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

ORDER MO-1814

Appeal MA-030389-2

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 joint bidder, who did not win the contract, 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 all documents in the City's custody and control that relate to:

- the bid process for the artificial turf replacement at Ivor Wynne Stadium, evaluation of the proposals and the awarding of the successful bid; and

- the administration, carrying out and completion of the project by [the named successful bidder].

The City identified 35 responsive records and granted partial access to them. The City relied on the following exemptions to deny access to the remaining records:

- section 7 (advice or recommendations)
- sections 10(1)(a), (b) and (c) (third party information)
- 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.

The appeal was transferred to me for adjudication.

The appellant in this appeal is also one of the affected parties (affected party A) in a related appeal (Appeal MA-030223-1), which I have disposed of in a separate order (Order MO-1813). The requester/appellant in that other appeal is an affected party in the present appeal (affected party C). The records in the two appeals overlap, but are not identical. For example, records relating to affected party C's bid proposal were not at issue in Appeal MA-030223-I, because this affected party was the requester/appellant, but they are at issue here. Similarly, records relating to the appellant in this appeal are not at issue, but were part of my inquiry in the other file and are covered Order MO-1813.

I started my inquiry here by sending a Notice of Inquiry to the City, which set out the facts and issues in the appeal. The City responded with a letter indicating that it was relying on representations previously submitted in the context of Appeal MA-030223-1.

I also sent the Notice to affected party B (the successful bidder) and affected party C (one of the unsuccessful bidders), whose interests could be impacted by the disclosure of the records.

Affected party C provided representations. Affected party B had provided representations in Appeal MA-030233-1 for the same records that are at issue in this appeal, and I will consider those representations here as well. The other affected party (affected party A), who was another unsuccessful bidder on the project jointly with the appellant, 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 a copy of the non-confidential portions of the representations submitted by affected party C. The appellant responded with representations. In its representations, the appellant identified 10 documents that, in its view, should have either been disclosed by the City or listed in the index as "Records Not Disclosed", but were not.

I then sent a Supplementary Notice of Inquiry to the City, adding adequacy of search as an issue, and asking for submissions. The City responded with representations.

RECORDS

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

Record #	Description	Total Pages	Exemptions Claimed
1	Email chain	2	**s. 14 –** pages 1 and 2 (in part)
2	Email chain	2	**s. 14** – page 2 (in part)
3	Email chain	1	**s. 14 –** (in part)
4	Email chain	1	**s. 14 –** (in part)
5	Email chain	2	**s. 12** - pages 1 and 2 (in part)
6	Email chain	4	**s. 7 –** pages 2 and 3 (in part)
7	Email chain	2	**s. 12** – pages 1 and 2 (in part)
8	Email chain	1	**s. 14** – (in part)
9	Email message	1	**s. 12** – (in part)
10	Procurement Award Report	4	**s. 10** – page 3 (in part)
11	Email chain	2	**s. 7** – pages 1 and 2 (in part)
12	Project Update	3	**s. 10** – page 2 (in part)
13	Affected party C scoring sheet summary	2	**s. 10** – pages 1 and 2 (in part)
14	Affected party A scoring sheet summary	3	**s. 10** – pages 1, 2 and 3 (in part)
15	Affected party B scoring sheet summary	2	**s. 10** – pages 1 and 2 (in part)
16	Overall scoring sheet summary	1	**s. 10** – (in part)
17-20	Handwritten notes	59	**s. 10** - numerous pages (in part)
21	Change Order #1	4	**s. 10** – (in whole)

Record #	Description	Total Pages	Exemptions Claimed
22	Letter from contractor to Affected party B	1	**s. 10** – (in whole)
23	Change Order	4	**s. 10** – (in whole)
24	Estimate from contractor to Affected party C	1	**s. 10** – (in part)
25	Affected party B RFP submission	229	**s.10** - (in whole) **s.14 –** (in part)
26-33	Partial copy of Affected party C bid	13	**s. 10** – pages 2-13 (in whole)
34	Partial copy of Affected party A bid	6	**s. 10** – (in part)
35	Affected party A RFP submission	125	**s. 10** – (in part)

DISCUSSION:

ADEQUACY OF SEARCH

Introduction

In appeals involving a claim that additional responsive records exist, as is the case here, the issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act*.

