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

ORDER MO-1813

Appeal MA-030223-1

City of Hamilton

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NATURE OF THE APPEAL:

In 2003, the City of Hamilton (the City) initiated a competitive process to select a supplier to replace the turf at Ivor Wynne Stadium. The City received three proposals for the work, one of which was submitted jointly by two companies. After the selection process had been completed and the contract awarded, one of the unsuccessful bidders submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for all documents and information concerning the project. Specifically, the requester wanted:

> … copies of any discussions, memoranda, letters, recommendations, assessments or other documents, whether in hard copy or electronic form, during 2000-2003 concerning the [contract for artificial turf replacement]. These will include but not be limited to the successful bid that [a named vendor] submitted.

The requester subsequently clarified that he was not seeking access to his own company's bid on the project.

The City identified 22 responsive records (590 pages) and granted partial access to them. The City relied on the following exemptions to deny access to the remaining information:

- sections 10(1)(a), (b) and (c) (third party information)
- section 11(e) (economic and other interests)
- section 12 (solicitor-client privilege)
- section 14 (invasion of privacy)

The City provided the requester with an index listing the records and the various exemptions claimed for each of them.

The requester, now the appellant, appealed the City's decision.

During mediation, the appellant decided not to pursue access to Records 11, 12, 13, 14, 19 and 22, as well as the email address withheld from page 2 of Record 15. Also, the City disclosed portions of Records 4, 5 and 6 to the appellant, as well as certain pages and partial pages comprising Record 20.

Further mediation efforts were not successful, and the appeal was transferred to me for adjudication.

I started my inquiry by sending a Notice of Inquiry to the City, setting out the facts and issues in the appeal, and the City responded with representations. The City withdrew the section 11(e) exemption claim and agreed to disclose the one page covered by this exemption to the appellant.

I also sent the Notice to three parties whose interests could be impacted by the disclosure of the records (the affected parties). Two affected parties provided representations - affected party A and affected party B. Affected party A is one of the companies that submitted the joint proposal. The other affected parties, including the company that bid jointly with affected party A, chose not to participate in the inquiry.

I then sent the Notice to the appellant, along with a copy of the City's representations. I also provided the appellant with copies of the non-confidential portions of the representations submitted by the two affected parties. The appellant responded with representations.

RECORDS:

The records remaining at issue in this appeal are described as follows:

Record #	Description	Total Pages	Exemptions Claimed	
1	Affected party A RFP submissions	125	**s.10** – pages 2 –125 (in whole) **s.14** – (in part)	
2	Affected party B RFP submissions	229	**s.10** – pages 2-229 (in whole) **s.14** – (in part)	
3	Project Update	3	**s.10** – Page 2 (in part)	
5	Affected party A Scoring Summary Sheet	3	**s.10** – pages 1, 2 and 3 (in part)	
6	Affected party B Scoring Summary Sheet	2	**s.10** – pages 1 and 2 (in part)	
7	Overall Scoring Summary Sheet	1	**s.10** – (in part)	
8	Purchase Order and Backup Documents	20	**s.10** – pages 3 and 4 (in part) and pages 5 –10, 14-20	
9	Partial Copy of Affected party A bid	20	**s.10** – pages 1 and 3-6	
10	Email chain	5	**s.10** – page 3 (in part) and pages 4 –5	
15	Email chain	3	**s.12** – pages 1 and 2 (in part)	
16	Email chain	4	**s.12 -** (in whole)	
17	Email chain	1	**s.10 –** (in part)	
18	Email chain	3	**s.12** – pages 1 and 2 (in part)	
20	Handwritten notes	59	**s.10** – numerous pages (in part)	
21	Procurement Award Report	4	**s.10** – page 3 (in part)	

DISCUSSION:

THIRD PARTY INFORMATION

The City and the affected parties rely on section 10(1) to deny access to Records 1 and 2, as well as the undisclosed portions of Records 3, 5, 6, 7, 8, 9, 10, 17, 20 and 21.

General principles

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, 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;
>
> (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;

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 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; 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) and/or (c) of section 10(1) will occur.

