations suggest an implicit expectation of confidentiality. The requester submits that the appellant's proposal was submitted in response to an RFP dated April 2015, which is more than 7 years ago so that any reasonable expectation of

confidentiality has expired.

[25] The requester submits that the appellant's representations provide no explanation as to how harm might reasonably be expected to result from the disclosure of the records at issue, why the appellant would no longer respond to the city's RFPs if its proposal might be disclosed nor how disclosure would result in its undue loss in future project proposals.

Analysis and findings

[26] As stated above, for the third party information exemption in section 10(1) to apply, the party resisting disclosure must establish that all three parts of the test are met. I have considered the parties' representations and reviewed the records at issue and I am not satisfied that the appellant has demonstrated that disclosure of the records at issue would give rise to the reasonable expectation of harm of the type specified in section 10(1)(a), (b), (c) or (d).

[27] To meet the third part of the test, the party resisting disclosure cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed.

[28] Harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, but parties should not assume that the harms under section 10(1) are self-evident so that they can be proven simply by repeating the description of harms in the *Act*.⁴ The amount and kind of evidence needed to establish the harm depends upon the context of the request and the seriousness of the consequences of disclosing the information.⁵

[29] The appellant repeats the descriptions of harm from section 10(1)(a), (b) and (c) of the *Act* and states that these harms will occur if its proposal is disclosed. In the absence of any detail, the appellants submissions provide no reasonable basis for concluding that the harms specified in section 10(1)(a), (b) or (c) may arise if the portions of the appellant's proposal that are at issue are disclosed.

[30] I have also considered whether evidence of harm can be inferred from the records themselves, however, I am not satisfied that it can be inferred in this appeal.

[31] The portions of the records at issue comprise parts of the appellant's technical proposal, the appendices and the fee proposal. As the requester has indicated in their representations, the proposal was supplied to the city in response to an RFP dated April 2015. The records provide no reasonable basis for me to infer the commercial value of

⁴ Orders MO-2363 and PO-2463.

⁵ *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.

the appellant's proposal or its relevance in the current engineering services market or to future unspecified RFPs.

[32] From my review of the proposal, it describes specific engineering services that the appellant has tailored to meet the city's terms of reference for the RFP and related fees for those services. There is insufficient evidence before me from which to infer that there is a competitive market for the appellant's customised engineering services in this format so that disclosure of the proposal could reasonably be expected to prejudice the appellant's competitive or negotiating position or result in undue loss or gain. Accordingly, I find that the harm specified in section 10(1)(a) or (c) cannot be inferred from the records themselves.

[33] Similarly, I am unable to infer the harm specified in section 10(1)(b). From my review of the records, I find that it cannot be inferred that disclosure of the appellant's proposal can reasonably be expected to result in similar information no longer being supplied to the city. Previous orders of the IPC have held that the third party exemption in section 10(1) has not applied to third party responses to RFPs where the three parts of the test are not met.⁶ There is no reasonable basis for concluding that, as a general principle, the effect of not applying the third party information exemption to this type of information will result in potential proponents declining to participate in municipal RFPs. In my view, it is equally as likely that the transparency of the RFP process provided by disclosure of the appellant's proposal may encourage other proponents to participate in future bidding processes.

[34] The appellant does not refer to the harms specified in section 10(1)(d)⁷ in its correspondence and in my view the section does not apply to the information in the records at issue.

[35] Accordingly, I am not satisfied that the disclosure of the information at issue gives 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. The third part of the test is not met.

[36] As all three parts of the test must be established, I find that the mandatory third party information exemption in section 10(1) of the *Act* does not apply to the portions of the appellant's proposal that the city has decided to disclose. Accordingly, I uphold the city's decision and dismiss this appeal.

ORDER:

1. I dismiss this appeal and uphold the city's decision to grant access to the portions of the records at issue.

⁶ For example, MO-3799 and MO-4162.

⁷ Section 10(1)(d) applies to records containing labour relations information.

2. By May 30, 2023, but not before May 25, 2023, I order the city to disclose to the requester the responsive records except for the information withheld pursuant to section 14(1).
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: _____

Katherine Ball
Adjudicator

_____ April 25, 2023