

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4404

Appeal MA21-00352

Municipality of Wawa

June 27, 2023

Summary: The Municipality of Wawa (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified third party's proposal for consulting services. The municipality notified the third party and decided to grant partial access to the proposal withholding portions pursuant to the personal privacy exemption in section 14(1) and the third party information exemption in section 10(1). The requester appealed and during the appeal the third party raised the frivolous and vexatious nature of the request.

In this order, the adjudicator finds that the third party is not entitled to rely upon the frivolous or vexatious provisions of the *Act* and the request is not an abuse of the access process at common law. The adjudicator finds that the information at issue is not personal information so that the personal privacy exemption does not apply. The adjudicator upholds in part the municipality's application of the third party information exemption. Accordingly, the adjudicator orders the municipality to disclose to the appellant portions of the information at issue to which the exemptions do not apply.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1), 4(1) and 10(1)(a) and (c).

Orders Considered: Orders PO-3738-I, M-850, MO-4060

OVERVIEW:

[1] This order disposes of the issues arising from a request submitted to the

Municipality of Wawa (the municipality) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) seeking access to records relating to a consulting proposal. The request stated:

For the period of between 1 September 2020 and up to and including 5 March 2021 and specifically relating to the proposal from [a named company], access is requested for general records, i.e. a copy of: "Any documentation relating to the RFP or RFQ, bid submission including supporting material covering experience and qualifications of [the named company's] consultants, Statement of Work scope, names of any subcontractors, any interim reports including drafts, minutes of any meetings or any documentation relating to the scope of work including such items as handwritten notes, reports, emails, presentation etc. in any media by any town official/employee who attended any meetings or discussion with the consultants conducted between 1 September 2020 and 5 March 2021.

[2] The municipality identified responsive records and issued a fee estimate to the requester. The requester narrowed the scope of the request to one record, the proposal submitted by the named company to the municipality.

[3] The municipality then notified the named company (the third party) of the request pursuant to section 28(1) of the *Act*. The third party objected to the disclosure of portions of its proposal on the basis of the mandatory third party information exemption in section 10(1) of the *Act* and the mandatory personal privacy exemption in section 14(1).

[4] The municipality decided to grant the requester partial access to the proposal withholding portions on the basis of the exemptions cited by the third party.

[5] The requester, now the appellant, appealed the municipality's decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore possible resolution.

[6] The mediator spoke to the appellant and the municipality to discuss the issues in the appeal. The municipality advised that it was maintaining its decision to grant partial access to the responsive record. The appellant advised that he wished to pursue access to the information withheld under the exemptions in sections 10(1) and 14(1) of the *Act*.

[7] As a mediated resolution was not achieved, the appeal was transferred to adjudication, where an adjudicator may conduct an inquiry.

[8] The adjudicator originally assigned to this appeal decided to conduct an inquiry and sought and received representations from the municipality and the third party initially, on the issues relating to the application of the mandatory exemptions in

sections 10(1) and 14(1).

[9] In its submissions, the third party asserts that the appellant's request is part of a pattern of conduct that amounts to a personal vendetta against the third party. The third party asks the IPC to make a finding that the appellant's request under the *Act* is frivolous and vexatious.

[10] In a modified Notice of Inquiry, which included the issue of whether the request is frivolous or vexatious/an abuse of process, the adjudicator sought and received representations from the appellant. In his representations, the appellant submits that the third party is not permitted to raise the frivolous or vexatious issue in the appeal. The file was then transferred to me to continue the adjudication. I reviewed the file and decided to invite the third party to submit reply representations before rendering a decision.

[11] The parties' representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[12] In this order, I find that the third party is not entitled to rely upon the frivolous or vexatious provisions of the *Act* and that the appellant's request is not an abuse of the access process at common law. I uphold in part the municipality's decision to withhold portions of the third party's proposal pursuant to the third party information exemption in section 10(1). In addition, I find that the information at issue does not contain "personal information" as defined in the *Act* and the personal privacy exemption in section 14(1) does not apply to the signature in the proposal. Accordingly, I order the municipality to disclose the portions of the record that it has withheld and to which the claimed exemptions do not apply, this information appears on pages 5 and 16 of the third party's proposal.