Where a requester provides sufficient detail about the records that he/she is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

If, after hearing all evidence and argument by the parties, I am satisfied that the searches carried out were reasonable in the circumstances, the institution's decision will be upheld. If I am not satisfied, further searches may be ordered or other appropriate steps taken.

Representations

In its representations, the appellant raises concern that the City disclosed significantly more records to the requester/appellant in Appeal MA-030223-1. The appellant takes the position that it should also be entitled to these other records, and submits:

> According to the Notice of Inquiry dated December 19, 2003 in respect of Appeal MA-030223-1, the City identified 590 records in response to the request in that

> appeal. During mediation, the City agreed to disclose additional documents. The City has identified far fewer than 590 responsive records in respect of [the appellant's] request and, because there was no mediation of this Appeal, [the appellant] has not been given the additional documents disclosed during the Appeal of MA-030223-1 mediation.
>
> For example, our client has identified the following documents that should have been either disclosed or identified in the "Index of Records Not Disclosed", but were not:
>
> - Final contract signed by the City of Hamilton and [affected party B], as well as any correspondence forwarding the contract or confirming its receipt;
> - Minutes of the site visit/meeting of 28/05/2003, which appear to be incomplete;
> - Minutes of the site visit/meeting of 28/05/2003 make reference to a meeting that was to have occurred on 04/06/2003. There is no reference to the minutes of this meeting;
> - Minutes of any other meetings after 28/05/2003 that were either a site visit or occurred with city staff. Such meetings should have occurred;
> - Final report to the City of Hamilton at the completion of the work;
> - Complete accounting of the monies paid toward the final invoice;
> - Complete accounting of the hold-back monies paid out as well as discharge letter/documentation to support its payment (this was to have occurred at 30 days after the completion of the work if to the satisfaction of the City);
> - Certificate of completion of the job;
> - List of any deficiencies at the end of the work and the schedule for their completion; and
> - All documentation after 28/05/2003, as the work was not completed until approximately 08/06/2003

The City was asked to respond. In its reply representations, the City confirmed the steps it took to search for responsive records and suggested several alternative reasons for why there were fewer responsive records in this appeal than in Appeal MA-030223-1:

> In response to the appellant's statement that in Appeal MA-030223-1 the City identified 590 responsive records, whereas in Appeal MA-030389-2 the City identified far fewer records, the City submits that the reason for the difference in quantity may very likely be as a result of the first request being from a different requester and thus encompassing different responsive records e.g. a bid submissions by the first requester, that the first requester would be entitled to, but that the appellant in Appeal MA-030389-2 is not. Also, of note is the fact that the appellant's client is a subcontractor to the bid submitted by [affected party A], and

> consequently not entitled to receive access to [affected party A's] complete bid, but only the portions that relate solely to his client.
>
> Also, I respectfully suggest that simply because the appellant's client believes that records should exist does not make it necessarily so.
>
> Upon receipt of the initial access request, the appropriate City Program Area provided responsive records to the Access & Privacy Officer assigned to that request. In response to the second access request which was handled by another Access & Privacy Officer and which encompassed similar (but, not all the same) responsive records identified for the first request, as well as records not requested in the first request, the Program Area advised that the responsive records could be found in the records provided to the first request. Other records in response to the second request were sought and provided by another City Program Area.
>
> Also worthy of consideration may be the date the appellant's request was received at the City. That date was July 30, 2003 and the City responded with identifying records up to and including July 30, 2003. The possibility may exist that there were records generated after that date which would not be responsive to the appellant's request.

Analysis and findings

As set out above, in appeals involving a claim that additional responsive records exist, the issue to be decided is whether the City has conducted a reasonable search for the records as required by section 17 of the *Act*.

In the current appeal, the City identified 35 records responsive to the appellant's request, as opposed to 22 records in Appeal MA-030223-1. I have reviewed the records in both appeals. A number of them overlap, and where they don't, this can be explained to some extent by the reasons offered by the City in its reply representations, including the fact that as a different requester, the appellant in this appeal would have access to and be denied access to different records than the appellant in Appeal MA-030223-1.

