Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4396

Appeal MA20-00059

City of Toronto

June 19, 2023

Summary: The appellant objected to the city's decision to disclose its commercial information contained in a winning proposal and an agreement for red light camera systems. The appellant claimed that the mandatory third party information exemption in section 10(1)(a) of the *Municipal Freedom of Information and Protection of Privacy Act* applied to the information at issue.

The adjudicator finds that the appellant has established that the section 10(1)(a) exemption applies to the information at issue in its winning proposal and she orders the city not to disclose it. She upholds the balance of the city's decision to disclose the information at issue in the agreement.

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

OVERVIEW:

[1] This appeal addresses the decision of the City of Toronto (the city) to disclose the commercial information of a third party contained in a winning proposal and an agreement for the supply, installation, operation and maintenance of red light camera systems (RLCS).

[2] The city received the following request for access to information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> Please provide the winning proposal response from [a named company], as well as the executed contract awarded on June 23, 2016, and any associated amendments and exhibits to include pricing for the RFP [specified number] for: The Supply, Installation, Operation, and maintenance of Red Light Camera Systems within the City of Toronto and other Municipalities within Toronto originally issued on April 24, 2015.

[3] The city located the winning proposal and the agreement responsive to the request. The city then notified an affected third party (the appellant) to obtain its views on disclosure of the records. The city subsequently issued a decision granting partial access to the responsive records. To deny access to the withheld information in the records, the city relied on the mandatory exemptions in sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*.

[4] The appellant was dissatisfied with the city's decision to grant partial access to the responsive records and appealed it to the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal. During mediation, the appellant consented to disclosure of additional information from the records at issue. The city disclosed this additional information to the party that submitted the access request (the original requester) in accordance with the appellant's consent.

[5] A mediated resolution of the appeal was not possible and the appeal was transferred to adjudication stage of the appeal process. I conducted an inquiry into the appellant's claim that the records remaining at issue qualify for exemption under section 10(1) of the *Act.* The appellant asked that I keep its representations confidential. In response, I advised the appellant of my decision to deny its request to keep its representations confidential and my reasoning. I explained that its written representations[1] did not satisfy the IPC's criteria for withholding representations set out in the IPC's *Practice Direction Number 7*, to which I had referred the appellant. This letter was my notice, in accordance with *Practice Direction Number 7*, to the appellant that I would share its written representations with the other parties to the appeal and refer to its written representations when providing reasons in this order.

[6] I shared the appellant's written representations with the city and the original requester. I invited the city and the original requester to provide representations in response to my Notice of Inquiry and to the appellant's written representations. The city provided representations but the original requester did not.

[7] In this order, I do not uphold the city's decision to disclose the RFP submission information at issue that I find is exempt under section 10(1)(a), but I uphold the remainder of the city's decision.

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[1] This refers to the appellant's 12 pages of written representations and not to the 522 pages of attachments that the appellant submitted with its written representations.

RECORDS:

[8] At issue are the records and information that the city has decided to disclose, which the appellant argues are exempt from disclosure under section 10(1) of the *Act.*

These records are:

- the price table at pages 117- 119 of the agreement
- the information on pages 1-143 and 203-205 of the appellant's RFP submission.

DISCUSSION:

[9] The sole issue in this appeal is whether the mandatory exemption at section 10(1) of the *Act* applies to the appellant's price table in the agreement and to the RFP submission information that the appellant objected to disclosing. The city has decided to disclose this information and the appellant opposes disclosure. As the party relying on the section 10(1) exemption and asserting that it applies to the information at issue, the appellant bears the burden of establishing that the exemption applies. For the reasons that follow, I find that the third party information exemption applies to the RFP information at issue, but does not apply to the price table found in the agreement.

The section 10(1) exemption

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

[2] *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.).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[11] For section 10(1) to apply, the appellant 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; and

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) and/or (c) of section 10(1) will occur.

Part 1 of the section 10(1) test: the records at issue reveal commercial information

[12] The IPC has described the types of information protected under section 10(1) as follows:

> ***Commercial information*** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[4] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[5]
>
> ***Financial information*** is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[6]
>
> ***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.[7]

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

> ***Trade secret*** includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
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> a) is, or may be used in a trade or business;
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> b) is not generally known in that trade or business;
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> c) has economic value from not being generally known; and
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> d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[8]

[13] There is no dispute that all of the information at issue in this appeal relates to the selling and buying of the appellant's RLCS services, and is commercial information within the meaning of section 10(1). I find that all of the information at issue is commercial information within the meaning section 10(1) and that the first part of the test is satisfied.

