

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4369

Appeal MA20-00166

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 portions. The third party appealed, objecting to the city's decision on the basis that the mandatory third party information exemption applies to the information that the city decided to disclose.

In this order, the adjudicator finds that the third party information exemption in section 10(1) does not apply to the portions of the records that the city decided to disclose. Accordingly, the adjudicator upholds the city's access decision 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*) for records relating to a named company's response to a specified request for proposals (RFP). The RFP concerned professional design and construction administration services for the city's construction of a wet weather flow system to improve the city's water quality. The city notified the named company (the third party)

of the request pursuant to section 21(1) of the *Act*.

[2] 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 third party's proposal, with portions withheld pursuant to section 14(1) of the *Act*. The third party, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC) on the basis that the mandatory third party information exemption in section 10(1) of the *Act* applies to the information that the city decided to disclose.

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

[5] Mediation did not resolve the matter and the appeal was transferred to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry. I decided to conduct an inquiry and invited and received representations from the parties. The parties' representations were shared in accordance with section 7 of the IPC *Code of Procedure and Practice Direction 7*.

[6] 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:

[7] The records at issue consist of the portions of the appellant's proposal in response to the specified RFP that the city has decided to disclose to the requester. These records comprise parts of the technical proposal (pages 1-15, 19, 21-76, in full and page 20, in part), the man hour matrix (page 77, in full) and the appendices, which include the cost proposal (pages 78-158 and 274 -545, in full).

DISCUSSION:

[8] The sole issue to be determined in this appeal is whether the mandatory third party information exemption in section 10(1) of the *Act* applies to the portions of the third party's proposal that the city decided to disclose to the requester.

[9] For the reasons that follow, I find that the third party information exemption does not apply to the records at issue. As I explain, I am not satisfied that the third part of the test for the application of the third party exemption in section 10(1) is met as there is no reasonable basis for me to find that disclosure of the portions of the proposal at issue may result in any of the harms specified in section 10(1)(a), (b) or (c).

[10] 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

[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,

(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.

[12] 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

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.

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.

[13] 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

[14] 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 establishing that the exemption applies.

Parties' representations

[15] 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.

[16] 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 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.

[17] 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.

[18] 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

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*.

information in the form of fee schedules and pricing indices relating to the proposed work.

[19] 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.

[20] 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.

[21] 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.

[22] In regard to the second part of the test, which requires the information to have been supplied in confidence, the requester submits that the appellant's proposal was successful. The requester submits that the information in the proposal could therefore be considered negotiated or mutually generated and not "supplied" for the purposes of section 10(1).

[23] The requester states that the appellant's proposal was submitted in response to an RFP dated September 2013, which is more than 9 years ago so that any reasonable expectation of confidentiality has expired.

[24] 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 similar information might no longer be submitted 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

[25] 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 portions of the appellant's proposal that are at issue. I am not satisfied that the appellant has demonstrated that disclosure of the information at issue would give rise to the reasonable expectation of harm of the type specified in section 10(1)(a), (b), (c) or (d).

[26] 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.

[27] 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

[28] 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.

[29] 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.

[30] The portions of the records at issue comprise parts of the appellant's technical proposal, the man hour matrix and the appendices, which include the cost proposal for the work. As the requester has indicated in their representations, the proposal was supplied to the city in response to an RFP dated September 2013.

[31] The appellant's proposal provides no reasonable basis for me to infer its commercial value or its relevance in the current design and construction services market or to future unspecified RFPs.

[32] From my review of the information at issue, I note that it includes technical drawings and pre-designs for the work specified in the RFP. The proposal includes impact studies and evaluations of different design options. It may be arguable that this type of information may have market value and its disclosure may affect the appellant's competitive position in the market place. However, it appears to me that the appellant has tailored the proposal to meet the city's terms of reference for the RFP and the related costs for the specified work. There is insufficient evidence before me from which to infer that there is a competitive market for the appellant's customised design and construction 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.

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.

[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.
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 _____

⁶ For example, MO-3799 and MO-4162.

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