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

ORDER MO-2121

Appeal MA-050251-1

Regional Municipality of Durham

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NATURE OF THE APPEAL:

The Regional Municipality of Durham (the Municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from one of two corporate bidders, for the records related to a specified Request for Proposals (the RFP). In particular, the requester sought the following:

1. Correspondence between the Municipality and a named organization (the affected party) relating to a letter of intent dated January 15, 2003, a response to the letter of intent dated January 16, 2003, an application for GeoSmart funding dated February 3, 2003, an acknowledgement of that application dated February 5, 2003, a letter approving GeoSmart funding dated May 2, 2003 and the preparation of tender document for the RFP.

2. The involvement of the employees of the affected party in the preparation of the application for GeoSmart funding.

3. Communications regarding the agreement between the affected party and the Municipality for:

    a. data collection, key project deliverables, further requirements, data conversion and search engine placement;
    b. the needs analysis;
    c. search for a GIS (Geographic Information System) solution prior to the application and list of companies contacted;
    d. spatial data;
    e. ASP delivery of GIS services;
    f. training;
    g. the "Tourism Gateway Software License";
    h. the study that supports the outcomes projected;
    i. clarification on the RFP referred to in the application, and additional information about companies contacted and the area of the search;
    j. description of the responsibilities of a named individual as project partner.

4. Correspondence relating to the verification that the affected party owned the intellectual property rights to the GIS technology used.

5. Records relating to whether the named organization delivered their GIS solution for the prices outlined in the GeoSmart application.

6. Records relating to any ongoing revenue sharing program in place with the affected party.

The Municipality issued a decision in which it provided access to some records in full and denied access to parts or all of the remaining records on the basis of the exemptions in sections 9(1)(b)

(relations with governments) and 10(1) (third party information) of the *Act*. The Municipality also responded directly to parts of the requester's request in its decision letter. The Municipality included an Index with its decision that set out the records responsive to the request and the exemptions claimed for each record. Specifically, the Municipality responded as follows to each enumerated item in the request:

1. The Municipality disclosed a number of pages of correspondence, severing some information under sections 9(1)(b) and 10(1) of the *Act*. It also noted that the email account of the former Director of Tourism had been removed from the server.

2. The Municipality provided an explanation of the relationship between itself and the affected party.

3. The Municipality indicated that no records responsive to any of the enumerated items exist.

4. The Municipality disclosed the RFP 644-2003 and referred the requester to specific portions of it.

5. The Municipality disclosed the Final Report GeoSmart Program, and referred the appellant to specific portions of it.

6. The Municipality provided an explanation that there was no shared revenue.

The requester (now the appellant) appealed those portions of the Municipality's decision regarding the existence of additional responsive records. The appellant did not appeal the application of the exemptions cited by the Municipality in its decision letter.

During the mediation stage, the appellant reiterated its position that there must be printed emails from the former Director of Tourism (part 1 of the request), and this remains an issue in the appeal. The appellant agreed during the mediation stage to remove parts 2, 4 and 5 of its request from the scope of the appeal. The appellant also indicated that it is not satisfied with the Municipality's response to parts 3 (a through j) and 6 of its request.

During mediation, with the Municipality's consent, the appellant amended its request to include three additional records:

7. information regarding Tourism Gateway Software License,

8. information on the Memorandum of Agreement, and

9. the scoring data for the RFP.

Also during mediation, the Municipality issued a supplementary decision letter in response to the appellant's amended request. The Municipality indicated that access to the record responsive to part 7, the Tourism Gateway Software License, is denied under section 10(1) of the *Act*. The Municipality advised the appellant that there is no Memorandum of Agreement on file responsive to part 8. The Municipality subsequently provided a draft agreement which was attached to the RFP. However, the appellant submits that there must be another record in response to this part of its request. The Municipality also advised the appellant that the records responsive to part 9, the scoring data, are being withheld under section 7(1) of the *Act*.

At the conclusion of the mediation stage, the following issues remained outstanding:

- the Municipality's application of section 10(1) to the Tourism Gateway Software License Agreement;

- the application of section 7(1) to the scoring data; and

- whether the Municipality conducted a reasonable search for additional records responsive to parts 1, 3 (a through j), 6 and 8 of the appellant's request.