[14] The appellant also submits that the records contain financial information and that its RFP submission also contains trade secret information. The city does not address this submission of the appellant. I accept that some of the pricing information is financial information within the meaning of section 10(1). However, the appellant's representations do not convince me that the RFP contains any trade secret as they do not identify the "information contained or embodied in a product, device or mechanism" that is a purported trade secret.

[15] The appellant submits the RFP trade secret information relates to its products and services, including important and detailed specifications for various products (such as cameras, camera flash mechanisms, camera housings, camera lift poles, sensors and detectors, image processing hardware, servers, workstation, data storage and security, and associated software systems, including computer code and system architecture). It adds that this information would be of interest to its competitors, is not generally known and has been consistently treated as confidential. These submissions from the appellant align more with technical information than with trade secret information. Having reviewed the RFP submission, I am satisfied that it also contains technical information.

[16] As I have found that all of the information at issue fall within the types of information protected by section 10(1) in satisfaction of part 1 of the test, I will consider whether the information satisfies the next part of the test.

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[8] Order PO-2010.

Part 2 of the test: supplied in confidence

[17] In the Notice of Inquiry that I sent to the parties, I provided the information in paragraphs 18 to 21, below, explaining the IPC's approach to determining whether the second part of the test is met.

Supplied

[18] The requirement that the information must have been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[9] 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.[10]

[19] Previous IPC orders 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). 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.[11]

[20] There are two exceptions to this general rule:

1. **the "inferred disclosure" exception**. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non- negotiated confidential information supplied to the institution by a third party.[12]

2. **the "immutability" exception.** This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[13]

In confidence

[21] 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.[14] Relevant considerations in deciding whether an expectation of

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[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] 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*).
[12] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[13] *Miller Transit*, cited above at para. 34.
[14] Order PO-2020.

confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.[15]

The RFP submission was supplied in confidence

[22] The appellant argues that it supplied its RFP submission to the city with a reasonable expectation of confidence and watermarked the entire RFP submission "confidential." The city does not address the appellant's RFP submission in its representations or dispute the appellant's argument. Applying the considerations in paragraph 21 above, I am satisfied that the appellant communicated its intention that its RFP submission be kept confidential and that the RFP submission is not otherwise publicly available. I find that the appellant supplied its RFP submission to the city with a reasonable and implicit expectation of confidentiality, meeting the second part of the section 10(1) test. Below, I consider whether the RFP submission satisfies the last part of the test.

The price table in the agreement was not supplied in confidence

[23] The appellant submits that it also supplied the price table at pages 117- 119 of the agreement in confidence. It explains that it submitted the price table separately, in a confidential envelope, before the price table was inserted into the agreement. The appellant argues that, while information in a contract is generally not protected from disclosure, the price table should be because it was not the product of a negotiation; rather, it is a detailed price list of services that the appellant could provide at the city's request. The appellant states that it supplied the price list to the city to show the city all the available services (and their pricing) from which the city could choose. The appellant explains that the agreement approved a contract for up to $18 million worth of services over two terms: approximately $10.5 million for one five year term and approximately $7.5 for a second five year term (the second term would be awarded at the sole discretion of the city's General Manager, Transport Services and subject to budget approval). The appellant concludes its representations on this issue by stating that the city expressly declined to negotiate the price table with it.

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[15] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

[24] In its representations, the city submits that the price table was not supplied in confidence. The city asserts that the price table was negotiated through the RFP process and included in the agreement. The city states that many IPC orders have found that the content of contracts and agreements involving an institution and a third party do not normally qualify as having been supplied.

[25] I am not persuaded by the appellant's argument that the price table was supplied because it was included in the agreement without any negotiation. The price table is a list of services from which the city can choose what it likes, as the appellant asserts, however, that is not determinative. The price table is a contractual provision of the agreement between the city and the appellant and, therefore, mutually generated by the contracting parties – the parties have agreed to the prices listed in the price table for the corresponding services. As indicated in my Notice of Inquiry to the parties, IPC orders have held that the contents of a contract will not normally qualify as having been "supplied" for the purpose of section 10(1) even where the contact is preceded by no negotiation or where it reflects information that originated from one of the parties. The appellant's representations and the agreement itself do not persuade me to depart from this approach, nor do they satisfy me that either of the inferred disclosure or immutability exceptions applies to the price table. The pricing information in the price table is not immutable in the way that financial statements, underlying fixed costs or product samples are; nor would its disclosure permit accurate inferences to be made about underlying, non-negotiated confidential information supplied by the appellant.[16]

[26] I find that the price table at pages 117- 119 of the agreement was not supplied by the appellant and does not meet the second part of the test for the application of the section 10(1) exemption. Accordingly, I uphold the city's decision to disclose the price table in the agreement to the original requester.