RECORDS:

[13] The information at issue consists of the portions withheld from pages 5, 8-14, 16, 21-23 and 26 of the third party's proposal to the municipality for consulting services.

ISSUES:

- A. Is the appellant's request frivolous or vexatious or an abuse of the access process?
- B. Does the record contain "personal information" as defined in section 2(1) of the *Act* and, if so, whose personal information is it?

- C. Does the mandatory exemption in section 10(1) for third party information apply to the record?

DISCUSSION:

Issue A: Is the appellant's request frivolous or vexatious or an abuse of the access process?

[14] Section 4(1)(b) of the *Act* provides institutions with a way of dealing with frivolous or vexatious requests. It provides that:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[15] Past orders have affirmed that, when refusing a request on this basis, the onus of demonstrating that an access request is frivolous or vexatious rests with the institution.¹ A finding that a request is frivolous or vexatious is serious and operates as a limitation on a requester's access rights under the *Act*. It should therefore be used sparingly.

[16] The issue in this appeal is whether the third party, not the municipality, is entitled to raise the frivolous or vexatious provisions of the *Act* and seek a finding to that effect on appeal.

[17] In its representations, the third party provides some history and context to the appellant's request. It is the third party's position that the request is part of a pattern of conduct by the appellant to inundate multiple municipalities with access requests in a personal vendetta towards the third party's principal consultant. The third party submits that the appellant's requests are frivolous and vexatious and an abuse of the right of access and that it has no expectation that this pattern of conduct, which amounts to harassment, will end until the IPC concludes that it is frivolous and vexatious.

[18] The appellant submits that the frivolous and vexatious provisions of the *Act* are not available to the third party because the municipality did not make such a claim in its response to the request. The appellant submits that this appeal arises from his one access request submitted to the municipality. The appellant relies upon the findings of the adjudicator in Order PO-3738-I and submits that the onus is on an institution to make a frivolous and vexatious claim, not a third party.

[19] The appellant's position is that the request giving rise to this appeal is not an

¹ Order M-850.

abuse of process at common law nor is it a bad faith request.

[20] I invited the third party to provide submissions on Order PO-3738-I and the appellant's position that only an institution could invoke the frivolous and vexatious provisions of the *Act*. In its reply representations, the third party did not directly address this issue but reiterated its primary position. The third party drew parallels between the appellant's conduct and the definition of a vexatious litigant and examples of abuses of the access process in previous orders of the IPC.²

[21] I did not invite representations from the municipality on this issue. The municipality did not rely upon section 4(1)(b) in its response to the appellant's request. The municipality decided to grant the appellant partial access to the third party's proposal and the third party has not appealed that decision.

Frivolous or vexatious

[22] Past decisions of the IPC in which adjudicators have considered the frivolous or vexatious provisions agree that section 4(1)(b) was included in the *Act* by the Legislature to protect the interests of institutions in administering the access scheme, not the interest of other parties outside government.³ In Order PO-3738-I, the adjudicator drew an analogy with the legislative decision to include discretionary exemptions in the *Act*. The adjudicator noted that

As with discretionary exemptions, it is generally thought that if the Legislature had intended for the frivolous or vexatious provisions to be available to non-government parties to invoke, it would have done so through express language like that used in the third party information and personal privacy exemptions in sections [10(1)] and [14(1)] of the *Act*.

[23] I agree with this analysis and adopt it in this appeal. In the absence of express language extending the right to rely upon the frivolous or vexatious provisions of section 4(1)(b) to third parties, there is no means of doing so.

[24] In this appeal, the municipality did not deal with the appellant's access request summarily under the *Act* by exercising its discretion to find the request frivolous or vexatious. The municipality responded by notifying the third party and seeking its comments on disclosure. The municipality then issued an access decision that reflected the third party's position granting partial access to the proposal and relying upon exemptions for withholding information.

[25] As the municipality did not deal with the appellant's request by relying upon section 4(1)(b) of the *Act* and the third party did not appeal the municipality's decision on that basis, I find that it is not open to the third party to raise the issue in the

² Orders MO-2113, M-618, M-850 and PHIPA Decision 136.

