

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-4643

Appeal MA23-00805

Town of Newmarket

April 14, 2025

**Summary:** The Town of Newmarket received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for information relating to a certain bidding process and work awarded for a project. The requester later limited the scope of the request to information relating to the winning bidder. The town refused to disclose the information because it considered it to be third party information protected from disclosure under the mandatory exemption at section 10(1) of the *Act*.

The affected party consented to the disclosure of some information at issue in the records, and the adjudicator orders the town to disclose that to the appellant. The adjudicator also finds that section 10(1) does not apply to any of the remaining information at issue and orders the town to disclose that as well.

**Statute Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, sections 2(3), and 10(1).

**Order Considered:** Order PO-2435.

### OVERVIEW:

[1] The Town of Newmarket (the town) received a request under *the Act* for information regarding the bidding process and subsequent award of work for a specified road work project by the town.

[2] Before issuing its decision, the town notified affected parties about this request,<sup>1</sup> seeking their views regarding the disclosure of the responsive records. (Only one of these affected parties is now involved, given the narrowed scope of the appeal.) The town later issued an access decision granting partial access to the responsive records. The town relied on the mandatory exemptions at sections 10(1)(a) and 10(1)(c) (third party information), and another exemption (which was later removed from the scope of the appeal during IPC mediation).

[3] The requester (now the appellant) appealed the town's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] The IPC appointed a mediator to explore resolution. During mediation, the appellant confirmed that it was only interested in information about the successful bidder. The mediator tried to seek consent for disclosure of the information relating to the successful bid, but could not. Since further mediation was not possible, the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[5] I began a written inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the town and the affected party (the successful bidder). I sought and received written representations in response. The affected party later provided unsolicited representations. I explain why I accepted these representations, under the IPC's *Code of Procedure*, as a preliminary issue in this order.

[6] For the reasons that follow, I allow the appeal. I will order the town to disclose both the portions that the affected party consents to the disclosure of, and the remaining information relating to the affected party in the two records at issue.

## **RECORDS:**

[7] The information at issue in this appeal only relates to the winning bidder (the affected party). It is found in two records: two sections of a chart in an email (record 1) and the lines relevant to the affected party in a spreadsheet (record 2).

[8] In record 1, the remaining information at issue is the information relating to the affected party in the columns entitled "The Stage III Evaluation" and "The Unofficial Value of the Bid." (The titles of these columns are not at issue in this appeal because they were disclosed to the appellant, according to the IPC's copy of the redacted record.)

[9] The affected party does not object to the following information being released to the appellant in record 2:

- The Project Descriptions

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<sup>1</sup> As required by section 21(1) of the *Act*.

- The Start Date and End Dates
- The Project Similarities to the Scope of the RFP, and
- The Scoring Grid.<sup>2</sup>

[10] As a result of the affected party's lack of objection to disclosure of the above information in record 2, that information is removed from the scope of the appeal, and I will order the town to release it to the appellant.

[11] In record 2, the remaining information at issue is the information in some rows in a spreadsheet regarding the affected party's past experience in similar projects, under the following titles (none of which are at issue, having been disclosed):

- The Project Names
- The Project Locations
- The Construction Costs
- The Client Company Names
- The Client Contact Full Names
- The Client Phone Numbers, and
- The Client [Email] Addresses.

## **DISCUSSION:**

[12] The only issue in this appeal is whether information at issue in portions of two records prepared by the town during the bidding process are exempt from disclosure under the mandatory exemption at section 10(1) of the *Act*. For the following reasons, I allow the appeal.

[13] Before considering the exemption at section 10(1), I will consider a preliminary issue relating to the processing of this appeal, in light of the IPC's updated *Code of Procedure* (released in September 2024).

### **Preliminary issue: should I accept the affected party's unsolicited representations?**

[14] After providing its representations in response to the Notice of Inquiry, the affected

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<sup>2</sup> The affected party also stated that it does not object to the disclosure of the named senders, recipients, and content of record 1, but the town already disclosed that information.

party sent in further, unsolicited “fresh as amended” representations.