This office commenced the adjudication stage of the appeal by sending a Notice of Inquiry to the Municipality, outlining the background and the issues in the appeal and inviting representations from the Municipality on all of the issues described above. The Notice of Inquiry was also sent to the affected party, who was invited to provide representations on the application of section 10(1) to the Software Licence Agreement. Both the Municipality and the affected party responded with representations. This office then sent the Notice of Inquiry, along with the entire representations of the Municipality and the non-confidential portions of the representations of the affected party, to the appellant, who was invited to provide representations. The appellant responded with representations. The file was then transferred to me to conclude the inquiry. I provided the Municipality with the appellant's representations and asked the Municipality to respond to the appellant's representations as follows:

a) Regarding part 1, archiving of files of departing senior staff;

b) Regarding part 2, any emails or correspondence discussing the draft Memorandum of Understanding [related to part 8 of the request];

c) Regarding part 3, are there any documents in existence, not already disclosed, that address the appellant's questions, and the Municipality's position on the disclosure of these documents; and

d) Regarding part 9, the appellant's request to have the scoring data without the individual advisor's names.

The Municipality provided representations in response and also provided the appellant with the scoring data removing the names of the individual advisors, the departmental associations of the individual advisors and any specific pricing references. However, the appellant informed this office that it was not satisfied with the severances of the information on the scoring data (part 9).

During adjudication, it came to my attention that the records produced to this office as responsive to the request included the Software Maintenance Agreement, which was appended to the Software License Agreement. I then sought and received representations from the Municipality and the affected party on whether the mandatory exemption in section 10(1) of the *Act* applies to the Software Maintenance Agreement, which refers to and is subject to the terms of the Software License Agreement.

RECORDS:

Subject to a determination on the adequacy of the Municipality's search for responsive records, the following three records are at issue: the Software License Agreement, the Software Maintenance Agreement and the undisclosed portions of the scoring data for the RFP.

DISCUSSION:

ADVICE TO GOVERNMENT

The Municipality claims that the discretionary exemption in section 7(1) applies to the undisclosed portions of the scoring data for the RFP. Section 7(1) of the *Act* states:

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

Section 7(2)(a) provides an exception to the 7(1) exemption and reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;

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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner),* [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- 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 (Assistant Information and Privacy Commissioner),* [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner),* [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224]

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal applied for S.C.C. 31224; Order PO-2115; Order P-363, upheld on judicial review *in Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, 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.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal applied for S.C.C. 31226]

Representations of the Municipality

The Municipality states in its initial representations that:

> Each scoring paper contains an assessment of the data provided by the corporation looking to contract with the Region. The assessment not only looks at the data provided but in many cases looks at the impact this would have on the Region, including budgets and service levels. By evaluating each proposal and commenting on its impacts to the Region, the scoring data reveals advice to the Region on the consequences of choosing a specific contractor. Simply because this employee wasn't the final decision maker, does not change the fact that the decision maker was dependant on their advice when making the decision. In fact, if this data was deemed not to be advice, then potentially, the Region would not be able to avail itself of all the different expertise in the corporation to make decisions. This ability to rely on multiple employees for advice is one of the things that makes the institution competitive when contracting with outside corporations. While all scorers did not sit down with the ultimate decision maker and debate the issues, each scorer's paper reflects an opinion, as if expressed in a debate.

Representations of the Appellant

The appellant states in its representations that:

> RFP 644-2003 included mandatory and optional requirements in addition each bidder was asked to provide a verbal presentation of their proposal and answer any questions the Region had. The RFP indicated that no weight would be given to items outside these requirements. There were two bidders. The bidders' responses and presentations were reviewed and scored by four staff members from the Region.
>
> I am not asking for the names of the staff who rated the responses, all I'm asking is how did each judge score the bidders in each category and their verbal presentation. Providing this information to the short list of bidders is standard procedure in many jurisdictions.

Analysis/Findings

In response to the appellant's request for the scoring data, the Municipality provided the appellant with the scoring data forms of four advisors, severing the names of these advisors, their departmental associations and any reference to specific data.

I agree with the Municipality that each scoring data form "contains an assessment of the data provided by the corporation looking to contract with the Region". However, although some of

the information in the scoring data forms do qualify as "advice or recommendations of an officer or employee of an institution or a consultant retained by an institution", as set out in section 7(1), the information that remains at issue in this appeal does not set out any recommended course of action and therefore does not qualify for exemption under section 7(1).