Part 3: harms

Could reasonably be expected to

[27] The appellant claims that the harms under section 10(1)(a) could reasonably be expected to occur if the RFP submission information at issue is disclosed. As the party resisting disclosure of this information, the appellant must provide detailed evidence about the risk of harm if the information is disclosed.[17] The appellant must show that the risk of harm is real and not just a possibility.[18] However, it does 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.

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[16] Order MO-1706,
[17] Orders MO-2363 and PO-2435.
[18] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.

Section 10(1)(a): prejudice significantly the competitive position of an organization

[28] Section 10(1)(a) seeks to protect information that could be exploited in the marketplace.[19] The appellant submits that it is apparent, and not merely speculative, that the disclosure of the information at issue in its RFP submission can reasonably be expected to significantly harm its competitive position and cause it undue loss, thus satisfying the third part of the test. The city disputes that the harms part of the test is met and it states that the appellant bears the burden of establishing that the harms can reasonably be expected to occur.

[29] The appellant explains that it is in the business of supplying and servicing RLCS, a highly consolidated marketplace in which new business is generally acquired through competitive public sector procurements. It states that it is the smallest company of only three companies in the RLCS market that are capable of bidding and winning large tenders for RLCS in North America. The appellant states that one of the two larger companies with which it competes, has billions of dollars in revenue, thousands of employees and considerable influence on the RLCS market and industry. It states that it competes directly with that company in many jurisdictions, including Ontario, where it has successfully out-bid that company in RLCS RFPs for the last 10 years.

[30] In this context, the appellant argues that disclosure of the RFP submission information at issue would provide that company and its other competitors with detailed commercial and financial information, and the specifications of its products and services. The appellant asserts that disclosure would give its competitors a significant competitive advantage in preparing their own proposals for future RFPs to provide RLCS to municipalities in Canadian and other jurisdictions, since its designs can be used worldwide. It submits that if its competitors attempted to undermine it in future RFPs and/or attempted to replicate the products and services that it has developed, it would lose the benefit of money it has invested in its product and service development, which could damage its competitive position and result in undue loss.[20] The appellant also argues that disclosure would result in its pricing and systems being spread quickly to its competitors, who could use it to their advantage and cause the appellant undue loss.

[31] Finally, the appellant submits that the disclosure of its RFP submission information would be contrary to the interests of municipalities in Ontario and other RLCS customers because it would undermine the public policy objective of achieving the best value for public funds through competitive procurement processes. The appellant explains that these processes typically include anti-collusion provisions that prohibit proponents from communicating about the contents of their proposals to ensure a robust competition on the basis of technology and pricing.

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[19] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[20] The appellant relies on Orders P-246 and P-582 in support of this argument.

Disclosure of the RFP submission information at issue could reasonably be expected to prejudice significantly the appellant's competitive position

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

[33] Having reviewed the appellant's representations and the records at issue, and considered the circumstances of this appeal, I am satisfied that the appellant has established that disclosure of the information at issue could reasonably be expected to significantly prejudice its competitive position within the meaning of section 10(1)(a) of the *Act*. I am also satisfied that evidence of harm can be inferred from the information at issue in the records themselves.

[34] The RFP submission information at issue includes commercial, financial and technical information, as I explained in paragraphs 13 to 15 above. This detailed and extensive information could be exploited in the marketplace by the appellant's competitors in the ways described by the appellant in its representations. It is reasonable to expect that, if disclosed, this information could, and likely would, be used by the appellant's competitors (two larger companies with greater resources and market share than the appellant) to their advantage in future RFP submissions, thereby significantly prejudicing the appellant's competitive position.

[35] I find that disclosure of the RFP submission information at issue could reasonably be expected to result in the harms in section 10(1)(a) and, therefore, this information is exempt from disclosure under that section of the *Act*. I do not uphold the city's decision to disclose this information.

ORDER:

1. I uphold the city's decision to grant access to the price table at pages 117 to 119 of the agreement. I order the city to disclose these pages of the records to the original requester by **July 25, 2023**, but not before **July 20, 2023**, and to copy me on its correspondence disclosing those records.

2. I order the city to withhold the remaining RFP submission information at issue.

Original signed by: June 19, 2023

Stella Ball
Adjudicator