The appellant's representations do not specifically address the application of the section 10(1) test to the records in this appeal. However, he submits generally that the third party information should be disclosed:

- Inquiry Records 1 and 9 appear to be [affected party A's] bid. The Information and Privacy Commissioner/Ontario should order information

> disclosed that reveal why [affected party A] should have been disqualified and why [the City] did not disqualify it.
>
> …
>
> - Inquiry Record 2 is [affected party B's] bid. The public should have access to information contained in it that will disclose whether the bid was non-compliant. The public should also have access to information that will disclose whether [the City] treated all of the bidders fairly.

Part 1: type of information

Records 1 and 2

The City and both affected parties claim that Records 1 and 2 contain commercial and/or technical information. Affected party B also claims that Record 2 contains financial information.

These types of information have been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *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].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The City submits:

> Records 1 and 2 are tender submissions from the two bidders not represented by the appellant in this appeal, Record 8 contains copies of the unit price information from records 1 and 2, and Record 9 is a duplicate of the unit price information of Record 1 (but not exact copies, which is why they were not removed from the scope of the request). Tender submissions meet the three-part test for the mandatory section 10 exemption. By the fact that tenders are submitted in order

> to win a contract to provide goods and/or services, and contains information relating to the pricing of the product or services, the timelines for installation, etc., materials contained in tender documents should be considered to be commercial information. Further, these tender submissions also contain technical information relating to the product (in this case, artificial turf for Ivor Wynne Stadium), its installation, and its maintenance. The City feels that this information meets part one of the test.

Affected party A also takes the position that the information is commercial and technical. In this order, I will refer to that information, in particular Records 1, 5 and 9, as belonging to affected party A despite the fact that it relates to the bid submitted jointly by affected party A and the other joint bidder who did not participate in the inquiry.

> The information contained in the Bid Package is commercial information. The Bid Package sets out in great detail [affected party A's] methodology for carrying out the proposed work. This includes, among other things, the proposed scope of services, work plan and schedule, the unique warranty offered to the City by [affected party A], the product specifications and advantages of [affected party A's] products and systems, the response time for service, the installation process, and the staffing requirements. The Bid Package also describes in detail how the project will be managed, the team that is proposed, the role of each and their qualifications and experience. In addition to this information, the Bid Package information is therefore commercial information as defined in the Commissioner's previous Orders, including Order MO-1504 and Order PO-1818, both of which deal with access to bid information.
>
> Much of the information contained in the Bid Package also satisfies the Commissioner's definition of technical information. As described in the Bid Package, [a named individual] has developed a new turf replacement technology, for which patents are pending. The Bid Package describes in detail the nature of this technology, the specifications for the product, including colour-fastness, UV resistance, durability, fire retardance, weight, density, drainage and other specifications. It also sets out, in similar detail, technical information respecting the installation, servicing and maintenance of the artificial turf.

Affected party B makes the following general submissions on the types of information contained in Record 2:

> This Record is our client's Request for Proposal submission to the City of Hamilton. Such record reveals technical, commercial and financial information supplied implicitly in confidence to the City of Hamilton. The disclosure of such information could reasonably be expected to prejudice significantly the competitive position of our client and interfere significantly with its negotiating powers.

> Furthermore, some parts of said record contain personal and third party information regarding our client's employees and contractors. This information shall not be disclosed as well for these additional reasons.

Affected party B also provides detailed representations on specific information contained in the records and its reasons for concluding that this information qualifies as technical, commercial and/or financial information. For example, affected party B submits that the contract price, terms of payment, the bid bond, the consent of surety, the certificate of liability insurance and the company's annual sales volume and bonding capability, all consist of financial and/or commercial information; and information including test results of its product, sample specifications and test results consists of technical information.

The appellant's representations do not deal directly with any of the types of information listed in section 10(1).

Consistent with many past orders dealing with similar records, I find that Records 1 and 2, the bid documents from the two affected parties for the turf replacement project, contain "commercial information", for the purposes of section 10(1) [Order M-288, M-759, M-1239, P-367, PO-1964]. These records were submitted to the City in response to a competitive selection process for the purchase and sale of goods and services relating to the production, installation and maintenance of a new turf system for the local stadium. This process is clearly a commercial undertaking, and Records 1 and 2 are directly related to this business venture. I also find that some portions of these two records contain "financial" and "technical" information, as those terms are used in section 10(1).

