

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4440

Appeal MA22-00391

The City of Richmond Hill

September 19, 2023

**Summary:** The City of Richmond Hill (the city) received a request for a bid summary and the winning submission for a storm sewer project. The city identified responsive records and withheld them under sections 10(1)(a) and (c) (third-party information) of the *Act*. In this order, the adjudicator partially upholds the city's decision. He finds that the bid summary and parts of the winning submission are not exempt from disclosure, and orders them disclosed.

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

**Orders and Investigation Reports Considered:** Orders MO-3058-F and MO-3246.

### OVERVIEW:

[1] The City of Richmond Hill (the city) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

A list of all the submitters and their total bid price, plus the complete submission document including Schedule of Prices for all terms and references for the company awarded the following contract:

[Particular RFQ] - The Supply of All Labour, Materials and Equipment Necessary to Carry Out the Cleaning and Disposal of Storm Sewer

Catch Basins Extracted Materials and Liquids at Various Locations  
within the City of Richmond Hill

[2] The city located responsive records and after notifying organizations who may be affected by disclosure of the records (the affected parties) issued a decision granting partial access to two records. Information in the records was withheld under sections 10(1)(a) and (c) (third-party information) of the *Act*. The requester (now the appellant) appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[3] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator initially assigned to the appeal decided to conduct an inquiry, and representations were sought and received from the city, the requester, and the affected parties. Representations were only received from one of the affected parties, who submitted the winning bid. Representations were shared in accordance with the IPC's *Code of Procedure*. The appeal was then assigned to me to complete the inquiry. I reviewed the parties' representations and determined that I did not need further representations from any of the parties before making my decision.

[4] For the reasons that follow, I partially uphold the city's decision. I find that the bid summary and parts of the winning submission are not exempt from disclosure and order them disclosed.

## **RECORDS:**

[5] The records at issue consist of the withheld portions of a bid closing submission summary (one page) and the withheld portions of the complete submission of the winning bid (16 pages).

## **DISCUSSION:**

[6] The sole issue in this appeal is if the mandatory exemptions at sections 10(1)(a) and (c) for third party information apply to the records. The city claims the application of sections 10(1)(a) and (c) to the withheld portions of the records, and the affected party adopts this position.

[7] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>1</sup> where specific

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<sup>1</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

harms can reasonably be expected to result from its disclosure.<sup>2</sup>

[8] Section 10(1) 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;

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

[9] For section 10(1) to apply, the city or affected parties 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.

### **Part 1: Type of information**

[10] As noted above, to satisfy part 1 of the section 10(1) test, the city and the affected party must show that the records contain information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

[11] With respect to the bid closing submission summary (the submission summary), the city submits that the record contains the commercial and financial information of six parties (the appellant and five affected parties) that submitted bids in response to the request for quotation (RFQ), particularly pricing information. For the submission of the winning bid (the winning submission), the city submits that it contains the commercial and financial information of an affected party, particularly regarding their previous work experience and Environmental Compliance Approvals provided by the Ministry of the Environment. The affected party adopted the representations of the city, and further submitted that the submission summary contains commercial, financial and technical

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<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

information, as it relates to the selling of services from the affected party to the city.

[12] The appellant submits that the prices contained in the submission summary are solely a lump sum per unit price and do not demonstrate any cost accounting methodology, pricing practices, profit and loss data, overhead, or operating costs. They also note that the information in the submission summary represents yearly unit pricing sums over a three-year period. The appellant did not provide specific representations on whether the winning bid contained financial, commercial, or technical information.

[13] Based on my review of the records and the parties' representations, it is clear that both records contain financial and commercial information as required by the first part of the section 10(1) test. Additionally, I find that the winning submission contains technical information.

[14] Both records relate to the buying and selling of services that are being provided to the city by the bidders. While I accept the appellant's position that the submission summary only contains lump sum unit prices and does not contain other information such as operating costs, previous orders have found that information relating to the buying and selling of services qualifies as commercial information.<sup>3</sup> Additionally, previous orders have found that records that reveal specific pricing data, which both records do, constitute financial information.