³ Order PO-2050.

appellant's appeal. Accordingly, the issue of the frivolous or vexatious nature of the appellant's request under the provisions of the *Act* is not before me in this appeal.

Abuse of process at common law

[26] While a third party may not rely upon the *Act's* frivolous or vexatious provisions, previous orders of the IPC have held that parties to an appeal have a right to argue that a request made under the *Act* constitutes an abuse of process at common law and to have the appeal dismissed on the basis of such a finding.⁴

[27] The grounds for arguing an abuse of the right of access at common law are a pattern of conduct that amounts to abuse of process, a request made in bad faith or a request made for a purpose other than to obtain access.⁵ As the common law principles of abuse of process form the foundation of the frivolous or vexatious provisions of the *Act*, I will consider previous orders of the IPC dealing with these provisions.⁶

[28] In this appeal, the third party submits that the appellant has engaged in a pattern of conduct amounting to an abuse of process.

Pattern of conduct

[29] The third party states that the appellant has submitted multiple requests for its proposals from different municipalities and when an institution seeks fees for processing the requests, the appellant abandons the request or narrows the scope of the request. The third party states that many of the municipalities are small and remote with populations of less than 1000 and 10 or less employees, limited resources and training in the *Act* and limited funds for obtaining advice about responding to the requests. The third party submits that these municipalities all have in common the fact that the third party has competed for and provided services to them. The third party's position is that the multiple requests represent a pattern of conduct in pursuit of harassing the third party and causing it harm.

[30] The appellant submits that the fact that the parties have had previous incidences of dealing with unrelated access requests "should not, does not and must not color any of the process here." The appellant denies that his requests are an abuse of process and states that he has submitted a single request to this municipality.

[31] In Order M-850, the adjudicator reviewed dictionary definitions of the phrase "pattern of conduct" and formed the view that a "pattern of conduct" in the context of access requests requires "recurring incidents of related or similar requests on the part

⁴ Orders PO-3728-I, PO-2906, PO-2490, MO-2635 and M-618.

⁵ The common law grounds reflect those set out in section 5.1(1) and (b) of Regulation 823, which provides for the grounds upon which an institution shall conclude that a request is frivolous or vexatious under the *Act*.

⁶ Order MO-2635.

of the requester (or with which the requester is connected in some material way).”

[32] I agree with and adopt this definition of a “pattern of conduct” in this appeal. I accept the third party’s submission that the appellant has made a number of requests to different municipalities for the same or similar records. In this appeal, the appellant is pursuing access to records relating to the third party’s proposal for consulting services related to a review of the municipality’s service delivery processes. I have previously issued an order disposing of an appeal brought by the appellant under the *Act* and arising from a similar request for the third party’s proposal submitted to another municipality.⁷ The third party has cited other requests and related appeals in which access is sought to similar records pertaining to services it has proposed and/or provided to different municipalities.⁸ In each of these requests, the third party is the named consultant. In my view, these requests are targeting records arising from the relationships of different municipalities with the third party and they demonstrate a “pattern of conduct”.

Amounting to an abuse of process

[33] I now consider whether the appellant’s pattern of conduct amounts to an abuse of the right of access. Previous orders of the IPC have established the following factors that may be relevant when making this determination: the number of requests, the nature and scope of the requests and the purpose and timing of the requests.⁹ Other factors may also be relevant and the focus should be on the cumulative nature and effect of a requester’s behaviour.¹⁰

[34] As noted above, I am satisfied that the appellant has submitted a number of requests seeking similar records concerning the third party’s relationship with different municipalities. I do not accept the appellant’s submission that these requests are unrelated. From my review of the different requests, I find that they share common features; in each request the appellant specifies the third party and seeks access to records relating to services proposed or provided by the third party to a municipality.

[35] I have considered the appellant’s purpose in making these requests and pursuing the appeals. The third party submits that the requests amount to harassment and a personal vendetta and provides some background to give context to the appellant’s conduct. The appellant submits that the requests are not an abuse of process nor are they made in bad faith. The appellant submits that he is exercising his right of access.