Records 3, 5, 6, 7, 8, 9, 10, 17, 20 and 21

None of the representations submitted by the parties in this appeal deal specifically with the application of part one of the test to Records 3, 5, 6, 7, 8, 9, 10, 17, 20 and 21.

On my view of these records, they are all documents produced in the context of selecting a supplier for the turf replacement project. Some are internally generated email messages and other records reflecting discussions that took place in the context of choosing a supplier, including detailed scoring sheets for the various bidders; others are copies of pages of actual bid proposals; and others are handwritten notes made by various City staff involved in the evaluation process. In all cases, the City has released portions of the records and withheld others. In my view, the withheld portions include information directly relating to the bid documents themselves, and I find that they contain commercial, technical and/or financial information for the same reasons as Records 1 and 2.

In summary, I find that the first part of the section 10(1) test has been established for Records 1 and 2, and the undisclosed portions of Records 3, 5, 6, 7, 8, 9, 10, 17, 20 and 21.

Part 2: supplied in confidence

Supplied

The "supplied" component of part two reflects the purpose of the section 10(1) exemption, namely protecting the informational assets of third parties [Order MO-1706].
Information may qualify as "supplied" if it was directly supplied to a City by an affected party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by an affected party [Orders PO-2020, PO-2043].

Records 1 and 2

Affected party A's representations do not make specific reference to the "supplied" component of part two.

Affected party B submits:

> Record no. 2 had been supplied by our client directly to the City of Hamilton on or before Monday, April 7, 2003 at the request of said City. This Record is a Submission submitted by our client in response to a Request for Proposal addressed by the City and concerning the contract for artificial turf replacement at Ivor Wynne Stadium. It is clear on the face of the Record itself that the information contained therein was prepared by our client and supplied by our client to the City of Hamilton.

The City's representations deal, implicitly, with the "supplied" component of part two. The City confirms that Records 1 and 2 consist of bid proposals from the two affected parties, submitted in the context of the selection process for a turf replacement supplier.

Records 1 and 2, the bid proposals, were provided by the two affected parties to the City as part of the normal process followed by public institutions when seeking a supplier of goods and services through a competitive selection process. Clearly, the "supplied" component of part two has been established for these two records.

Records 3, 5, 6, 7, 8, 9, 10, 17, 20, and 21

The only reference to the "supplied" component of part two as it relates to Records 3, 5, 6, 7, 8, 9, 10, 17, 20, and 21 is contained in the City's representations. The City submits:

> Records 5, 6, 7 and 20 contain breakdowns of scores assigned to the various bidders. The scoring for this tender evaluation was set up in such a way that a number of the scoring criteria is out of 1, so if a bid submission contains the required information, they score a 1, if the submission did not include the criteria, they scored a zero. Accordingly, the release of the scoring breakdown for [affected parties A and B] would tell the appellant exactly what criteria was

included or not included in these bids. As this information speaks to the third party information submitted in the tender documents, these scores should also be exempt under the section. It should be noted that the appellant has already received the total scores received by each vendor, broken down into four scores out of 25. The appellant has also received the breakdown for a quarter section where the vendor received a score of 25/25, as it can be inferred from a perfect score that the vendor included all criteria in the noted section.

Similarly, Records 3, 10, 17 and 21 have notes handwritten or typed which make specific references to the information provided in Records 1 and 2, giving the highlights or differences noted for each bid. As such, the portions of the records which speak to the bid submissions were considered to qualify for the section 10 exemption as well.

As noted earlier, information not directly "supplied" to the City by an affected party will nonetheless satisfy this component of the part two test if disclosing the information would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected party [Orders PO-2020, PO-2043]. I find that some of the information contained in Records 3, 5, 6, 7, 8, 9, 10, 17, 20, and 21 fits this characterization, and others does not. Specifically:

- The withheld paragraphs on page 2 of Record 3 and page 1 of Record 20 consist of information pulled from Records 1 and 2 and listed by City staff. Disclosing this information would reveal portions of Records 1 and 2 and therefore the paragraphs were "supplied" for the purposes of part two.