[15] The affected party asked that the first set of representations not be provided to me. However, the representations had already been provided to me.

[16] The IPC’s *Code of Procedure* and as well as *Practice Direction 2* (which describes the inquiry process in general and sets out requirements and guidelines for representations) is relevant to this procedural issue. *Practice Direction 2* states:

5. Parties should carefully review the Notice of Inquiry and any accompanying materials and address each of the issues raised in the Notice of Inquiry. Parties are also *strongly encouraged to review any relevant existing Orders*, other case law or statutory materials and IPC Interpretation Bulletins. Parties should include references to such material in their Representations. Copies of this material should also be provided to assist the IPC.

6. *Parties are limited to submitting one set of Representations in response to each request to do so. Unsolicited supplementary or additional representations will only be considered by the IPC in exceptional instances.* [Emphasis added.]

[17] When I received the unsolicited representations, I asked the affected party about what prompted them. The response provided did not constitute “exceptional circumstances.” However, I am exercising my discretion under the Code of Procedure to nevertheless vary the process, and accept the unsolicited representations in place of the initial ones. I have the authority to do so under sections 2.01, 2.03, and 17.01 of the Code of Procedure, which say:

2.01 Subject to the provisions of FIPPA and MFIPPA, this Code is to be broadly interpreted in the public interest to secure the most fair, just, and expeditious determination on the merits of every Appeal.

2.03 The IPC may, in its discretion, waive or vary any of its own procedures in accordance with section 17.

17.01 The IPC may in its discretion waive or vary any of the procedures prescribed or adopted by or under this Code, including any requirement or specified time period where the IPC considers it advisable to secure the fair, just, and expeditious resolution of the proceedings.

[18] When I consider the unsolicited representations, in the particular circumstances of this appeal, given the information that remains at issue, I find that it is advisable to accept the unsolicited representations in place of the initial representations received to secure the fair, just, and expeditious resolution of this appeal. Given the limited amount of information remaining at issue and the fact that the outcome would not change (whether

I accept or reject the unsolicited representations), in my view, accepting the unsolicited representations would be more expeditious than adjudicating the question of whether to accept them at all.

[19] I will now turn to the question of whether the remaining information at issue is exempt from disclosure under section 10(1) of the *Act*.

**Does the mandatory exemption at section 10(1) for third party information apply to the information at issue in the records?**

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

[21] 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[.].

[22] For section 10(1) to apply, the party arguing against disclosure (in this appeal, that is the town and the 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

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<sup>3</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.*).

<sup>4</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[23] Since I find, below, that there is insufficient evidence that part three of the test is met, there is no need to discuss parts one and two (though I will discuss the affected party's position that the information is a "trade secret").

### ***Part 3: harms***

#### *Could reasonably be expected to*

[24] 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>5</sup>

[25] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>6</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>7</sup>

#### *Representations*

##### The town's representations

[26] Regarding sections 10(1)(a) (prejudice to competitive position) and 10(1)(c) (undue loss or gain), the town states that it "allows for the possibility of harm to the third party through prejudice to their competitive position, however, the burden of proof must be on the third party to demonstrate this."

[27] Regarding section 10(1)(b) (similar information no longer supplied), the town submits that there is little risk of this harm because the information at issue in this appeal is information that is required for the town to make a fair evaluation of experience and cost before awarding a contract to a supplier. The town also explains that the requirement to provide this information as part of bid proposals will remain, and that suppliers who wish to do business with the town will continue to do so.

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<sup>5</sup> Orders MO-2363 and PO-2435.

<sup>6</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>7</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.

### The affected party's representations

[28] The affected party's representations mainly relate to the harms in sections 10(1)(a) (prejudice to competitive position) and 10(1)(c) (undue loss or gain) of the *Act*, although it did not specifically cite or refer to these sections.

[29] The affected party states that the town contracted with it to provide reconstruction and road resurfacing services. It says that the information at issue includes "sensitive financial information and historical information," and "the identity and credentials of various personnel."

[30] The affected party asserts that disclosure of "any" information at issue would place it at a competitive disadvantage.