Concerning the departmental associations on the individual advisors, in its initial representations the Municipality, stated the following:

> The Region received two proposals for the provision of these services. Upon receipt, the Region took its expertise and began evaluating these proposals. The Region put together four individuals, two from Economic Development and Tourism and two from CIS (Corporate Information Systems) to evaluate the proposals independently and present their findings, advice and recommendations to the institution so that a contract could be awarded.

It would appear that the Municipality has, therefore, already provided the appellant with "the departmental associations of the individual advisors". Nevertheless, I find that the departmental associations of the individual advisors do not qualify for exemption under section 7(1). In my view this is factual information and falls within the exception in section 7(2)(a). Therefore, the departmental associations of the individual advisors are not exempt under section 7(1).

The appellant stated that it is not interested in the "the names of the staff who rated the responses". As such, the only information at issue with respect to the scoring data forms is the "specific pricing references". These pricing references consist of the contract cost and the software maintenance fees for each of the two bids. The appellant is aware of its own pricing proposals for the contract cost and the maintenance fee. The appellant, as stated in its representations, is also aware of the affected party's maintenance fee. The appellant received a copy of the Municipality's GeoSmart funding application, in response to its access request to the Ministry of Natural Resources. This document lists the affected party's maintenance fee. The appellant is similarly aware of the affected party's contract cost. The Municipality provided this information to the appellant in its June 8, 2005 decision letter, by means of the enclosure entitled "Schedule A".

In any case, I find that the contract cost and maintenance fee do not qualify for exemption under section 7(1). These figures represent factual information and fall within the exception in section 7(2)(a). Therefore, the contract costs and maintenance fees do not qualify as advice or recommendations and are not exempt under section 7(1).

In summary, I find that section 7(1) does not apply. As no other exemptions have been claimed for the undisclosed portions of the scoring data forms, and no mandatory exemptions apply, I will order the scoring data forms to be disclosed with the names of the individual advisors, which are not responsive to the request, severed.

THIRD PARTY INFORMATION

The Municipality claims that the mandatory exemption at section 10(1) applies to the Software Maintenance and License Agreements.

Section 10(1) states, in part, as follows:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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)(a), (b) or (c) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), and/or (c) of section 10(1) will occur.

Part 1: type of information

The affected party and the Municipality maintain that the Software Maintenance Agreement and Software License Agreement contain commercial and technical information, as well as information that qualifies as a "trade secret". The types of information listed in section 10(1) have been discussed in prior orders, as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> *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]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Representations of the Municipality

The Municipality states in its initial representations that:

> The Software Licensing Agreement and Maintenance Agreement signed with (the affected party) contain third party commercial information. In particular, the Software Licensing Agreement contains information regarding the third party

> pricing of services, range of services provided and maintenance fees and objectives.

In later representations, the Municipality also states that the Software License Agreement contains trade secrets, but fails to describe how the contents of the records qualify as a "trade secret" in any detail.

Representations of the Affected Party

The affected party submits that the Software License Agreement provides technical and commercial information. Concerning the Software Maintenance Agreement, the affected party states that:

> The Software Maintenance Agreement provided by us to the Regional Municipality of Durham contains commercial information. The agreement provides details of the services to be provided, conditions for these services and additional entitlements, client responsibilities, pricing and payment terms, and other conditions. These details were part of the competitive response made by us to the Request for Proposals (RFP) issued by the Regional Municipality of Durham.

Representations of the Appellant

The appellant does not address this issue in its representations.

Analysis/Findings

I find that the Software Licensing and Maintenance Agreements contain information that qualifies as technical and commercial information.

I find that both agreements contain technical information prepared by a professional in the field and describe the operation or maintenance of a process, namely the specialized mapping software provided by the affected party to the Municipality.

I also find that both agreements contain commercial information concerning the selling of services, namely, the conditions to be met by the Municipality in exchange for provision of the specialized mapping software by the affected party.

I am not satisfied that the Software License Agreement contains "trade secrets" as defined in section 10(1). This agreement only contains terms as to the use of the affected party's software by the Municipality. This agreement does not contain information such as a formula, pattern, compilation, program, method, technique, or process or information contained or embodied in a product, device or mechanism as referred to in Order PO-2010.

Because of my findings concerning technical and commercial information, part 1 of the test is satisfied.