Nevertheless, the appellant has identified ten specific listed records that, in its view, should have been included in the scope of the request. In its reply representations, the City does not address the whereabouts of these records and, based on these representations, I am not satisfied that the City has undertaken an adequate search for them. In order to satisfy the requirements of section 17 as it relates to these 10 identified records, the City must provide a detailed explanation of the steps undertaken to locate them and more specific reference on a record-by-record basis as to why they fall outside the scope of the appellant's request, if that is the case.

Accordingly, I will order the City to perform additional searches for records responsive to all aspects of the appellant's original request, including those referred to by the appellant in their representations submitted during the course of this appeal.

ADVICE TO GOVERNMENT

The City claims section 7(1) as the only basis for denying access to the undisclosed portions of Records 6 and 11. Both of these records are e-mail chains.

The withheld portions of Record 6 consist of parts of a message sent by an outside consultant to a City employee, commenting on the selection process for the turf replacement supplier. The parts that have already been disclosed consist of an email from the City employee to his superior and on to others, including City legal counsel, for review and advice.

Most of Record 11 has been withheld. In consists of a series of email message sent to and from City employees concerning how to deal with a request from a City Councillor concerning the turf replacement project.

Section 7(1) reads:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or

- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

  [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)]

The City did not address the section 7(1) exemption in its original representation. I drew this to the attention of the City in my Supplementary Notice of Inquiry, and the City responded by stating that it had "no further comment" with respect to whether the information contained in these two records consists of advice and/or recommendations.

The appellant submits:

> The City has provided no information as to the nature of any records it believes constitute "advice" within the meaning of s. 7(1) of the *Act* and no explanation as to why such records satisfy the requirements of s. 7(1). The City bears the onus of proving that the records fall within the s. 7(1) exemption. In the absence of any representations from the City on this point, [the appellant] is unable to make any responding representations and can only assume that the City has dropped its reliance on s. 7(1).

I accept the appellant's position. Unless the requirements of section 7(1) are clear on the face of the records, they cannot qualify for this discretionary exemption.

The withheld portions of Record 6 are part of an email sent by a consultant to the City. This consultant is not an officer or employee of the City, and the content of the message makes it clear that the consultant had not been put on retainer by the City in relation to the turf replacement project. Accordingly, the undisclosed portions of Record 6 do not qualify for exemption under section 7(1) and should be disclosed. It is important to note that, unlike Appeal PA-030223-1, where this same record was at issue, the City did not claim section 12 as a basis for denying access to Record 6. In fact, the City appears to have exercised discretion in favour of disclosing the portions of Record 6 that may have established the requirements of this discretionary exemption claim.

As far as Record 11 is concerned, one part of the email chain that appears on the bottom of page 1, identifies a course of action that the staff person is advising be taken in the circumstances; and the response that appears at the top of page 1 reflects this advice. I find that these two portions of Record 11 qualify for exemption under section 7(1). The withheld portions on page 2 do not appear on their face to contain nor would they reveal advice or recommendations and, in the absence of any representations from the City, I find that page 2 does not qualify for exemption under section 7(1) and should be disclosed.

THIRD PARTY INFORMATION

The City and the affected parties rely on section 10(1) to deny access to Records 10, 12, and 13-35, in whole or in part.

In its representations, the appellant appears to accept that the various bid packages themselves fall within the scope of section 10(1), and in fact argued strongly for this position in its role as an affected party resisting disclosure in Appeal MA-030223-1. The appellant submits:

> We have already taken the position that [affected party A's] bid package should be exempted from disclosure under the Third Party Information exemption in respect of Appeal MA-030223-1. We do not know the contents of the other bid packages, but agree with the City that they should not be disclosed if to do so would disclose trade secret, technical, commercial or financial information.

The appellant takes a different position regarding the disclosure of scoring information for the various bidders, and specifically disagrees with the City that Records 10, 12 and 21-24 "are capable of being exempted as third party information".

On my review of Records 10 and 12, it is clear that the withheld portions of Record 12 and some of the withheld portions of Record 10 reflect the contents of various bid documents. Based on the appellant's position that information from bid packages should be exempt from disclosure, I have decided to remove the bid proposals (Records 25 and 35), other records containing excerpts from the bid proposals (Records 26-34), the withheld portions of Record 12, and the portions of Record 10 containing bid information from the scope of this inquiry.