[15] The winning submission also contains detailed pricing information, information about the affected party's pricing practices, and technical information related to their Environmental Compliance Approvals and previous work experience. Accordingly, I find that part one of the test has been met for both records.

## **Part 2: supplied in confidence**

[16] Part two of the three-part test itself has two parts: the affected party must have "supplied" the information to the city, and must have done so "in confidence", either implicitly or explicitly. Where information was not supplied to the city by the affected party, section 10(1) does not apply, and there is no need for me to decide whether the "in confidence" element of part two of the test is met.

[17] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>4</sup>

[18] 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.<sup>5</sup>

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<sup>3</sup> See, for example, Order MO-3530.

<sup>4</sup> Order PO-2010.

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

[19] In order to satisfy the “in confidence” component of part two, the party resisting disclosure must establish that, as the supplier of the information, it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>6</sup>

[20] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case must be considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- treated consistently by the third party in a manner that indicates a concern for confidentiality,
- not otherwise disclosed or available from sources to which the public has access, and
- prepared for a purpose that would not entail disclosure.<sup>7</sup>

## ***Representations***

### *City representations*

[21] The city submits that the information in both records was supplied by the affected parties in confidence. They state that the bid summary contains information supplied by all of the affected parties in response to the city’s solicitation for its RFQ. They state that the information was not the product of any negotiation, and reference IPC Orders MO-1368 and MO-1504 as examples of where similar information was found to have been supplied by a third party to an institution. They state the same for the winning submission. They note that the information in the records was received via the city’s RFQ hosted on a bid and tender website.

[22] The city also submits that the information in both records was implicitly supplied in confidence, and that it is reasonable in the circumstances for this to be their expectation. They state that this information was not negotiated, is not otherwise disclosed or available from sources to which the public has access, and was prepared for a purpose that does not entail disclosure. They submit that it is unlikely that third parties who responded to the RFQ would have participated in the RFQ process if they knew that their information would be documented and disclosed to competitors or the general public, and that a reasonable person participating in the RFQ would have expected that the information provided would remain confidential.

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<sup>6</sup> Order PO-2020.

<sup>7</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4<sup>th</sup>) 134; 88 Admin LR (4<sup>th</sup>) 68; 241 OAC 346.

[23] The city further submits that confidentiality is essential to ensure the integrity of the tender, request for proposal, and request for quotation system. They cite their Procurement By-law<sup>8</sup>, which states that "Suppliers'" unit rates and any other information identified as confidential by a supplier will be kept confidential, and limited to select staff within the city. They also cite the Addenda, Terms and Conditions of the RFQ document for the project being bid on, which states that the city will maintain the confidentiality of bid submissions.

#### *Affected party representations*

[24] The affected party that provided representations submits that the information supplied to the city is owned and derived exclusively by the affected party as its "competitive work product". They state that the information is not the product of any negotiation. They state that confidentiality of information in the tendering, proposal, and quotation competitive process is an industry standard, and that there is a reasonable expectation of confidentiality. They reiterate the city's submissions that the city's Procurement By-law and the RFQ document discuss the confidentiality of information supplied to the city. They submit that their entire business model is based on the confidentiality of the tender, request for proposals and quotations systems and state that they would not have supplied the information but for the reasonable expectation of confidentiality and industry standard upon which they relied.

#### *Appellant representations*

[25] The appellant refers to the Terms of Reference of the RFQ document, explaining that it states that the RFQ process is not intended to create a formal legally binding bidding process and that the city may request further information from responding parties as part of the process. He states that it is a common practice after a closing date for the bidding website to provide results, including the total bid price. He provided examples of previous RFQs in various municipalities where pricing information was made public after the bidding process concluded.

[26] He states that the RFQ form required respondents to identify any information in their submission that is considered confidential, and the website which hosted the RFQ does not allow for alteration of the bid form. He states that this means that the respondent could not have marked their submission confidential, and therefore could not have expected their submission to have been supplied in confidence.

#### ***Analysis and finding***

[27] After reviewing the records at issue and the parties' representations, I find that the information in the submission summary and the submission of the winning bid were supplied within the meaning section 10(1).