[36] On the face of this appeal, the appellant is challenging the municipality’s decision to deny access to portions of the third party’s proposal on the basis of the third party information exemption in section 10(1) and the personal privacy exemption in section

⁷ Order MO-4292.

⁸ Orders MO-4263 and MO-4292.

⁹ Orders M-618, M-850 and MO-1782.

¹⁰ Order MO-1782.

14(1) of the *Act*. In the other appeals, the appellant has similarly but unsuccessfully challenged the municipalities' application of the third party information exemption in section 10(1). I have therefore considered whether, as the third party submits, the appeals are intended for nuisance value alone and without reasonable grounds.

[37] For the reasons that are set out in my analysis of the issues below, I reach a finding that the section 10(1) third party information exemption does not apply to a portion of the information that the municipality has decided to withhold and I order it to be disclosed. To this extent, the appellant's appeal cannot be described as being without reasonable grounds. Similarly, as I also explain below, I find that the information at issue does not contain "personal information" as defined by the *Act* so that the personal privacy exemption does not apply to the record as the municipality claims.

[38] However, there is only one portion of the record that the municipality has decided to withhold pursuant to the personal privacy exemption and that is the signature of the third party's principal consultant. While I acknowledge that the appellant has a right to bring an appeal and challenge to municipality's reliance upon the exemption under the *Act*, I have some sympathy with the third party's submission that pursuing access to a signature to appeal suggests the appellant's purpose is not access and has the appearance of "nuisance value."¹¹ More than a nuisance, in my view using the appeal process to pursue access to an individual signature is conduct suggestive of a personal vendetta. This apparent use of the appeal process is a concern.

[39] Notwithstanding this concern in the appeal before me, for a pattern of conduct to amount to an abuse of the access process, I must consider the *cumulative* nature or effect of the appellant's conduct. The information before me is that the appellant has made at least six requests to different municipalities. The third party refers to a history between the parties beginning with an access request that the appellant made in 2013. Thereafter and since 2020, the appellant has submitted the other requests.

[40] There is no reasonable basis for me to find that the cumulative effect of the six requests that have been made since 2013 is interfering with the operations of an institution. As the requests have been made to different municipalities, any cumulative effect is upon the third party, not the institutions. As I noted, the appellants requests are focussed on the individual municipality's relationships with the named third party so that the scopes of the requests are not overly broad. In the two appeals that I have adjudicated, the municipalities' searches have each identified one record that is responsive to the request.

[41] Having considered the factors relevant to this appeal, on balance I find that the appellant's current number of requests and their nature do not amount to an abuse of

¹¹ The third party cites Order M-618 in support of this submission.

the access process. However, as I have noted, there are aspects of the appellant's use of the access and appeal processes that raise concern. While I have not found the pattern of conduct to amount to an abuse of the access process in the current circumstances, future requests by the appellant for similar information may result in different findings in future appeals.

[42] I now consider the issues arising in relation to the application of the exemptions claimed by the municipality.

Issue B: Does the record contain "personal information" as defined in section 2(1) of the *Act* and, if so, whose personal information is it?

[43] The municipality relies upon the mandatory personal privacy exemption in section 14(1) of the *Act* for withholding the signature of one of the third party's consultants in the proposal. In order to decide which sections of the *Act* may apply to the proposal, I must first determine whether it contains "personal information" and, if so, to whom the personal information relates.

[44] For the reasons that follow, I find that the consultant's signature is not personal information as defined in the *Act*.

[45] Section 2(1) of the *Act* defines "personal information" as "recorded information about an individual," and provides a non-exhaustive list of examples, including any identifying number, symbol or other particular assigned to an individual (paragraph (c)) and an individual's name if it appears with other personal information about the individual (paragraph (h)).

[46] Information is "about" an individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.¹²

[47] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.¹³

[48] The municipality's position is that the consultant's signature is their personal information. Citing Order MO-1194, the municipality submits that the question whether or not a signature or handwriting style is personal information is dependent "on context and circumstances." The municipality relies on Order MO-4060 in which the adjudicator determined that a third party's signature was "personal information" but not those of municipal officials, whom the adjudicator found had signed the record in their official

¹² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(2.1) and (2.2).