Part 2: supplied in confidence

Supplied

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

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

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

In confidence

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

Representations of the Municipality

The Municipality states that:

> [it] had no input whatsoever as to the content of these documents, They are the sole property of the third party [also known as the affected party], who may or may not have signed an agreement with their own provider of software indicating that these documents must be signed by anyone being granted access…
>
> The third party supplied these documents to the Region [also known as the Municipality] for signing in order to gain access to the system and to provide the required software services to the Region. The Region was not able to negotiate these terms and access to the system was conditional upon signing them. The purpose of these documents is to set out maintenance of the contract, including wait times for provision of services, copyright information, ownership of material and access to the database. It also indicates the price of services provided and what services are covered by annual fees and when services come at an additional price. This is all supplied to the Region as part of the contract. The Region even paid for the contract at a supplied price when it awarded the RFP. No additional negotiation was allowed after the awarding of this RFP - as that would go against the Region's Purchasing Policies. These documents are required signing for access to network - laying out additionally codes of conduct for those employees of the Region granted access. This is normal procedure in any Intellectual Property contract, given the damages that could occur if people were to use the network in an inappropriate manner.
>
> In PO-1698, the Commission found that "supplied" information is:
>
> > …for such information to have been "supplied", it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected party.
>
> The Region was required to sign these agreements as written and there was no negotiation of the terms in these agreements.
>
> In MO-1450, the Commission considered that the purpose of this section is to protect third parties competitive interests. In that case, an appellant was seeking information with regards to a contract between a municipality and a contractor. The Commission quoted from caselaw, stating that:

> …the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source and that is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. [the Municipality's emphasis]

Representations of the Affected Party

The affected party states that:

> The contracts provided to Durham Region were not negotiable. Execution of these contracts as provided was essential for our company to deliver data and services… [The information in the Agreements] was communicated with the implicit understanding that it was to be kept as confidential and has always been treated by both parties as such.

Representations of the Appellant

With respect to this aspect of the test under section 10(1), the appellant submits that:

> Most of the contract information is described on the GeoSmart application or on [the affected party's] web site.

Analysis/Findings

In Order MO-1706, Adjudicator Bernard Morrow states:

> … [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be

made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

The two agreements in question in this case, the Software License Agreement and the Software Maintenance Agreement, are similar to the Service Level Agreements (SLAs) considered in Order PO-2435 by Assistant Commissioner Brian Beamish. The SLAs addressed in that decision originated from an RFP, and are contracts between the Ministry of Health and Long-Term Care and named consultants for the provision of information technology services.

In that case the Ministry submitted that:

> Proposals submitted by potential vendors in response to government RFPs are not negotiated; a vendor's per diem rates in particular, as contained in their proposals, cannot be a negotiated item. The Ministry either accepts or rejects the proposal in its entirety.

Assistant Commissioner Beamish found that:

> If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS [Management Board Secretariat which issued the RFP] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry … to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of these SLAs, I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.
>
> In summary, I find that the SLAs are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no

> information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1) [section 10(1) of the municipal *Act*].

I agree with and adopt Assistant Commissioner Beamish's approach. Having reviewed both agreements, I find that they do not contain information that is immutable or not susceptible to change. I find that the Software Maintenance Agreement and Software License Agreement are contracts between the Municipality and the affected party that were subject to negotiation, and that the information in the agreements was, accordingly, "supplied" within the meaning of that term in section 10(1). These contracts came into existence as a result of the Municipality's acceptance of the affected party's proposal in response to the RFP. The terms of the affected party's proposal, along with a number of other significant terms, were subsequently transferred into the agreements. The agreements were then read and signed by both the Municipality and the affected party. As stated above, this demonstrates that the contents of these two agreements were, in fact, subject to negotiation. In support of this finding, I note that the Municipality's Application for GeoSmart funding, which was prepared before the affected party's proposal in response to the RFP, contains information concerning the affected party's business proposal to the Municipality for the provision of the Tourism Gateway software. This application contains a number of terms for the provision of the software which were later incorporated into these agreements, either directly or in a modified form.

Accordingly, it is not necessary for me to address the "in confidence" component of part 2 of the section 10(1) test before concluding that this part has not been established with respect to the two agreements. Since neither agreement meets part 2 of the test, they do not qualify for exemption under section 10(1) and it is not necessary for me to consider the "harms" component in part 3.