[31] Regarding the "sensitive financial and historical information," the affected party asserts that disclosure of this "will cause significant and detrimental financial impact given the potential for it to be used for competitive purposes." It states that disclosure of "details of services offered . . . and corresponding pricing. . . could reasonably be expected to cause harm to [the affected party] and hinder future tendering processes and bid submissions." It also states that disclosure would "circumvent" future bidding processes and give its competitors "access to proprietary and confidential information used by" the affected party in preparing its bid and carrying out its contract. It asserts that this will give an unfair economic advantage in future bids to the affected party's competitors, after the affected party's contract is concluded with the town. The affected party also states that this would influence its decision to bid on future projects with the town. (The latter appears to relate to the harms contemplated in section 10(1)(b), that similar information will no longer be provided.)

[32] The affected party asserts that, "most importantly, disclosure . . . would result in undue financial loss" to it, arguing that disclosure "would result in inappropriate gain to the party or parties seeking the disclosure in that they would obtain the information at no cost and for no valid reason."

[33] The affected party also argues that disclosure of the records would show that it was one of six selected vendors, though this information (and other details) was not available to the affected party during the bidding process.

[34] Regarding the "identity and credentials of various personnel," the affected party states that this "may have been provided" with the permission of these individuals as part of the affected party's bid submission. The affected party argues that disclosure of this information "would result" in the affected party "being in a position of liability in that private information would be disclosed without consent of all parties involved."

### *Analysis/findings*

[35] For the following reasons, I find that neither the town nor the affected party have

provided sufficient evidence that part three of the test applies to the remaining information at issue.

[36] In my view, a key to understanding why the information at issue in this appeal does not meet part three of the test for section 10(1) is looking at the basic nature of it:

- in record 1, it is brief information reflecting the affected party's progression through the bidding process and its unofficial bid value, and
- in record 2, it is high-level information about three past projects for similar work (project name and location, construction costs, client name and contact person, phone number and email address).

Sections 10(1)(a) and (c): prejudice to competitive position / undue loss or gain

[37] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace.<sup>8</sup> I find that neither the town nor the affected party sufficiently explained how disclosure of the information at issue, described above, could be exploited in the marketplace. The town "allows for the possibility of harm to the third party through prejudice to their competitive position," and then says that the affected party must show this. However, as a party resisting disclosure, the town has its own burden of proof. Also, parties resisting disclosure must show that the risk of harm is real and not just a "possibility,"<sup>9</sup> as the town suggests here. Therefore, I do not accept that the town has met its burden of proof that section 10(1)(a) or section 10(1)(c) applies to the information it has withheld.

[38] Likewise, I find that the affected party has not met its burden of proof. I am unpersuaded by its representations because they are vague assertions that lack sufficient support, and critically, do not adequately consider the minimal and general nature of the information at issue here.

[39] For example, I reject the affected party's position that "any" disclosure of the information at issue would place the affected party at a competitive disadvantage. To accept that position, I would have to accept that information simply reflecting its progression in the bidding process or a past project's location would reasonably be expected to prejudice its competitive position or cause it undue loss (or its competitors undue gain, as claimed). In my view, that is not reasonable. I find that the affected party's evidence does not sufficiently establish that disclosure of "any" information at issue would place it at a competitive disadvantage.

[40] Given the nature of the brief and general information at issue, I also do not accept the affected party's passing characterizations of it as "proprietary" or a "trade secret." To be a "trade secret" for the purpose of section 10(1), the information must be "a formula,

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<sup>8</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>9</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.



pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which [then meets four specified criteria]. The information that remains at issue in this appeal, described above, is none of those things.

[41] Regarding the affected party's overarching assertions about increased competition in future bids, the IPC has long held that the possibility that a third party may be subject to increased competition in the future due to disclosure of information does not, of itself, constitute prejudice for the purposes of section 10(1)(a) or undue loss to them (or undue gain to another party), under section 10(1)(c).<sup>10</sup> I agree with that approach and I adopt it here in the face of the affected party's assertions about increased competition in the future.