Accordingly, I will restrict my discussion of section 10(1) to Records 21-24, the remaining withheld portions of Record 10, as well as Records 13-16 (the scoring sheets) and the remaining withheld portions of Records 17-20.

General principles

Section 10(1) 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;
>
> (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.

Part 1: Type of information

The City and the affected parties do not deal specifically with the application of part one of the test to Records 10, 13-16, 17-20, and 21-24.

The appellant makes the following submissions relating to Records 13-16:

> We disagree with the City that information respecting the breakdowns of scores assigned to the various bidders satisfies the test for Third Party Information. Although we have not been able to review this information, it is highly unlikely that this scoring information or any other information that makes reference to elements in the bid packages will reveal trade secret, technical, commercial or financial information. To the extent that it does, these matters should be severed so as much information as possible from the record can be disclosed.

As far as Records 10, 17-20 and 21-24 are concerned, the appellant simply states that they do not qualify for exemption under section 10(1).

On my review of these records, they are all documents produced in the context of selecting a supplier for the turf replacement project. Record 10 is an internally generated report on the procurement process, which reflect discussions that took place in the context of choosing a supplier; the withheld portions of Records 17-20 consist of handwritten notes made by City staff during the course of assessing the various proposals; Records 13-16 consist of scoring information for the various bidders; and Records 21-24 are communications between the City and the successful bidder in the context of project implementation. In my view, the withheld portions of these records include information directly relating to the bid documents themselves

or information concerning implementation of the turf replacement project. Consistent with many past orders dealing with records relating to a competitive bidding process, I find that the records at issue here contain "commercial information", for the purposes of section 10(1) [Order M-288, M-759, M-1239, P-367, PO-1964]. I also find that some portions of Records 21-24 contain "financial information" as this term is used in section 10(1).

Therefore, I find that all relevant portions of Records 10, 13-16, 17-20 and 21-24 satisfy part one of the section 10(1) test.

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].

The only reference to the "supplied" component of part two as it relates to Records 10, 13-16, 17-20 and 21-24 is contained in the City's representations. The City submits:

> Records [13-20] 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 [10 and 12] have notes handwritten or typed that make specific references to the information provided in Records [25 and 35], 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 10, 12, 17-20 and 21-24 fits this characterization, and others does not. Specifically:

- Record 21 is a change order issued by the City to affected party B during the course of implementing the turf replacement project. Records 22-24 appear to form the basis for a second change order request submitted by this affected party. I find that these records were either supplied by affected party B or would reveal information supplied by this affected party, thereby satisfying the "supplied" component of the section 10(1) test.

- Records 13-16 are scoring sheets. As the City points out, the total scores 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 13-16 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 handwritten notes that comprise Records 17-20 were prepared by City staff as part of the competitive assessment process for the turf replacement project. None of these records were "supplied" directly by any of the affected parties. However, some portions, if disclosed, would reveal or permit accurate inference to be made regarding information actually supplied by the affected parties. Only the portions that fit this latter description satisfy the "supplied" component of part two.

- The remaining withheld portions of Record 10 are two sections of a Procurement Award Report prepared by City staff on the turf replacement project. These sections contain the views and assessments of the proposals made by City staff. I have removed the portions that contain direct references to the content of the bid proposals from the scope of this inquiry. The portions that remain originate with the author of the Report and were neither "supplied" nor would they reveal or permit accurate inferences to be made regarding information actually supplied by the affected parties. These remaining 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 21-24 and the described portions of Records 17-20 were "supplied" to the City and satisfy the first component of part two of the section 10(1) test; and the withheld portions of Records 13-16, the remaining withheld portions of Record 10 and Records 17-20 were not "supplied", and the information contained in these records 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 for Records 21-24, and the described portions of Records 17-20, the only ones 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 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 [Order PO-2043]

The City's submissions do not deal with Records 17-20 or 21-24.

Records 21-24 all relate to change orders under discussion between the City and affected party B, the successful bidder, after the contract for the turf replacement project had been awarded.

Affected party B provided representations in the context of Appeal MA-030223-1 in support of its position that its bid documents for the turf replacement project were submitted in confidence, but I have no representations from this affected party concerning the post-contract change order records.