- The withheld portions of Records 8 and 9 consist of copies of selected portions of Records 1 and 2, respectively. They meet the "supplied" test for the same reasons as Records 1 and 2.

- Records 5, 6 and 7, as well as 18 withheld pages of Record 20 are scoring sheets. As the City points out, the total scores for affected parties 1 and 2 have been disclosed, but individual component scores have not. Clearly, the scores themselves were created by City staff, not "supplied" by the affected parties. I also find that disclosing the individual scores would not reveal or permit anyone to draw accurate inferences with respect to any information provided by the affected parties in the bid proposals.

  First, having reviewed the scoring sheets, I do not accept the City's position. Many individual scoring criteria are not "1", and it is clear that even when the criterion is "1", partial scores are frequently assigned. Also, even where an individual score equals the maximum criterion, this simply confirms that the criterion has been satisfied, and does not reveal the manner in which the affected party met the requirements.

Second, past orders have determined that, as a general rule, scoring information does not meet the "supplied" component of part two. This issue was canvassed extensively by Adjudicator Laurel Cropley in Order PO-1993. After referring to the relevant portions of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy*, 1980, vol 2 (Toronto: Queen's Printer, 1980) which outlines the purpose underlying section 17(1), and Orders MO-1237, P-373 and MO-1462 that dealt with similar records, Adjudicator Cropley concludes:

> The scoring information in the records at issue was clearly not supplied by the consultants who tendered the proposals. Neither would its disclosure reveal the information provided by them or permit the drawing of accurate inferences with respect to it. Consistent with previous orders of this office and the intention of the Legislature in enacting this provision, I find that the information at issue in this appeal was not supplied to the Ministry and the second part of the section 17(1) [the equivalent provision to section 10(1) in the provincial *Freedom of Information and Protection of Privacy Act*] test has not been established. On this basis, I find that the exemption in section 17(1) does not apply in the circumstances.

Applying this same reasoning, I find that the scoring information withheld from Records 5, 6, and 7 and the 18 pages of Record 20 was not "supplied" by the affected parties for the purposes of part two and, therefore, this information does not qualify for exemption under section 10(1) of the *Act*. (see also Order P-1553)

- The withheld portions of Record 10 consist of an email message dated April 23, 2003 sent by subcontractor involved with affected party A's bid to City staff. It deals with the selection of the winning bid on the turf replacement project. This record originates with the subcontractor and was clearly "supplied" to the City for the purposes of part two of the test.

- The withheld portions of Record 17 consist of an email message sent by one City staff person to another, outlining the rationale for selecting the successful supplier on the turf replacement project. Seven withheld pages of Record 20 consist of handwritten notes made by City staff in the context of reviewing the bid proposals from affected parties A and B. The withheld portions of Record 21 are described as parts of a Procurement Award Report prepared by City staff on the turf replacement project. Some portions of these three records contain direct references to the content of the two bid proposals, which meet the "supplied" component of part two for the same reasons as Records 1 and 2; while other portions contain the views and assessments of the proposals made by City staff, which originate with those individuals and was neither

> "supplied" nor would they reveal or permit accurate inferences to be made regarding information actually supplied by the affected parties. These later portions fail to meet the "supplied" component of the test, and do not qualify for exemption under section 10(1) of the *Act*.

In summary, I find that Records 1 and 2 in their entirety, the withheld portions of Records 8 and 9, the withheld paragraphs on page 2 of Record 3 and page 1 of Record 20, and the described portions of Record 17, 20 and 21 were "supplied" to the City by the affected parties and satisfy the first component of part two of the section 10(1) test. The withheld portions of Records 5, 6, 7, 10 and the remaining described portions of Record 20 were not "supplied", and the information contained in these portions does not satisfy part two of the test and therefore they cannot qualify for exemption under section 10(1) of the *Act*.

I will now consider the second component of part two of the test only for those records or portions of records that were "supplied".