¹³ Orders P-1409, R-980015, PO-2225 and MO-2344.

capacity. The municipality submits that the signature at issue in this appeal is also that of a third party, not an official of the municipality, and should therefore be treated as "personal information."

[49] The third party's position is also that the consultant's signature is personal information within the meaning of the *Act*.

[50] The appellant's representations do not directly address whether the record contains personal information. In relation to the withheld signature, the appellant states that the signature has previously appeared on public documents so that it should not now be considered "personal" for the purposes of the *Act*.

[51] From my review of the record, I note that the third party's proposal contains the names of each of its consultants, together with a short biography setting out their relevant experience and expertise. This portion of the proposal is not in issue in this appeal. The proposal also contains the signature of the principal consultant and it is this information over which the municipality claims the mandatory personal privacy exemption.

[52] I agree with the municipality's submission that the IPC has held that the determination of whether or not a signature or handwriting style of an individual is personal information for the purposes of the *Act* depends on context and circumstances.¹⁴

[53] However, I do not agree with the municipality's submission in relation to Order MO-4060. In my view, the context and circumstances relevant to the determination are those surrounding the capacity in which the signature was provided, not whether the signature belongs to a third party or an institution's representative.

[54] The record at issue in Order MO-4060 was an employment agreement and the employee's signature appeared along with other information, including compensation, benefits, home address and name. The adjudicator in that appeal found that this information identified the employee, an affected party in the appeal, in their personal capacity and was therefore personal information within the meaning of the *Act*. The adjudicator distinguished other signatures in the employment agreement that belonged to the institution's representatives who had signed the agreement on behalf of the institution. These signatures were found to relate to those individuals in their official capacities and disclosure would not reveal anything of a personal nature about them.

[55] I agree with and adopt the reasoning of the adjudicator in Order MO-4060. In this appeal, the record at issue is a third party consulting proposal for the provision of services to the municipality. The principal consultant's signature appears in the proposal together with their name and a short biographical paragraph about their relevant experience and expertise. From my review of the record, I find that the principal

¹⁴ Order MO-1194.

consultant has signed the proposal as a representative of the third party. I am satisfied that the consultant signed the proposal at issue in this appeal in a business capacity, not their personal capacity, and its disclosure would not reveal anything of a personal nature about them. Accordingly, I find that the consultant's signature in the record is not personal information.

[56] As I have found that the portion of the record at issue does not contain personal information, the mandatory personal privacy exemption in section 14(1) of the *Act* cannot apply to it.

[57] I will order the municipality to disclose the signature, which appears on page 16 of the proposal.

Issue C: Does the mandatory exemption in section 10(1) for third party information apply to the withheld portions of the proposal?

[58] The municipality relies upon the mandatory third party information exemption in section 10(1) for withholding the remaining portions of the proposal. For the reasons that follow, I find that with the exception of the information withheld from page 5 of the proposal, the third party exemption applies to the portions of the record that the municipality decided not to disclose to the appellant.

[59] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions, where specific harms can reasonably be expected to result from its disclosure.¹⁵

[60] For section 10(1) to apply, the party arguing against disclosure, in this case the municipality and the third party, 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) or (c) and/or (d) of section 10(1) will occur.

Type of information

[61] The municipality and the third party submit that the information in the proposal is commercial and/or financial information, including the rates/fees for the provision of the proposed services, cost breakdowns, a client list and proprietary information

¹⁵ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

relating to the third party's process and deliverables.

[62] The third party cites a number of IPC orders in support of its submission.¹⁶

[63] The appellant does not address the type of information in the proposal in their representations but states that the third party is comprised of former municipal public servants, who have used knowledge and information acquired at public expense to establish the consultancy. The appellant refers to the information in the proposal as "mundane information and knowledge that is in the public domain."

[64] I have reviewed the record and find that it is a proposal for the review, evaluation and strategic planning of the municipality's core service delivery processes. The portions of the proposal that the municipality has decided to withhold and that are at issue in this appeal are details about the third party's knowledge base, its processes, scope of proposed work, timelines, information about the third party's clients and similar projects, the third party's methodologies and costs breakdowns. Details about the municipality's terms of reference, and the proposed fee are in the portions of the record that the municipality has decided to disclose to the appellant.