Although I have accepted in Order MO-1813 that bidders on the turf replacement project supplied their bid proposals to the City with a reasonably held expectation of confidentiality, the rationale for my decision does not extend to records created in the context of contract implementation with the successful bidder. In the absence of any representations from either the City or affected party B regarding Records 21-24, I find the confidentiality on requirements outlined in Orders PO-2020 and PO-2043 have not been established. There is no explicit reference to confidentiality on the face of any of these records, other than a standard fax cover sheet boilerplate statement on one page of Record 21 which, on its own, is not sufficient to establish a reasonable expectation of confidentiality. I have also reviewed the content of these records and, absence any evidence or argument from the parties, I am unable to infer any reasonably-held implicit expectation of confidentiality in the circumstances.

As far as the remaining portions of Records 17-20 are concerned, I find, with one exception, that the portions that were "supplied" reveal the contents of proposals that were submitted by bidders with a reasonably-held expectation of confidentiality, thereby satisfying the "in confidence" component of part two. The exception relates to information concerning the bid submitted jointly by the appellant and affected party A. In my view, it is not reasonable to conclude that information was not freely shared between these two parties with a common interest.

Accordingly, information relating to affected party A contained in Records 17-20 does not satisfy the "in confidence" component of part two.

In summary, I find that the "in confidence" component of part two of the section 10(1) test has been established for the portions of Records 17-20 that were "supplied" by affected parties other than the appellant and affected party A, and not been established for Records 21-24 and the portions of Records 17-20 containing information relating to affected party A.

Part 3: harms

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 harms 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].

As stated earlier in my introductory discussion of section 10(1), the appellant appears to accept that the various bid packages themselves fall within the scope of section 10(1), and in fact argued strongly for this position in its role as an affected party resisting disclosure in Appeal MA-020223-1. The only portions of Records 17-20 that satisfy the first two parts of the section 10(1) test meet this description, and I find that disclosing them could reasonably be expected to prejudice the competitive position of these affected parties, thereby satisfying the harms component of section 10(1)(a) of the *Act*.

In summary, the only portions of records that qualify for exemption under section 10(1) of the Act are the portions of Records 17-20 whose disclosure would reveal or permit accurate references to be made with respect to commercial information supplied to the City by various affected parties other than the appellant and affected party A in the context of submitting bid proposals on the turf replacement project. Records 21-24, the remaining withheld portions of Record 10, the withheld portions of Records 13-16, and the other portions of Records 17-20 do not qualify for this exemption.

SOLICITOR-CLIENT PRIVILEGE

The City relies on section 12 as the basis for denying access to the withheld portions of Records 5, 7 and 9.

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 [5, …, 7 and 9] 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. …

The appellant submits that having not had the opportunity to review the undisclosed portions of records 5, 7, and 9 they find it difficult to comment on the application of solicitor-client privilege. The appellant requests that I review the documents to ensure that information subject to the privilege has been severed where at all possible.

Record 5 is an email chain, portions of which have been disclosed. 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 5. 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 5 does not qualify for exemption under section 12 and should be disclosed.

The Record 5 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 5 meet the requirements of common law solicitor-client communication privilege and qualify for exemption under section 12 of the *Act*.

Record 7 is similar in nature to Record 5. 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 7 meet the requirements of common law solicitor-client communication privilege and qualify for exemption under section 12 of the *Act*.

Record 9 is an email message sent by a City lawyer to a City staff person, which was in turn forwarded by the staff person to other City employees. The signature line of the email and the "to-from" and "re" lines of the email chain have been disclosed to the appellant, but the substance of the lawyer's communication have not. This undisclosed portion consists of a communication between a solicitor and his client for the purpose of providing legal advice on the content of documents relating to the bidding process for 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 the withheld portions of Record 9 meet the requirements of common law solicitor-client communication privilege and qualify for exemption under section 12 of the *Act*.

PERSONAL INFORMATION/INVASION OF PRIVACY

The City claims that portions of Record 25 contain personal information but, in light of my findings under section 10(1) for this record, it is not necessary for me to deal with Record 25 here.