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure (in this case the City and the two affected parties) 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 [Order 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

- communicated to the City on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected parties prior to being communicated to the City
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [PO-2043]

The City submits:

> Part two of the test requires that the information be submitted in confidence, either implicitly or explicitly. In the blank tender document provided to all parties interested in bidding on a tender, the following wording is contained: "The City of Hamilton shall make every effort to safeguard the confidentiality of each proposal submission." Later, in the same document, it is made clear that the total bid amount will be made public for all bidders: "The bidders' names and the total

> contract price will be read out at the time of opening." This reflects the City of Hamilton's policy of keeping tender submission confidential other than the names of bidders and their total bid amounts. The names of the bidders, their total bid amounts and total scores have already been released to [the appellant], but the City considers all other information submitted as part of a tender to be explicitly confidential. This meets part two of the test.

Affected party A submits:

> The Bid Package was supplied in confidence to the City of Hamilton by [affected party A] in response to the City's Request for Proposals. The Request for Proposals states at p.2 that "the City of Hamilton shall make every effort to safeguard the confidentiality of each proposal submission". [Affected party A] expected that the Bid Package would be held in confidence by the City. In previous Orders MO-1504 and PO-1818, the Commissioner has held that proponent submitting bids to provincial or municipal authorities had a reasonable expectation that their bids would be treated in confidence.

Similarly, affected party B submits:

> Furthermore, [affected party B] had a reasonable expectation of confidentiality when it submitted to the City its Request for Proposal Submission.
>
> The Record was submitted in confidence implicitly, taking into account the circumstances surrounding the tendering process.
>
> …
>
> Indeed, [affected party B] is an active participant in Municipal tenders for artificial turf replacement. It is well aware of the tendering process which involves submission of bids in a sealed envelope and in the public tender opening in which only the name of the company, and total bid amount is released. Since only the total bid amount is to be revealed by the City, [affected party B] relied on the fact that the financial, commercial and technical information would not be communicated. Therefore, our client had a reasonable expectation that the City of Hamilton would hold such information in confidence.
>
> …
>
> Furthermore, the practice of treating financial, commercial and technical information as confidential would give rise to a general and reasonable expectation of confidentiality on the part of our client providing such information to the City of Hamilton. It is not the City's practice to disclose other details of the bids. Therefore, it is reasonable to conclude that the City does treat the type of information which is at issue in this appeal as confidential.

> …
>
> Finally, the City of Hamilton has a policy of keeping tender submissions confidential other than the names of bidders and their total bid amounts. This is namely reflected by the City's practice as well as the blank tender document provided to all parties interested in biding on a tender that states that "the City of Hamilton shall make every effort to safeguard the confidentiality of each proposal submission."

Affected party B identifies a number of previous orders in support of its various submissions.

The appellant's representations do not address the confidentiality component of part two.

It is clear, based on my review of Records 1 and 2 and the representations provided by the City and the two affected parties, that the competitive selection process followed by the City in this case (and in general) carries with it an expectation that the actual bid documents submitted by participants in the supplier selection process would be treated confidentially. My finding in this regard is reinforced by the City's policy of releasing only the names of the bidders and the total bid amounts, and the statement in the Request for Proposal that the City would make every effort to safeguard the information provided. I am also satisfied that the bid proposals themselves were submitted by the affected parties on the reasonably-held expectation that they would not be disclosed, and that have been treated confidentially by the City. I reach the same conclusion for the portions of Records 3, 8, 9, 17, 20 and 21 that meet the "supplied" component of part two, as discussed above.

Therefore, I find that part two of the section 10(1) test has been established for Records 1 and 2 and the identified portions of Records 3, 8, 9,17, 20 and 21.

Part 3: harms

General principles

To meet this part of the test, the City and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a): prejudice to competitive position

The City's representations focus on the harm identified in section 10(1)(b), stating that it would "leave it to [affected parties A and B] to discuss the harms listed in section 10(1)(a) and (c)".