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<sup>8</sup> Available online at: <https://www.richmondhill.ca/en/invest-and-do-business/resources/Procurement-Policy-Bylaw-113-16.pdf>

[28] The contents of a contract between an institution and a third party, being mutually generated, will not normally qualify as "supplied."<sup>9</sup> The city and affected party submit that the information at issue was not negotiated, and this is not disputed by the appellant.

[29] In Order MO-3058-F, the adjudicator discussed whether the contents of a winning proposal were supplied to an institution, noting that in some previous orders such information was found to be mutually generated where the terms of the proposal were incorporated into a contract between a third party and an institution. However, she distinguished the matter before her from these orders by explaining that while some of the terms proposed by the winning bidder may have been included in the institution's contract with the party, the subsequent incorporation of those terms into a contract does not serve to transform the proposal, in its original form, from information "supplied" to the institution into a "mutually generated" contract.

[30] I make the same finding here. It is clear that the withheld information about the non-winning bids in the submission summary, being bids that were not accepted by the city, would not be incorporated into the winning contract, but even for information in the submission summary (such as the value of the winning bid) or the winning submission itself, the fact that the information may have later formed part of the contract does not mean that it was mutually generated. I find that the information in both records was not mutually generated, and supplied for the purposes of section 10(1).

[31] Having found that the information was supplied, I must consider if this was done with a reasonable expectation of confidentiality. The city and affected party state that the information was implicitly supplied in confidence and refer to the city's Procurement Bylaw and the terms of the RFQ document. The city states that without an expectation of confidentiality it is unlikely that third parties would have participated in the RFQ process and the affected party submits that confidentiality is an industry standard, with their business model being contingent on the confidentiality of proposals.

[32] The appellant disputes these claims, stating that it is a common practice after an RFQ closing date for the results of the process to be posted publicly, including the winning bid. They also refer to the terms of the RFQ requiring that information be marked confidential if it is being supplied with an expectation of confidentiality, and state that this is not possible with the format of the electronic bid form. They state that this means the information within the proposal was not supplied with an explicit expectation of confidentiality.

[33] Based on my review of the records and the parties' representations, I find that the information in the winning submission has been supplied with a reasonable

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<sup>9</sup> This approach was approved by the Divisional Court in *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.) (*Boeing Co.*).

expectation of confidentiality. I acknowledge the appellant's argument that the bid form does not allow parties to explicitly mark certain information as confidential, which the terms of the RFQ instruct the bidders to do if they want the information to be treated confidentially. However, I accept the city and affected party's arguments that the withheld information in the winning submission record was supplied with an implicit expectation of confidentiality.

[34] Most of the withheld information in the winning submission consists of pricing information for specific parts of the project and the Procurement By-law specifically states that unit rates will be kept confidential. The remaining withheld information in the form, consisting of attachments and proposed start and end dates for the project, provide similar data about how a bidder will complete the work outlined in the RFQ document. Accordingly, I find that this information was supplied with an implicit expectation of confidentiality.

[35] With respect to the prices contained in the bid summary, I am unable to find that they were supplied with an expectation of confidentiality, either implicit or explicit. As discussed above, the Procurement By-law specifies that unit rates will be kept confidential, but it does not state that the overall bid would be kept confidential. Additionally, considering that if the bid price were to be accepted by the city it would become the price paid by the city for the project, in my view it would not be reasonable to expect that this would be kept confidential. As such, I find that there is no implied expectation of confidentiality. However, even if I were to find that there was an expectation of confidentiality for the prices in the bid summary, I find that part three of the test has not been met, discussed below.

### **Part 3: harms**

[36] 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 harms in the *Act*.<sup>10</sup>

[37] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace.<sup>11</sup> Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>12</sup> However, they do 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

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<sup>10</sup> Orders MO-2363 and PO-2435.

<sup>11</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>12</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.



of disclosing the information.<sup>13</sup>

[38] In applying section 10(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).<sup>14</sup>

### ***Representations***

#### *City representations*

[39] The city submits that their Procurement By-law stipulates that these types of RFQs use pricing as the primary evaluation criterion, with the “lowest compliant respondent as established under the evaluation” being selected for the contract. They state that disclosure of pricing information can thus be reasonably expected to significantly prejudice the competitive position of the affected third parties who replied to the RFQ.