The City also claims that portions of Records 1, 2, 3, 4 and 8 contain the personal information of identifiable individuals, specifically:

- the phone number of a soccer club that appears in four places in the "re" line of an email chain that comprises Record 1;

- the email address of the author of a message sent to the City on behalf of a soccer organization, which appears on page 2 of Record 2;

- the email address of the author of a message sent to the City on behalf of an organization potentially interested in bidding on the turf replacement project, which appears on page 1 of Record 3;

- the email address of the same author as Record 2 in the context of a different message sent to the City, which appears twice on page 1; and

- the full name of one individual and the first names of three other individuals, as well as an email address for these four individuals, that appear on a

> message sent to the City on behalf of one of the bidders on the turf replacement project, and a brief reply

All other portions of Records 1-4 and 8, including the content of the various email messages, have been disclosed to the appellant.

The City's representations do not deal specifically with these 5 records.

The appellant submits that, without having had the opportunity to review the portions of documents that the City claims contain personal information, it is difficult to make submissions. However, the appellant submits "issues of personal information can be dealt with in virtually all cases by severance".

"Personal information" is defined in section 2(1) of the *Act* as "information about an identifiable individual".

Previous orders issued by this office have drawn a distinction between personal information and information associated in his or her professional capacity. In Order PO-2225, which involved the names of non-corporate landlords owing money to the Ontario Rental Housing Tribunal, I outlined a process for determining whether information qualifies as "personal information" or information "about an individual in a business or personal capacity":

> [T]he first question to ask in a case such as this is: "*in what context do the names of the individuals appear"?* Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? …
>
> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"?* Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

Applying this approach to the withheld portions of Records 1-4 and 8, I find that the context in which the email addresses and phone number appear is not inherently personal, but rather is of a business or professional nature; and that there is nothing about this particular information that, if disclosed, would reveal something of a personal nature about any individual. The phone number withheld from Record 1 is associated with an organization, not an individual; and it is clear from the contents of Records 2, 3, 4 and 8 that the withheld names and email addresses are not personal in nature, but relate to business or professional organizations associated with the individuals who sent the messages.

Accordingly, I find that withheld portions of Records 1-4 and 8 do not contain "personal information", as defined in section 2(1) of the *Act*. Because only "personal information" can

qualify for exemption under section 14, I find that this exemption does not apply to Records 1-4 and 8, and the withheld portions should be disclosed.

PUBLIC INTEREST OVERRIDE

As a result of the various findings in this order, the only exemptions I have upheld are section 12 as it applies to portions of Records 5, 7 and 9; section 7(1) as it applies to the withheld portions of page 1 of Record 11; and section 10(1)(a) as it applies to the described portions of Records 17-20.

Section 12 is not listed among the exemptions subject to the public interest override in section 16 of the *Act*, so section 16 only has potential application in the context of the portions of page 1 of Record 11 that qualify for exemption under section 7(1) and, the portions of Records 17-20 that qualify for exemption under section 10(1)(a) of the *Act*.

The appellant's representations do not deal with section 16. Having reviewed the exempt information in Records 11 and 17-20, I find that there is no basis for concluding that there is a compelling public interest in disclosing this exempt information. In addition, even if a compelling public interest does exist, I am not persuaded that based on the evidence before me that it is sufficient to outweigh the purpose of either of the exemption claims in section 7(1) and section 10(1)(a) in the circumstances of this appeal.

ORDER:

1. I order the City to conduct a further search for records that are responsive to the appellant's request, as outlined in the request letter and the appellant's representations, and to provide the appellant with a decision in accordance with the provisions of the *Act*, treating the date of this order as the date of the request, without recourse to a time extension.

2. I order the City to disclose the withheld portions of Records 1, 2, 3, 4, 6, 8, 13-16, 21-24, the withheld portions of page 2 of Record 5, the withheld portions of page 2 of Record 11 and the portions of Records 10 and 17-20 described in the body of this order under the discussion of section 10(1). I will attach a highlighted copy of the relevant portions of Records 10 and 17-20 with the copy of this order sent to the City identifying the portions that should **not** be disclosed. Disclosure under this provision must be made to the appellant by **August 23, 2004** but not before **August 18, 2004**.

3. I uphold the City's decision to deny access to the withheld portions of Records 7, 9, 12, 25-25, the withheld portions of page 1 of Record 11, the withheld portions of page 1 of Record 10, and the portions of Records 17-20 not covered by Provision 2 of this order.

4. 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 disclosed to the appellant.

Original signed by: July 16, 2004
Tom Mitchinson
Assistant Commissioner