Affected party A submits:

> Disclosure of the Bid Package could reasonably be expected to result in significant prejudice to the competitive position and cause loss to [affected party A], for the following reasons.
>
> First, the turf replacement industry is highly competitive. The companies involved in the Ivor Wynne Stadium turf replacement competition --- [affected party A, affected party B and the appellant] --- compete frequently against each other and other companies for artificial turf contracts. The competition for contracts is usually through a bidding process similar to the one followed here. [Affected party A] competes against these companies not only for Canadian contracts but for contracts in the U.S. and Europe. Given the highly competitive nature of the industry, each company is looking for any advantage they can use against their opponent in the bidding process. As in any industry, confidential information about a competitor is especially useful and valuable.
>
> Second, the information described in the Bid Package is valuable proprietary information that was created and developed by [affected party A] over many years. [A named individual] has been working in the industry since the early 1990s. Over that period, he has invented proprietary technology of sewing filled turf systems as well as a technique for "shaving" and gluing the lines on the artificial turf to avoid problems when the lines are painted on the turf. He has several patents in the application stage related to turf installation equipment and techniques. The technology and expertise developed by [affected party A], and referred to in the Bid Package, is unique, proprietary and valuable.
>
> Third, [affected party A] as a result of its experience has developed its own unique approach and format for responding to Request for Proposals. This includes the first section of the Bid Package, which recapitulates the City's requirements for the Request for Proposals, the ways in which [affected party A] describes its methodologies, the unique waiver, and the ways in which it describes its previous clients and the team who will work on the project.
>
> If the Bid Package were disclosed, [affected party A's] competitors in this very competitive business will gain access to [affected party A's] confidential information respecting its technology, methodologies, and the manner in which it structures its proposals. Competitors could use this information to appropriate [affected party A's] proprietary information and to shape their own bids in a way that would undermine [affected party A's] bid packages. [Affected party A's]

> competitors would obtain this advantage in every bidding competition in which they are competing against [affected party A], as well as in their overall product development, marketing, staffing and competition against [affected party A]. [Affected party A's] competitors would be able to increase their market share against [affected party A], causing it to lose clients or prospective clients and therefore incur losses.
>
> For all the above reasons, [affected party A] submits that the Bid Package should be exempted from disclosure under s. 10(a) and (c) of the [*Act*]. …

Affected party B also submits that the disclosing its bid proposal (Record 2) could significantly prejudice its competitive position, could interfere significantly with contractual and other negotiations, and could result in undue loss. Affected party B submits:

> Indeed, the product provided by [affected party B] is highly specialized and a limited number of companies worldwide have the capabilities to provide such produce. In most cases, the same companies bid on the same projects. In order to provide the required services, [affected party B's] employees require specialized expertise and experience in the field. The disclosure of [affected party B's] methodology and resources would compromise its competitive edge in bidding on future projects. This would prejudice significantly its competitive position and would interfere with its contractual negotiations and result with undue loss to it. …
>
> …
>
> Furthermore, as part of the bid process, [affected party B] was asked to provide information regarding methods, techniques, processes or information that would enable it to produce, install and do the maintenance of artificial turf. Each company which submits a bid for the opportunity may have their own methods, techniques, processes or information in producing, installing and maintaining artificial turf, which separates it from its competitors. Although the substance of the product and how it is installed and maintained may overlap from company to company, there may be certain techniques or processes that each company utilizes which are generally not known in the trade or business. It is this technical and commercial information that our client submitted to the City of Hamilton whereby it engages in producing, installing and maintaining artificial turf that sets it apart from its competitors and has this economic obvious value. The value is derived from our client's ability to be the successful proponent in many bid opportunities, as was the case for the City of Hamilton project. [Affected party B's] concern entails the ability of competitors to use [their] technical and commercial information in developing their own proposals for future bids in which [affected party B] competes. The value of its technical and commercial information would be used by its competitors to be successful in other bids. Disclosure could result in undue loss to [affected party B] and gain to the information seeking party, in

