

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-4441

Appeal MA21-00494

City of Niagara Falls

September 21, 2023

**Summary:** The City of Niagara Falls (the city) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a request for tender submission to the city for a municipal service centre. The city granted partial access to the submission, withholding portions under section 10(1) of the *Act* (third party information). In this order, the adjudicator allows the appeal in part. He finds that portions relating to the allocation of work completed by sub-contractors are exempt from disclosure under section 10(1), but finds that the names of the sub-contractors are not exempt and orders them disclosed.

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

**Orders and Investigation Reports Considered:** Order MO-4220.

### OVERVIEW:

[1] The City of Niagara Falls (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified submission to the city in response to a request for tender (RFT) related to a municipal service centre renovation.

[2] The city located the responsive record and notified an affected party under section 21(1) of the *Act* to obtain its views regarding disclosure of the record. The city then issued a decision granting the requester partial access to the responsive record

and withholding some information under the mandatory exemptions in sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*. The requester (now the appellant) was dissatisfied with the decision and appealed it to the Information and Privacy Commissioner of Ontario (IPC).

[3] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeals process. The adjudicator previously assigned to the appeal decided to conduct an inquiry. She sought and received representations from the city, the named company (the affected party), and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[4] I was then assigned to the appeal. I reviewed the parties' representations and determined that I did not need further representations from the parties before making my decision.

[5] For the reasons that follow, I allow the appeal, in part, and find that one portion of the withheld information is not exempt from disclosure under section 10(1) and order it disclosed to the appellant. However, I uphold the city's decision to withhold another portion of the record.

## **RECORDS:**

[6] The records at issue consist of the withheld information in the "Appendix C - Sub-Contractor Form" on pages 7-8 of the submission provided in response to the RFT. The names of the sub-contractors and the percentages of work allocated to them have been withheld.

[7] During the inquiry, the affected party consented to the disclosure of the withheld information on page 22 of the record, and it is no longer at issue. As the city has not yet disclosed this information, I will order it to do so.

## **DISCUSSION:**

[8] The sole issue in this appeal is if the mandatory exemption at section 10(1) for third party information applies to the withheld information in the submission. The city claims the application of sections 10(1)(a), (b), and (c) to the withheld portions of the submission, and the affected party adopts this position.

[9] 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>

[10] 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;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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

[11] For section 10(1) to apply, the city or affected 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), (c) and/or (d) of section 10(1) will occur.

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

[12] As noted above, to satisfy part 1 of the section 10(1) test, the city or the affected party must show that the records contain information that is a trade secret or scientific, technical, commercial, financial or labour relations information. The city and affected party submit that the records at issue contain commercial and financial information. The city also submits that the record contains technical information related to the tools to be used by the affected party to complete the project.

[13] The affected party submits that the names of the sub-contractors qualify as commercial information and cite Order PO-1722, where a list of sub-contractors in a bid

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

tender qualified as commercial information. They also submit that the percentage of the overall work to be completed by a contractor qualifies as financial information. The appellant does not dispute that the records contain commercial or financial information.

[14] Previous IPC orders have found that information related to the buying, selling, or exchange of merchandise or services qualifies as commercial information, while financial information has been found to be information related to money and its use or distribution.<sup>3</sup> With respect to the withheld information in the record, the names of the contractors are part of the bid submission, which relates to the exchange of services between the affected party and the city. The withheld percentages also specifically relate to the distribution of the money involved in the bid tender. As such, this information clearly qualifies as commercial and financial information and satisfies the first part of the test.

[15] Having found that the withheld information qualifies as commercial and financial information, I do not need to determine if it also qualifies as technical information.

## **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>

[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:

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<sup>3</sup> See, for example, Order PO-2010.

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

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

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

- 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 of the parties***

[21] The city submits that the information was supplied to the city by the affected party as part of the RFT process. They state that the bidder template included a statement of confidentiality, making the expectation of confidentiality explicit. They did not provide further representations.

[22] The affected party submits that its list of trades (the sub-contractors) and their respective allocation of work was supplied confidentially as part of its bid submission, and that this information is not available to the public. Like the city, they refer to the confidentiality statement in the bid document, which outlines that information provided by the bidders shall be kept strictly confidential. They state that although the policy also states that the information is subject to the *Act*, in Order M-772 it was found that this did not mean that it was not being provided on a confidential basis. They state that given the competitiveness of the industry and the difficult circumstances relating to costs and availability of labour due to the COVID-19 pandemic when the bid was made, it was reasonable for the affected party to believe that the names and work allocation would be kept confidential.

[23] The affected party refers to Order PO-1722, stating that it was found there that unit prices and other financial details were supplied with an expectation of confidentiality. They submit that the same applies to the work allocation percentages in this appeal, since this information could be used to determine pricing information. They state that in Order MO-4220 the adjudicator found that given the competitive nature of certain industries, including the construction industry, it is reasonable for an organization submitting specific proprietary information to do so with an expectation of confidentiality.

[24] The appellant generally stated that bid submissions are not made in confidence, but they did not provide any specific arguments to dispute the city or affected party's representations on part two of the test.

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<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.

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

[25] Based on my review of the record and the parties' representations, I find that the names of the sub-contractors and their allocations of work related to the project were supplied to the city by the affected party in its submission. Accordingly, I find that the information was supplied for the purposes of section 10(1).

[26] With respect to the expectation of confidentiality, I agree with the affected party's submission that a policy specifying that information contained in the bids is subject to the *Act* does not mean that the information will be automatically disclosed. I also accept that the bid document specifying that the information supplied will be kept confidential results in a reasonable expectation of confidentiality. Considering that the appellant has not provided representations disputing this position, I find that the information was supplied with a reasonable expectation of confidentiality.