[42] For record 1, the affected party does not sufficiently explain how disclosure of information reflecting its progression to a certain stage of a past bidding process and the approximate value of its bid would reasonably be expected to prejudice its competitive position, under section 10(1)(a). For similar reasons, I am not persuaded that disclosure of these basic facts in record 1 could not reasonably be expected to lead to undue loss to the affected party or undue gain to any other party, including the affected party's competitors, under section 10(1)(c).

[43] For the information remaining at issue in record 2 about three of the affected party's past projects, likewise, I find that the affected party does not sufficiently explain how disclosure could reasonably be expected to prejudice its competitive position under section 10(1)(a), or result in undue loss or undue gain, under section 10(1)(c). Again, it is important to keep in mind what the affected party is not consenting to disclose in record 2: the project names and locations, construction costs, client company name and full name of contact person, and the contact person's phone numbers and email addresses. I find that this is very general information, and it is not clear to me from the information itself, or the affected party's general assertions about harms, how the harms in section 10(1)(a) or 10(1)(c) could reasonably be expected to result from its disclosure. I observe that one of the rows of information in record 2 that the affected party wishes to withhold contains similar information to information that it is consenting to the disclosure of, so it is difficult to accept that there is a risk of harms from disclosure of that specific row of information.

[44] In addition, the fact that there were five other competitors is already evident (even though all of the information relating to their bids is redacted). So I am not persuaded to accept the affected party's argument that it would be unfair, presumably under section 10(1)(c), to now reveal the number of bidders though the affected party was not aware of that during the bidding process. I am unpersuaded that this is a "gain," or if it is, that it would be an "unfair" one, in the circumstances.

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<sup>10</sup> Order PO-2435 and subsequent orders following it.

[45] The affected party states that there is no valid reason for requesting this information. However, no reason needs to be given to request it. Furthermore, in this appeal, the reason for the request is irrelevant because the town did not deny the request for being frivolous or vexatious under the *Act*.

[46] Regarding the "identity and credentials" of individuals withheld in record 2, I disagree with the characterization that there are any "credentials" at issue; all the individuals involved are employees of the clients with which the affected party had the three past projects. I do not accept the affected party's assertion that disclosure of this information would make it liable, perhaps relying on section 10(1)(c) (undue loss), without citing it.

[47] I considered whether the affected party was raising a concern about disclosure of these individuals' names and contact information, as being the release of "private" information. Therefore, I considered whether the information at issue is "personal information" and therefore possibly exempt from disclosure under the section 14(1) personal privacy exemption. Section 2(3) of the *Act* states: "Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity." The information in record 2 relating to individuals all relates to employees of clients for which the affected party completed past projects. This information appears in a professional, official or business capacity, and there is nothing that reveals something of a personal nature about any of them, so it could not be subject to the personal privacy exemption. Therefore, I reject the suggestion that the affected party may suffer undue loss through disclosure of this information without consent.

[48] Therefore, based on my review of the parties' representations and information at issue itself, I am not persuaded that section 10(1)(a) or section 10(1)(c) applies to any of the information remaining at issue in either record.

Section 10(1)(b): similar information no longer supplied

[49] I find that section 10(1)(b) does not apply. Given the basic type of information that is at issue in the records and the town's explanation regarding its use, I accept that such information will continue to be required in any future contract bidding processes at the town. If the affected party would like to be considered for future contracts, it will not be able to do so without providing the basic types of information that are at issue here. So, while disclosure of these basic details "may influence" the affected party's decision to enter future bids, that does not establish that section 10(1)(b) applies (or that sections 10(1)(a) or 10(1)(c) do, given the IPC's approach to increased competition, discussed above).

[50] For these reasons, I find that the information at issue does not meet part three of the test for section 10(1). As a result, I do not uphold the town's decision to withhold it.

**ORDER:**

I allow the appeal. I order the town to disclose to the appellant the information that the affected party has consented to the disclosure of and the information that remained at issue. I order the town to do so by **May 23, 2025**, but not before **May 16, 2025**.

Original Signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

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April 14, 2025