> applying or using its information in their own bids in order to be successful. Disclosure would advantage competitors unfairly. …
>
> …
>
> Furthermore, [affected party B] manufactures its own product and so disclosing its financial and commercial information (as Contract price, Term of payment, Bid Bond, Consent of Surety, Certificate of Liability Insurance, Annual Sales Volume, Bonding capability, Financial References made by Contractors and Contractor's Sum Bid) will allow [affected party B's] competition a window into its operations. If the requester/appellant has access to [affected party B's] financial and commercial information, it could simply quote lower numbers and therefore have definitive advantage over [affected party B]. This very seriously prejudices [affected party B's] competitive position. …
>
> Moreover, the specific way [affected party B's] proposal was drafted, with each part of the proposal tailored to meet the specific requirements of the City and all the additional documents provided as extra in [affected party B's] Requested for Proposal Submission are commercial information which give great value to [affected party B]. Indeed, the additional documents provided by [affected party B] in the Submission are a particular concept approach in the bidding process and the industry. This approach was created and developed by [affected party B] and adds a great economic value to its bids. The disclosure of this information to a competitor would result in undue gain by the competitor with a concomitant undue loss to [affected party B]. Unfair commercial advantage would be gained by the requester/appellant in future tendering situations should this information be disclosed. …
>
> Finally, the detailed information found in the Request for Proposal would greatly assist another company to determine the bidder's strengths and weaknesses, and would provide valuable insight into how a competitor bids on projects. …

Again, affected party B relies on a number of identified past orders to support its position.

The appellant's representations do not deal specifically with the harms component of section 10(1), nor do they address the various submissions made by affected parties A and B.

The submissions of the affected parties on the harms issue are persuasive and meet the third part of the section 10(1)(a) test. In my view, the affected parties have provided detailed and convincing evidence sufficient to establish that, in the hands of a competitor in the field of artificial turf manufacturing, installation and maintenance, the information contained in Records 1 and 2, the bid documents, could be used in ways that could reasonably be expected to significantly prejudice the affected parties' competitive position. In the absence of any evidence to the contrary from the appellant, I accept the affected parties' position that the artificial turf replacement industry is a highly competitive field where information from a supplier's bid on

one contract could be used to by a competitor to gain advantage on future similar contracts, thereby meeting the requirements of the harms part of the section 10(1)(a) test.

Accordingly, I find that all three parts of the section 10(1)(a) test have been established for Records 1 and 2 in their entirety, as well as the portions of Records 3, 8, 9,17, 20 and 21 that contain information which, if shared, would reveal or permit accurate inferences about information contained in Records 1 and 2.

In light of this finding, it is not necessary for me to deal with the harms component of sections 10(1)(b) and (c), or the section 14 exemption claim.

SOLICITOR-CLIENT PRIVILEGE

The City relies on section 12 as the basis for denying access to Record 16, and to the withheld portions of Records 15 and 18.

General principles

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches:

> Branch 1: common law solicitor-client communication and litigation privileges
>
> Branch 2: statutory solicitor-client communication and litigation privileges

The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

The City does not specifically identify a particular privilege as the basis for applying section 12. On my review of the records, it appears that only solicitor-client communication privilege, and not litigation privilege, might be applicable in the circumstances of this appeal, and I will deal with the common law privilege first.

Solicitor-client communication privilege

Common law solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and a client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the City must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The City submits:

> Records 15, 16 [and] 18 … are all communications between city staff and city solicitors ([named city solicitor and named city staff]), regarding the issuing of the tender. Where portions of the records could be released, they were, but the withheld sections all include staff seeking legal advice, or legal advice being provided to staff. Where the response from the City's legal department is contained in the e-mail, it is clearly marked as confidential. Record 16 does not include a response from [a named city solicitor], although [the named city solicitor] recalls responding to the message, the record could not be located.

The appellant's representations do not address section 12.

Record 15 is an email chain, portions of which have been disclosed and other portions have were removed from the scope of the appeal during mediation. The chain begins with a message sent by a potential bidder on the turf replacement to a city staff person (not a lawyer) seeking clarification on the bidding process. This first message has been disclosed. The second part of the chain is the City's response, which has been withheld under section 12, followed by a brief notation forwarding the response to a number of other City staff, including a lawyer. All of these portions of the email chain appear on page 2 of Record 15. Clearly the communication between a City staff person and an outside supplier that neither contains nor reveals legal advice, does not qualify for exemption under solicitor-client communication privilege. The communication is not between a solicitor and a client, for one thing, nor is there any indication that the communication was intended to be confidential. Therefore, I find that the withheld portions of page 2 of Record 15, other than the email address information that has been removed from the scope of the appeal by the appellant, does not qualify for exemption under section 12 and should be disclosed.

