

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4567

Appeals MA22-00736 and MA23-00659

The Corporation of the Municipality of Clarington

September 20, 2024

Summary: The requester asked the municipality for the winning bid submission for sponsorship rights. The municipality disclosed parts of the submission but denied access to some financial information stating that it is third party information subject to the mandatory exemption in section 10(1).

In this order, the adjudicator finds the financial information is not subject to the exemption for third party information and orders the municipality to disclose it to the requester.

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

Orders Considered: Orders MO-1706 and MO-3058-F.

OVERVIEW:

[1] This order considers access to financial information in a winning bid submission for sponsorship rights.

[2] The Corporation of the Municipality of Clarington (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the winning bid for a specified Request for Proposal (RFP). The request read as follows:

A full and complete copy of the winning bid submission for RFP[#] Sponsorship Advertising and Naming Rights Sales.

[3] The municipality notified a third party who might have an interest in the disclosure of the information and then issued a decision granting partial access to the responsive records with severances pursuant to sections 10(1)(a) and (c) (third party information), and 14(1) (personal privacy) of the *Act*.¹

[4] The requester and the third party appealed the municipality's decision to the Information and Privacy Commissioner (the IPC). Appeal file MA23-00659 was opened to address the requester's appeal and Appeal file MA22-00736 was opened to address the third party's appeal. A mediator was assigned to attempt a resolution of both appeals.

[5] As mediation did not resolve the issues in either of these appeals, they were transferred to adjudication where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought representations from the third party and the municipality, initially.

[6] The municipality declined to provide representations. Representations were exchanged between the third party and the requester.

[7] The requester did not address the application of the section 10(1) exemption directly in its representations. Instead, he stated that he is only seeking access to fee payment structure information, which is the commission percentage rates found in record 1. This is the only information that remains at issue.

[8] In this order, I find that the section 10(1) exemption does not apply to the fee payment information at issue in record 1 and order the municipality to disclose it to the requester.

RECORD:

[9] As the requester confirmed in his representations, he is only seeking access to fee payment structure information. As a result, only the commission percentage rates on page 2 of record 1 remains at issue. Record 1 is titled: Appendix "A" – Form of Proposal – Section 1.0 Pricing.²

¹ Section 14(1) is no longer at issue as it was not claimed for the record at issue in this order, record 1.

² Originally there were four records at issue containing 37 pages. Records 2 to 4 (which are no longer at issue) are:

- RFP[#] – Sponsorship, Advertising, and Naming Rights Sales – Envelope One – [TP]
- Email Correspondence re. RFP[#] Sponsorship, Advertising and Naming Rights Sales – Clarification Request – dated between February 3, 2022, and February 8, 2022
- RFP Section 2.0 Signature Page and Appendix 'C' – proponent's Reference Form

DISCUSSION:

[10] The sole issue to be determined in this appeal is whether section 10(1) applies to exempt the commission percentage rates on page 2 of record 1 from disclosure. The municipality and the third party claim that this information is exempt from disclosure under sections 10(1)(a) and (c).

[11] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,³ where specific harms can reasonably be expected to result from its disclosure.⁴

[12] The relevant portions of section 10(1) state:

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

[13] For section 10(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
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.

³ *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.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Representations

[14] As noted above, the municipality did not submit representations.

[15] Although the requester submitted representations, it did not address the three-part test under section 10(1).

[16] The third party submitted brief representations, which I will discuss below in my analysis of the three part test under section 10(1).

Part 1 of the section 10(1) test: type of information

[17] The third party submits that record 1, Appendix A to the RFP, contains pricing information, specifically commission rates provided as part of a tender and business proposal. The third party submits that this type of information is financial information as contemplated by part 1 of the three part test.

[18] The IPC has described financial information as follows:

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.⁵

[19] The commission rates in record 1 refer to specific data about the third party's pricing practices. I find that this is financial information as that term has been defined by the IPC and that part 1 of the test under section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[20] The requirement that the information has been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁶

[21] 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.⁷

In confidence

[22] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their

⁵ Order PO-2010.

⁶ Order MO-1706.

⁷ Orders PO-2020 and PO-2043.

expectation is reasonable in the circumstances. This expectation must have an objective basis.⁸

[23] Relevant considerations in deciding whether an expectation of 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.⁹

Representations

[24] The third party submits that it supplied the commission percentage rates in record 1 to the municipality in its bid submission with a reasonable expectation of confidentiality, either implicitly by way of the process or as explicitly as set in its proposal.

Findings

[25] Generally, pricing information in a proposal made in response to an RFP have been considered to meet part 2 of the test.