SEARCH FOR RESPONSIVE RECORDS

Section 17(1) states:

> A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried

out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The Municipality was asked to provide a written summary of all steps taken in response to the request. In particular, the Municipality was asked to respond to the following, in affidavit form:

1. Did the Municipality contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the Municipality did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

The Municipality should provide the affidavit from the person or persons who conducted the actual search. It should be signed and sworn or affirmed before a

person authorized to administer oaths or affirmations.

The appellant describes in detail why it believes that additional records exist in response to parts 1, 3 (a through j), 6 and 8 of its request. I will address each component of the request individually.

Part 1: emails from the Municipality's former Director of Tourism.

The appellant states:

> The Region takes the position that they delete departing employee's disk space 4 weeks after they have resigned. They also point out that [the Director of Tourism] left the Region in the Fall of 2003 and [the appellant] did not request any documents until May of 2005 when "the ability to pull off the server what wasn't on the file was no longer an option available to the Region".
>
> [The Director of Tourism] held a senior position with the Region and was involved daily in decisions which would impact the municipality well into the future, for example the Region's application to GeoSmart for $60,000 in funding to help build a GIS based tourism portal. Surely, when senior staff leave the Region their files are archived in some format (electronic or hard copy) for future reference and not purged when the IT staff deleted the departing employee's disk space.
>
> The GeoSmart application for funding was complex and had to have involved considerable collaboration between [the affected party] and the Region. How can those communications have just vanished?...
>
> [We] through telephone and e-mail messages started raising concerns about the tendering process on September 19, 2004. The Region had plenty of advance warning that these files were going to be examined.

The Municipality addressed this issue as follows:

> Further to the policy provided with our original representations, the Region had a policy at the time of [the Director of Tourism's] departure that should a department wish to keep the emails of a departing staff member it was the department's responsibility to inform the Corporate Information Services Department by written request. Should no request to keep the emails be received, then the records would be purged 4 weeks after the departure of the employee. No request was made by the Economic Development and Tourism Department to keep the email files of [the Director of Tourism] and as such those records were completely purged from the system 4 weeks after her departure. The Region has no way of recreating those files at this time. The Region has the right to create

> policies with regards to the storing of files that are not covered by specific provincial legislation. In this case, the Region's policy was followed and the emails; not covered by any specific provincial legislation, no longer exist.

Part 3 and Part 6: Records regarding any agreements between the Municipality and the affected party regarding items referred to in the Municipality's application to GeoSmart for funding and records relating to any ongoing revenue sharing program.

The appellant asked a number of very specific, technical questions with respect to these two parts of its request.

The Municipality replied to the appellant's questions concerning parts 3 and 6, as follows:

> … where the Appellant claims that agreements must have been made prior to the funding documentation being sent to the Province, the Region responds stating that there was no agreement between the Region and [the affected party] prior to the awarding of the contract under the RFP. Any contract worth more than $50,000 must be approved by Regional Council and as such could never be done by "verbal contract". There would have been no agreements entered into without the knowledge of Provincial Funding. It was the Province that informed the Region that there were other companies prior to awarding us the funding and as such the RFP was started immediately. Any revenue sharing agreement would be part of the 3rd party contract for which the Region has claimed a s. 10(1) exemption in the original documentation. …The Region has already disclosed that it received no additional funding from any revenue sharing agreement.
>
> The Appellant claims that a list of companies contacted prior to the funding document creation should be available. The Region indicated that of the companies contacted; only [the affected party] provided an "off-the-shelf" solution. The Region is under no legislative obligation to keep a list of the names of those contacted. If the Region had kept the names, then the list would have been in the file. No such documentation was discovered in the file. A thorough search of the file was done as per [the Director of Economic Development and Tourism's] affidavit and all records found were included in the Index of Records. No such list was found and the Region was under no legislative obligation to keep such a list…
>
> The Region has no additional documentation with regards to the claims in the funding documentation that a needs analysis was done. No needs analysis was ever completed by the Region despite what that document indicates.

Part 8: Information on the Memorandum of Agreement.