The Record 15 email chain continues on page 1, with a communication from the City staff person to her superior and then to City legal staff seeking advice on how to deal with an aspect of the tender process, and the lawyer's response. This information consists of a communication between a solicitor and client prepared for the purpose of seeking and providing legal advice. In the circumstances and given the nature of the subject under discussion, it is reasonable to infer that the exchange was intended to be treated confidentially. Therefore, I find that the withheld portions of page 1 of Record 15 meet the requirements of common law solicitor-client communication privilege and qualify for exemption under section 12 of the *Act*.

Record 16 is also an email chain. Pages 2-4 and the bottom portion of page 1 comprise the original message, sent by an outside consultant to a City employee, commenting on the selection process for the turf replacement supplier. This message was in turn forwarded to the recipient's superior and on to others, including City legal counsel, for review and advice. Although the document originated from outside the City, the content of the original message has, in effect, been adopted by the City employee who received it, and forms the scope of the advice being sought from legal counsel. Unlike Record 15, where the initial communication was disclosed and is not directly linked to the legal advice that stems from it, Record 16 is more appropriately considered in its entirety as a communication between City staff and their legal counsel generated for the purpose of seeking legal advice on a matter relating to the turf replacement project. In the circumstances and given the nature of the subject under discussion, it is reasonable to infer that the exchange was intended to be treated confidentially. Therefore, I find that Record 16 meets the requirements of common law solicitor-client communication privilege and qualifies for exemption under section 12 of the *Act*.

Record 18 is similar in nature to Record 15. It is an email chain that starts with a message sent by an outside potential bidder on the turf replacement project to a City staff person, followed by her response. These portions of the chain have been disclosed to the appellant. The chain then continues with communications back and forth between City employees involved in the project and City legal staff, which has been withheld, and ends with a final message regarding an addendum to the Request For Proposal document, which was also disclosed.

The undisclosed portions of the chain consist of communications between solicitors and clients prepared for the purpose of seeking and providing legal advice. In the circumstances and given the nature of the subject under discussion, it is reasonable to infer that the exchange was intended to be treated confidentially. Therefore, I find that the withheld portions of Record 18 meet the requirements of common law solicitor-client communication privilege and qualify for exemption under section 12 of the *Act*.

SEVERANCE

Section 4(2) reads:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head

> shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

The appellant points to this provision in its representations:

> If a record responsive to [the appellant's] request contains information that legitimately falls under one of the … exemptions, s. 4 imposes a severance obligation on Hamilton. To discharge that obligation, Hamilton must disclose as much of the record as can reasonably be disclosed without disclosing the information that falls under the exemption(s). Even a cursory review of the index of severed records shows that Hamilton interpreted the exemptions too broadly and did not attempt to sever several responsive records. If Hamilton had discharged its … severance obligation [the appellant] may have determined that it was not necessary to appeal the decision of Hamilton's Access and Privacy Officer.

A number of records under consideration in this appeal have been severed by the City and partially disclosed to the appellant. As a result of this order, the appellant will receive additional portions of records that do not qualify for exemption. The records that will not be disclosed to the appellant either qualify for exemption under section 10(1)(a), which is a mandatory exemption, or under the solicitor-client communication privilege component of section 12. In the circumstances, I am satisfied that the City has discharged its severance obligation in accordance with the *Act*.

ORDER:

1. I uphold the City's decision to deny access to Records 1, 2 and 16 in their entirety, and the portions of Records of Records 3, 8, 9, 15, 17, 18, 20 and 21 that qualify for exemption under sections 10(1)(a) or 12 of the *Act*.

2. I order the City to disclose Records 5, 6, 7 and 10, and the portions of Records 15, 17 and 20 not covered by Provision 1. I have attached a highlighted version of Records 15, 17 and 20 that indicates the portions that qualify for exemption and should not be disclosed. Disclosure under this provision must take place by **August 23, 2004** but not before **August 17, 2004**.

3. In order to verify compliance with Provision 2 of this order, I reserve the right to require the City to provide me with a copy of the records disclosure to the appellant, upon request.

Original Signed By: July 16, 2004
Tom Mitchinson
Assistant Commissioner