[40] They also note that the records at issue contain unit pricing of services, which could result in the loss of the competitive position of the affected third parties and subsequently undue financial loss. They state that with the unit pricing information, competitors would be able to undercut the prices of the affected third parties to secure contracts when competing for similar RFQs in the future. The city also submits that none of the affected parties consented to disclosure of the information, and that there is no undisclosed information that could be disclosed pursuant to section 4(2) of the *Act*.

#### *Affected party representations*

[41] The affected party that provided representations reiterated the city’s submissions regarding the primary evaluation criterion for RFQs being price, and that information about the unit pricing of services being disclosed would result in a loss of competitive position and subsequent undue financial loss. They state that the disclosure of the records would interfere significantly with the contractual or negotiations of the company as it would lose its competitive advantage and leverage. They submit that their entire business and livelihood is based on the tendering, quotation, and proposal processes, and the release of the information would prejudice the entirety of their business in not just the city, but Ontario.

#### *Appellant representations*

[42] With respect to harms, the appellant reiterated his position that lump sum

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<sup>13</sup> *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.

<sup>14</sup> Order PO-2435.

amounts are regularly made public at the conclusion of the bidding process, and provided several examples for this. He further submits that the fact that other affected parties did not respond to the city's notices regarding the access request is indicative of their consent, stating that if they did not consent, they would have responded.

### ***Analysis and finding***

[43] I am satisfied that the disclosure of some of the withheld information in the winning submission could reasonably be expected to result in the harms contemplated by sections 10(1)(a) and (c).

[44] In Order MO-3246, the adjudicator explained how previous IPC decisions considering the application of section 17(1) (the provincial equivalent of section 10(1)) to unit pricing information found that disclosure of such information could potentially prejudice the competitive position of an affected party. I make the same finding here. The detailed pricing information contained in the winning submission could reasonably be expected to be used to undercut the prices of the affected party, and potentially prejudice their economic position or cause undue loss. I find that this also applies to the withheld completion dates in the winning submission, which reflect the rate at which the project would be completed.

[45] However, previous IPC decisions have generally focused on the impact of detailed third party financial and commercial information being released, particularly as it relates to unit pricing.<sup>15</sup> While that applies to the withheld information in the winning submission, the bid summary only contains the final bid price, rather than unit prices or other detailed financial information. As such, I do not find that the effect of disclosure on the affected parties' economic position would be the same.

[46] When assessing the economic impact of releasing summarized pricing information, previous IPC decisions have found that the harms contemplated by sections 10(1)(a) and (c) were not established.<sup>16</sup> Here, both the affected party and the city focused their representations on the impact of releasing pricing information, rather than the overall bids. As outlined above, the need for accountability in how public funds are spent underscores the need to provide detailed evidence to support the harms of disclosure. Having considered all of the evidence submitted by the city and affected party in this inquiry to establish the claimed harm, they have not established a reasonable basis to conclude that the harm in section 10(a) or (c) will arise if the information in the bid summary is disclosed. Accordingly, I find that part three of the section 10(1) test has not been established and order the information disclosed.

[47] In addition to the bid summary and the unit prices in the winning submission, the winning submission also contained Environmental Compliance Approval letters related to the affected party's proposal. Neither the city nor the affected party provided

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<sup>15</sup> See, for example, IPC Orders P-610, PO-1932, and MO-3705.

<sup>16</sup> See, for example, IPC Order P-610.

representations on the harms that would occur following disclosure of this information. Although harms can sometimes be inferred from the records themselves, I have reviewed the records and it is not clear that any of the harms contemplated by sections 10(1)(a) or (c) would result from their disclosure. Accordingly, I am unable to find that they meet part three of the section 10(1) test and order them disclosed.

**ORDER:**

1. I order the city to disclose the bid summary in its entirety to the appellant by October 24, 2023, but not before October 19, 2023.
2. I order the city to disclose pages 4 and 8 -16 of the winning submission by October 24, 2023, but not before October 19, 2023.
3. I reserve the right to require the city to provide me copies of the records it discloses to the appellant.

Original signed by: \_\_\_\_\_  
Chris Anzenberger  
Adjudicator

\_\_\_\_\_ September 19, 2023