[26] The record contains information supplied by the third party, the successful proponent in the RFP process. Therefore, the successful proponent's proposal was accepted by the municipality and its terms were likely then incorporated into a contract. The IPC has previously considered the application of section 10(1) or its provincial equivalent to winning RFP proposals.¹⁰ For example, in Order MO-1706, the adjudicator considered a winning proposal and found:

... it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office

⁸ Order PO-2020.

⁹ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

¹⁰ See Order MO-3705, for example.

involving information delivered in a proposal by a third party to an institution.

[27] In Order MO-3058-F, the adjudicator adopted the analysis in Order MO-1706, considered the IPC's consideration of winning proposals and stated,

I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.

[28] Upon review of the records, the adjudicator was satisfied that the information in the winning proposal was supplied within the meaning of section 10(1). The adjudicator was also satisfied that the information was supplied with a reasonably held expectation of confidentiality.

[29] Adopting the analysis in Orders MO-1706 and MO-3058-F for the purposes of this appeal, I find that the pricing information of the third party, the winning proponent, being the information at issue in this appeal, was supplied in confidence to the municipality for the purposes of the RFP process.

[30] I note that previous orders have found that where a bid document becomes the contract, it is considered to have turned into negotiated information "since its presence in the contract signifies that the other party agreed to it."¹¹ However, in the case before me, there is no evidence the proposal submitted by the third party (the successful proponent) was turned into the contract between itself and the municipality.

[31] Therefore, I find that part 2 of the test has been met for the pricing information at issue in record 1. I will now consider whether part 3 of the test under section 10(1) has been met for the commission percentage rates at issue in record 1.

Part 3: harms

[32] 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

¹¹ Order MO-3530.

repeating the description of harms in the *Act*.¹²

[33] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.¹³ 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.¹⁴

[34] 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).¹⁵

Representations

[35] The third party claims that disclosure of the commission percentage rates found in record 1 would result in the harms considered in sections 10(1)(a) and (c). Section 10(1)(a) considers whether disclosure of information would prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the third party. Section 10(1)(c) considers whether disclosure of information would result in undue loss or gain to the third party.

[36] The third party submits that the release of pricing information can reasonably be expected to:

- harm its competitive position in the bidding process with the municipality and other institutions;
- significantly interfere with current and future contractual and other negotiations related to sales and management of revenue generation program(s); and
- affect its ability significantly to provide the municipality future information related to pricing of its services.

[37] It further submits that the release of pricing information such as the commission percentage rates at issue in this appeal, would cause undue loss of revenue for its business; while, at the same time, provide competing suppliers with information that they can use that would give rise to an undue gain.

¹² Orders MO-2363 and PO-2435.

¹³ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹⁴ *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.

¹⁵ Order PO-2435.

Findings

[38] The harms set out in sections 10(1)(a) and (c) relied upon by the third party seek to protect information that could be exploited in the marketplace.¹⁶

[39] Having considered the representations of the third party and reviewed the commission percentage rates in record 1, I find that the third party has not provided detailed evidence about the risk of harm if the commission percentage rates are disclosed. Specifically, it has not explained how disclosure of that specific information could reasonably be expected to cause the claimed harms under sections 10(1)(a) and 10(1)(c).

[40] On their face, the commission percentage rates at issue appear to be, in my view, general overall rates. The third party has not explained how these commission percentage rates could be used by its competitors. Besides, its generalized statements on harm, the third party has also not established that disclosure of the commission percentage rates could reasonably be expected to interfere with its current or future negotiations with the municipality or other organizations. Furthermore, based on my review, I do not find that any section 10(1) harm can be inferred from the content of record 1 itself and/or the surrounding circumstances.

[41] I find that the third party has not established that disclosure of the commission percentage rates in record 1 could reasonably be expected to prejudice significantly its competitive position or reasonably be expected to interfere significantly with its contractual or other negotiations under section 10(1)(a). I also find that the third party has not established that disclosure of the commission percentage rates in record 1 could reasonably be expected to result in undue loss to the third party or undue gain to the third party's competitors under section 10(1)(c).

[42] Accordingly, I find that part 3 of the test has not been met.

Conclusion

[43] As I have found that part 3 of the test under sections 10(1)(a) and 10(1)(c) has not been met and all three parts of the test must have been established for the exemption to apply, I find that the information at issue, the commission percentage rates in record 1, is not exempt from disclosure. Accordingly, I will order the municipality to disclose the commission percentage rates to the requester.

ORDER:

1. I order the municipality to disclose to the requester the commission percentage rates in record 1 by **October 28, 2024** but not before **October 22, 2024**.

¹⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

2. I reserve the right to require the municipality to provide me with a copy of record 1 as disclosed to the requester.

Original Signed by: _____

Diane Smith
Adjudicator

September 20, 2024 _____