### **Part 3: harms**

[27] Having found that parts one and two of the test have been met, I must determine if there is a reasonable expectation that one of the harms specified in paragraph (a), (b) or (c) of section 10(1) will occur. 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 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>8</sup>

[28] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace.<sup>9</sup> Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>10</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 of disclosing the information.<sup>11</sup>

[29] 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>12</sup>

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<sup>8</sup> Orders MO-2363 and PO-2435.

<sup>9</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>10</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>11</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>12</sup> Order PO-2435.

## ***Representations***

[30] The city claims that the harms outlined in sections 10(1)(a), (b), and (c) could reasonably be expected to occur if the records were disclosed. With respect to sections 10(1)(a) and (c), they state that by releasing negotiated prices between the third party and their affiliates it could harm their agreements. They state that the withheld information is proprietary and unique to the affected party. They submit that by releasing the information, there is the potential for the affected party's future negotiations to be impacted due to the nature of the information at issue, which they state consists of technical, commercial and financial information. They submit that if the information is disclosed, the affected party could reasonably be expected to be placed at a disadvantage in future negotiations.

[31] Regarding the harms contemplated in section 10(1)(b), the city claims that the release of the information being disclosed could result in similar information no longer being provided to the city because third parties may not want to work with the city if there is the potential for the information in their bid submissions to be disclosed. They state that having fewer organizations willing to work with the city would be detrimental and would affect the city's ability to complete projects that they do not have resources to do in-house.

[32] The affected party submits that disclosure of the sub-contractor names in conjunction with the percentage of work to be completed establishes the harms contemplated by section 10(1). They also submit that the release of the names on their own will compromise the relationships the affected party has developed with the sub-contractors over many years, and potentially harm their competitive position in the industry.

[33] With respect to the percentage of work completed by each sub-contractor, the affected party submits that this is analogous to unit prices contained in a bid submission, and state that disclosure of the allocation could prejudice the competitive position of the affected party, as well as the sub-contractors. They state that disclosure would enable competitors, with knowledge of the total project cost, to calculate the cost of each sub-contractor, and enable them to underbid the affected party in future bidding projects, as well as inform future negotiations with the trades. They rely on the analysis of harm related to unit prices in Order MO-4220.

[34] The appellant submits that the risk of harm has not been established by the affected party. They state that unit prices, which they are not seeking, are not the same as the allocations of cost that they are seeking, and state that the affected party did not object to the sole disclosure of the sub-contractors' names. They state that there is a risk of public harm if broad aspects of the costs of projects and the names of sub-contractors in a bid are not released. They state that, in general, bid forms are not executed truthfully, and contractors will switch out sub-contractors post-submission for other sub-contractors for cheaper prices.

[35] The appellant further states that withholding this information allows bidders to “unethically bid/price shop,” stating that it allows contractors to go to their preferred sub-contractors and grant them part of the project. They submit that there is no harm in the disclosure of the information, and ask that, at minimum, the sub-contractors’ names should be disclosed.

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

[36] I am satisfied that the disclosure the sub-contractors’ allocation of work could reasonably be expected to result in the harms contemplated by sections 10(1)(a) and (c). However, I find that the expectation of harm due to the disclosure of the names of the sub-contractors themselves has not been established by the city or the affected party.

[37] Regarding the sub-contractors’ allocation of work, I agree with the appellant’s position that they are not identical to the unit prices that were withheld in Order MO-4220, along with other IPC orders.<sup>13</sup> However, I find that, even if not identical, the allocation of work percentages provide a similar breakdown of the pricing information in a bid that unit prices provide.

[38] Considering that the total price of the bid was disclosed by the city prior to this appeal, it is not unreasonable to expect that a breakdown of the percentages of each type of work to be completed by a sub-contractor could be used to determine information similar to unit prices. I accept the city and affected party’s arguments that this could be expected to result in the affected party being undercut when bidding for future projects. As such, I find that there is a reasonable expectation of the harms contemplated by sections 10(1)(a) and (c). Having found this, I do not need to determine if there is a reasonable expectation that the harms contemplated by section 10(1)(b) will occur if the information is disclosed.

[39] For the names of the sub-contractors, it is not clear, based on the city and affected party’s representations, what specific harm would occur if they were disclosed. Previous IPC orders have found that parties resisting the disclosure of the names of sub-contractors on their own did not establish a reasonable expectation of harm contemplated in section 10(1) (and its provincial equivalent).<sup>14</sup> The affected party submits that the disclosure of this information would harm their long-standing relationships with the sub-contractors, but they did not provide evidence of what this harm would be, or how it would occur.

[40] As the adjudicator found in Order MO-4220, given their long-standing relationships with the appellant, it is reasonable that those in the industry or even the public may already know about these relationships. In any case, the onus is on the appellant to establish a link between disclosure of the information and the harms

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<sup>13</sup> See, for example, IPC Orders P-610, PO-1932, and MO-3705.

<sup>14</sup> Orders M-602, P-166, P-610, PO-1722 and MO-2906.



contemplated in section 10(1). I find that this link has not been established and thus the information is not exempt under section 10(1).

**ORDER:**

1. I uphold the city's decision to withhold the allocations of work percentages in the record at issue.
2. I order the city to disclose the sub-contractors' names on pages 7-8 of the record, and the withheld information on page 22 of the record. I order the city to disclose this information by **October 26, 2023** but not before **October 21, 2023**. I have provided the city with a copy of 7-8 of the record, highlighting this information in yellow. To be clear, only the information that is highlighted in yellow should be disclosed to the appellant.
3. In order to verify compliance with Order provision 2, I reserve the right to require the city to provide me with a copy of the record disclosed to the appellant.

Original Signed By: \_\_\_\_\_  
Chris Anzenberger  
Adjudicator

September 21, 2023 \_\_\_\_\_