Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1784

Appeal MA-030424-1

City of Cornwall

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NATURE OF THE APPEAL:

The City of Cornwall (the City) received a request *under the Municipal Freedom of Information and Protection of Privacy Act (*the *Act)* for the following information:

> We would like a copy of the contract signed between the City of Cornwall and [a named company] for services provided at the Cornwall Civic Complex.

After consulting with the named company, the City denied access to the record on the basis that it qualified for exemption under section 10(1)(a) of the *Act* (prejudice the competitive position of a third party).

The requester (now the appellant) appealed the City's decision.

Mediation was not successful, and the appeal was transferred to the adjudication stage.

I initiated my inquiry by sending a Notice of Inquiry to the City and the named company (the affected party), outlining the facts and issues in the appeal and seeking written representations. In response, the City advised me that it had changed its position and no longer objects to the disclosure of the record. The affected party did not provide representations in response to the Notice, but indicated that it wished to rely on the submissions provided to the City at the request stage.

I decided it was not necessary to hear from the appellant before proceeding with my order.

RECORDS:

The record is a 21-page agreement, with four schedules (11 pages) attached, between the City and the affected party, dated May 1, 2001. It deals with the provision of food services at the Cornwall Civic Complex.

DISCUSSION:

THIRD PARTY INFORMATION

General principles

Section 10(1)(a) states:

> 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, where 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;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the City and/or 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; and

2. the information must have been supplied to the City 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

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

An agreement of this nature clearly relates to the buying of services by the City from the affected party, and falls squarely within the scope of "commercial information", thereby satisfying the first part of the section 10(1)(a) test.

Part 2: supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043].

The contents of an agreement involving an institution and an affected party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of an agreement, in general, have been treated as mutually generated, rather than "supplied" by the affected party, even where the agreement is preceded by little or no negotiation [Orders PO-2018, MO-1706].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

a) communicated to the institution on the basis that it was confidential and that it was to be kept confidential;

b) treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;

c) not otherwise disclosed or available from sources to which the public has access; and

d) prepared for a purpose that would not entail disclosure [PO-2043]

The affected party's submissions to the City do not address the "supplied" component of part two.

Consistent with past orders dealing with contracts of this nature, I find that the agreement between the City and the affected party was negotiated between these parties, not "supplied" by the affected party [Orders P-36, P-204, P-251, PO-2018].

As far as the "in confidence" component is concerned, the affected party identifies clause 19 of the agreement, which outlines a process to be followed by the City if it receives a request for access to the agreement under the *Act*. This process requires the City to consult with the affected party before responding to any such request.

In my view, a provision such as clause 19 is not sufficient to establish the confidentiality requirements of part two. It is clear that, although the parties to the agreement intend to treat its contents confidentially in a general sense, the agreement itself clearly recognizes that a member of the public may request access to the record under the *Act*, and that the requirements of sections 21 and 10(1) would apply in that context.

That being said, my finding that the agreement was not "supplied" by the affected party is itself sufficient for me to determine that part two of the section 10(1)(a) test has not been established.

Because all three parts of the section 10(1)(a) test must be established in order for the agreement to qualify for exemption, I find that it does not, and that the record should be disclosed to the appellant.

ORDER:

1. I order the City to disclose the agreement to the appellant by **June 2, 2004** but not before **May 28, 2004**.

2. In order to verify compliance with Provision 1, I reserve the right to require the City to provide me a copy of the agreement disclosed to the appellant.

Original signed by: April 27, 2004
Tom Mitchinson
Assistant Commissioner