[65] The IPC has defined commercial information as information that relates solely to the "buying, selling or exchange of merchandise or services."¹⁷ From my review of the withheld portions of the third party's proposal, I am satisfied that the information qualifies as commercial information as it relates to a proposal for a commercial transaction between the third party and the municipality. The information comprises details of the services to be provided and a breakdown of the costs for the provision of those services.

[66] I do not agree that the information is financial information. The total fee for the services, being the total amount to be paid to the third party for undertaking the proposed work, is set out in the disclosed portion of the record.

[67] I also do not agree with the appellant's submission that the source of the third party's skill or expertise to provide the consulting services is determinative of how the information should be classified under the first part of the test.

[68] Accordingly, I find that the first part of the test under section 10(1) of the *Act* is met.

Supplied in confidence

[69] The second part of the test that the information must meet to qualify for the third party information exemption is that it must have been "supplied" by the third party to the institution "in confidence." The requirement that the information has been

¹⁶ *Toronto (City) (Re)*, 2019 CanLII 75845 (ON IPC), Order MO-1706 and MO-2164.

¹⁷ Order MO-1706.

“supplied” to the institution reflects the purpose in section 10(1) of protecting informational assets of third parties.¹⁸

[70] 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.¹⁹

[71] 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.²⁰

[72] In deciding whether an expectation of confidentiality is based on reasonable and objective grounds, relevant considerations 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.²¹

[73] The municipality and the third party submit that the proposal was supplied directly by the third party to the municipality. The parties point to the confidentiality clause included in the proposal as evidence of their mutual intention to treat it as such.

[74] The municipality also submits that the proposal should not be characterised as having been “mutually generated” by the parties as it was not the product of negotiation but contains information detailing sample work from the third party, which is mutable and subject to change. The municipality states that the proposal reveals details of work done for other clients of the third party and their identities which it understands was disclosed in confidence solely as part of the bid process.

[75] The appellant does not directly address whether the third party supplied the proposal to the municipality but submits that it was unsolicited. Regarding confidentiality, the appellant states that the third party’s proposal was discussed in an open council meeting. The appellant states that there was no indication of the proposal’s confidentiality made at the council meeting and it would have been available

¹⁸ Order MO-1706.

¹⁹ Orders PO-2020 and PO-2043.

²⁰ Order PO-2020.

²¹ Orders MO-2363 and PO-2435.

to the local media or reporters attending the council proceedings. The appellant's position is that the proposal is a "boiler template" and is not a negotiated document nor mutually generated between the parties.

[76] From my review of the proposal, I agree with the parties that the proposal was generated by the third party and is not the product of negotiation. Accordingly, I find that the information contained in the proposal was supplied by the third party.

[77] Regarding whether the proposal was supplied "in confidence", I note that there is an express statement that the proposal is to be treated as "strictly confidential work product" and the word "confidential" appears at the bottom of each page of the proposal.

[78] I have considered the appellant's submission that the proposal was discussed at a municipal council meeting. While I accept that the third party's proposal may have been discussed, there is no evidence before me that the commercial information that is at issue in this appeal was disclosed at the council meeting or made available to the media. This would be inconsistent with the express wording on the proposal and the evidence of the third party and its expectation of confidentiality. The appellant has not provided any public record of the portions of the proposal that are at issue being made publicly available.

[79] I accept the municipality's and the third party's submission that their expectation is that the proposal would be treated as confidential. I note that the proposal contains information relating to similar work that has been undertaken by the third party for other clients and the third party's proprietary interest in this information is consistent with their expectation that it would be treated as confidential and the inclusion of an express statement to that effect.

[80] Accordingly, I am satisfied that the information at issue in the proposal was supplied by the third party to the municipality in confidence and that the second part of the test under section 10(1) is met.