The appellant submits that:

> The Region claims [the affected party] and the Region prepared the application for GeoSmart funding when the Region understood only [the affected party] offered a GIS based tourism portal solution. [The affected party] was fully aware that other vendors offered a similar solution - in fact, [the affected party] launched their travel site using [our] technology in 2001.
>
> When GeoSmart reviewed the proposal in February 2003 it pointed out to the Region that vendors other than [the affected party] could supply GIS based tourism solution. This forced the Region to issue RFP 644-2003.
>
> Preparing the application for GeoSmart funding and the later authoring of RFP 644-2003 would have been very taxing on [the affected party's] resources. I do not believe they would have gone to this effort without a Memorandum of Understanding with the Region that they would get the work.

The Municipality replied to these submissions on Part 8 of the request, as follows:

> Further to the affidavit of [the Director of Economic Development and Tourism Department], provided with our original representations, the Region completed a thorough search of the files pertaining to the Appellant's request. All records discovered were listed in the Index of Records. The Region discovered no documentation surrounding the Draft Memorandum of Understanding. It was a draft document, not a finalized copy. As such, there was no correspondence on the file with regards to the document. Nothing ever came about regarding the draft document as it was brought to the Region's attention that additional companies provided the service. As such, the Region entered into an RFP situation and the draft document was considered null and void. With regards to any emails, they would have been sent by [the Director of Tourism] as she was the employee who had control of the file until after the awarding of the RFP. As such, no current employee with the Region was involved with the draft document. [The Director of Economic Development and Tourism Department], stated in his affidavit that he took over carriage of … the file after the awarding of the RFP. The Region does not have any documentation regarding the creation of the draft document. It has searched every applicable file in every applicable department and nothing has been found. The Region cannot produce documentation that it does not have.

Analysis/Findings

I find that the Municipality has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate responsive records within its custody or control. In its initial representations the Municipality provided affidavits that provided a comprehensive description of the steps taken to search for records responsive to each element of the request. Affidavits as to the searches undertaken to locate responsive records were provided by the following municipal employees:

1. Regional Clerk and Municipal Freedom of Information and Protection of Privacy Coordinator

2. Director of Economic Development and Tourism

3. Supervisor, Purchasing

4. Network Administrator

The Municipality searched for responsive records in the Finance Department, the Economic Development and Tourism Department and the Corporate Information Services Department. The Municipality also provided detailed responses to the appellant's questions concerning the existence of additional records.

As stated above, during the adjudication stage of the appeal, it came to my attention that the responsive records produced to this office included the Software Maintenance Agreement, which was not specifically mentioned in the Index of Records provided by the Municipality. The Index of Records states that the appellant received five of 11 pages of the Agreement between the Municipality and the affected party. The Software Maintenance Agreement and the Software License Agreement, which are the withheld portions of this record, are each three pages in length, and combined with the five pages that were disclosed, add up to the length of this record as referenced in the index. From this, it is evident that the Municipality viewed both the Software License Agreement and the Software Maintenance Agreement as part of the overall agreement between the Municipality and the affected party, which is the record identified in the Index of Records.

I have considered whether the existence of these records should be taken as evidence that the Municipality did not do a reasonable search for records. In my view, it does not. They are accounted for in the index and were, in any event, identified as responsive, provided to this office, and fully dealt with in this order.

During adjudication, I also found that the records at issue produced to this office by the Municipality included two scoring data forms not previously disclosed to the appellant. In response to my query to the Municipality, the Municipality disclosed these forms to the appellant, even though these two scoring data forms were not used in evaluating the two

proposals. Notwithstanding that these records were disclosed, they are in my view not responsive to the request because they did not form part of the scoring. Accordingly, the existence of these records (which were, in any event, located and produced) does not, in my view, suggest that the search for records was not reasonable.

Having carefully reviewed the parties' representations, including the comprehensive affidavit material submitted by the Municipality, and the responsive records, I am satisfied that the searches carried out by the Municipality were reasonable in the circumstances.

ORDER:

1. I uphold the Municipality's search for responsive records.

2. I order the Municipality to disclose the scoring data forms used to evaluate the RFP, with the names of the individual advisors severed by sending copies to the appellant not later than **December 22, 2006** and not earlier than **December 18, 2006**.

3. I order the Municipality to disclose the Software License Agreement and the Software Maintenance Agreement by sending copies to the appellant not later than **December 22, 2006** and not earlier than **December 18, 2006**.

4. In order to verify compliance with this order I reserve the right to require the Municipality to provide me with a copy of the records disclosed to the appellant pursuant to provisions 2 and 3, upon my request.

Original signed by: November 16, 2006
Diane Smith
Adjudicator