Harms

[81] I now turn to the third part of the test under section 10(1), the harms test. 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 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 the harms in the *Act*.²²

[82] The third party submits that disclosure of the commercial information in the

²² Orders MO-2363 and PO-2435.

proposal could reasonably be expected to result in the type of harm set out in section 10(1)(a). The third party's position is that disclosure would prejudice its competitive position in the market place such that the third party's methodology and processes could be adopted by competitors or the third party's pricing undercut.

[83] The third party submits that the municipal government consulting industry is highly competitive and cost-conscious. The third party submits that disclosure of the work that is detailed in the proposal, in conjunction with the cost breakdown, would provide competitors with a proprietary process model that they have developed and that is theirs exclusively. The third party's position is that, if disclosed, this would severely prejudice its ability to succeed in future bids.

[84] The municipality reiterates the third party's submissions and supports its position.

[85] The third party also submits that disclosure of its client list in the proposal would provide competitors with an advantage and an opportunity to solicit work and entice clients away from existing commercial relationships. In support of this submission, the third party cites a number of IPC orders.²³

[86] The appellant disputes the third party's claim to have a competitive advantage in the municipal government consulting market. The appellant does not directly address the harms test in section 10(1)(a) in their representations but submits that any competitive advantage enjoyed by the third party is not attributable to its proprietary knowledge or processes.

[87] I have reviewed the proposal and considered the parties' representations. I accept the submissions of the third party and the municipality that the municipal government consulting industry is highly competitive and cost conscious. I also accept the third party's submission that the value of its work in this industry derives from the experience and skills of its consultants and the methodologies and processes that they have developed from this experience. From my review of the proposal, I am satisfied that the combination of the specifics of the proposed work and the costs breakdown, if disclosed, could be reasonably expected to prejudice the third party's competitive position. I accept the third party's submission that a competitor could seek to replicate this process as it has been tailored to meet the municipality's terms of reference, to the third party's detriment in the competitive market place. I find that these portions of the proposal meet the harms test in section 10(1)(a).

[88] Similarly, I accept that disclosure of the third party's client list as it appears in the proposal could reasonably be expected to provide a competitor with an advantage and an opportunity to lure business away from the third party. Previous orders of the IPC have considered disclosure of customer lists and the work involved by an entity to

²³ Orders PO-3038, MO-2070 and PA12-119.

create such a list.²⁴ I accept the third party's submission that disclosure of its client information could reasonably be expected to prejudice the third party's competitive position so that the harms test in section 10(1)(a) is met.

[89] However, I am not persuaded that the information relating only to the consultants' skills and experience, if disclosed, could reasonably be expected to result in any of the harms listed in section 10(1). This information appears on page 5 of the proposal and explains the value of the consultants' experience to the proposed work. From my review of the proposal, I note that short biographies of the consultants appear in the portion of the proposal that the municipality has decided to disclose so there is no reasonable basis for finding that the disclosure of similar information on page 5 could be expected to result in the type of harm specified in section 10(1)(a) to (c).

[90] Accordingly, I find that the information at issue on page 5 of the proposal does not meet the harms test in section 10(1) and does not qualify for exemption.

[91] The third party does not refer to the harms specified in section 10(1)(d)²⁵ in its representations and in my view the section does not apply to the information at issue on page 5 of the record.

[92] In summary, I am satisfied that all three parts of the test in section 10(1) are met and that the third party exemption applies to the information at issue in the proposal, except for the information withheld from page 5, which I find does not meet the harms test and does not qualify for exemption.

[93] I uphold the municipality's decision in part and order it to disclose the portion previously withheld from page 5 and the principal consultant's signature on page 16 of the proposal.

ORDER:

1. I order the municipality to disclose to the appellant the information that it decided to withhold on page 5 of the proposal and the signature withheld under section 14(1) that is not "personal information" on page 16 of the proposal by **August 1, 2023** but not before **July 27, 2023**.
2. I uphold in part the municipality's application of section 10(1).
3. In order to verify compliance with provision 1 of this order, I reserve the right to require the municipality to provide me with a copy of the record as disclosed to the appellant.

²⁴ Orders MO-2070 and PO-3038.

²⁵ Section 10(1)(d) applies to records containing labour relations information.

Original signed by: _____
Katherine Ball
Adjudicator

_____ June 27, 2023