



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2186

Appeal MA-050226-1

The Regional Municipality of Niagara



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

In May, 2003, the Ministry of Health and Long-term Care (the Ministry) issued a Request for Proposals (RFP) to operate the Niagara Ambulance Communication Service Pilot Project. The Regional Municipality of Niagara (the Municipality) submitted a proposal in response. The Municipality's proposal was successful. This appeal to the Office of the Information and Privacy Commissioner relates to a request for access to information relating to the contract.

NATURE OF THE APPEAL:

The Municipality received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for "a copy of the operating budget for Niagara Region Ambulance Dispatch Centre, and staffing levels (# calls/system status controller)."

The Municipality located the responsive records and issued a decision denying access, under sections 9(1)(b) and (d) (relations with other governments), and section 10(1) (third party information) of the *Act*.

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

At the onset of mediation, the Municipality informed the mediator that the records at issue, described in the Mediator's report as an RFP, a contract and a proposal, could not be forwarded to the IPC, due to the confidentiality clause in the contract.

As no issues could be resolved in mediation, the file was transferred to the adjudication stage of the appeal process, in which the adjudicator conducts an inquiry.

At the onset of adjudication, because the Municipality had not produced the records at issue to the IPC, I asked the Adjudication Review Officer (ARO) assigned to the file to contact the Corporate Records Manager and Freedom of Information Co-ordinator for the Region, to request production of the records.

I received 10 pages of responsive records. Although further records existed, I decided to begin the inquiry. I sent a Notice of Inquiry to the Municipality, outlining the facts and issues, and inviting it to make representations. The Municipality responded with representations, and after reviewing them I decided that I required all of the responsive records in order to properly decide the issues in this appeal. Accordingly, I issued a production order, directing the production of all of the records at issue in this appeal. In response, the Municipality provided a further set of records to the IPC. After reviewing the records, I decided it was not necessary for me to invite representations from the appellant.

RECORDS:

No index or numbering was provided for the records. The Municipality did not advise which exemptions they claim for each record when they complied with my production order. The following chart describes the records and, in the column entitled, "Source", indicates whether they were prepared by the Ministry or the Municipality.

Record No.	Description	Source	No. of Pages
1	Pages from the RFP	Ministry	10
2	Proposal Response to RFP No. 2002-76	Municipality	534
3	Ministry Proposal Request RFP No. 2002-76	Ministry	187
4	Schedule M Sample Agreement	Ministry	94
5	Addenda 1 RFP 2002-76	Municipality	1
6	Addenda 2 RFP 2002-76	Municipality	1
7	Addenda 3 RFP 2002-76	Municipality	1
8	Addenda 4 RFP 2002-76	Municipality	1
9	Addenda 5 RFP 2002-76	Municipality	1
10	Revised pages	Ministry	5
11	Conflict of Interest and Post-Service Directive	Ministry	35
12	Clarification Forms	Municipality	12
13	Schedule N Sub-Occupancy Agreement	Ministry	14
14	Schedule O Proof of Insurance	Ministry	3
15	Price Envelope	Municipality	5
16	Proposal Envelope	Municipality	28
17	Mandatory Envelope	Municipality	44
18	Financial Viability Envelope	Municipality	39
19	2000/2001/2002 Annual Reports	Municipality	135
	Total Pages:		1150

The records, as noted, were withheld in their entirety under sections 9(1)(b) and (d), and under section 10(1).

PRELIMINARY ISSUE

Non Responsive Information

I identified 39 pages of résumés which were included as part of Record 2, which contain personal information. During the inquiry, the appellant confirmed that he did not request any personal information, and does not seek access to the résumés. Accordingly, they are not at issue in the present appeal, and have been removed from Record 2.

I also identified another 83 pages of documents interspersed throughout the records that, in my view, are clearly outside of the scope of the request. That information relates to the technology, fleet vehicles, etc., that the Municipality either uses or intends to use in its provision of ambulance services. This information is not within the scope of the appellant's request. The appellant was contacted and he stated that he did not seek access to this information. Accordingly, these 83 pages are no longer at issue.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

Sections 9(1)(b) and (d) and section 9(2) state:

(1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

(b) the Government of Ontario or the government of a province or territory in Canada;

...

(d) an agency of a government referred to in clause (a), (b) or (c)...

(2) A head shall disclose a record to which subsection (1) applies if the government, agency or organization from which the information was received consents to the disclosure.

The purpose of this exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" (Order M-912).

For me to uphold the application of this exemption, the Municipality must provide "detailed and convincing" evidence to establish that disclosure of the record at issue could reasonably be expected to reveal information which the Municipality received from one of the government agencies or organizations listed in the section. 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.)]. In addition, the Municipality must also demonstrate that it **received** this information in confidence.

On the records chart on page two of this order, the "source" column indicates whether the records were created by the Municipality or the Ministry. The Municipality did not specify the records for which it claims the exemptions under sections 9(1)(b) and (d).

Nor do the brief representations of the Municipality provide me with assistance in making this determination. Accordingly, I have reviewed each record, regardless of the source, in order to determine whether it contains information that was received in confidence.

After considering the evidence before me, I am not persuaded that any of the records contain information that the Municipality “received in confidence” from the Government of Ontario, for the reasons that follow.

“Received”

The Municipality submits that:

The information requested was received by the Government of Ontario through the process of achieving the contract for the delivery of ambulance dispatch services to the [Municipality] of behalf of the Province.

I note that section 9(1) of the *Act* refers to “information *the institution has received* in confidence. ...” In this case, the “institution” is the Municipality, not the Ministry. The Municipality’s submission that the Ministry received the information does not advance its argument that section 9(1)(b) or (d) applies. I have therefore reviewed the records to determine whether they are exempt under these sections.

In my view, the phrase “received in confidence” under section 9(1) is analogous to the phrase “supplied in confidence” under section 10(1), which is also at issue in the present appeal. This approach is consistent with previous analysis from this office (Order MO-1896). Accordingly, I will consider whether the information in the records was “received” in confidence using the same considerations as those that pertain to the “supplied” issue under section 10(1).

In determining what evidence will satisfy the onus to establish that information has been “supplied” in confidence under section 10(1), this office has made the following observations:

- 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 17(1) (this section is the provincial equivalent to 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].

This approach has recently 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.).

In Order PO-2435, Assistant Commissioner Brian Beamish adopted the view articulated in Orders MO-1706, PO-2371 and PO-2384 that, except in unusual circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be “supplied”.

I agree with and adopt these lines of reasoning for the purposes of this appeal as it relates to the current section 9(1)(b) and (d) analysis which immediately follows, as well as to the ensuing section 10(1) analysis.

Under contract law, it is well-settled that a course of offer and acceptance creates a contract, whose terms may be reflected in more than one document. In the present appeal, the records outlined in the records chart are, taken together, the contract between the Municipality and the Ministry. This office contacted the Municipality by telephone and confirmed that all the records forwarded following my production order comprised the contract. Therefore, Records 1 – 19 together constitute agreements of a contractual nature, and on this basis, I find the information was neither “supplied” by the Ministry nor “received” by the Municipality. (See Orders PO-2562 and PO-2543, which also take this approach).

This conclusion is further supported by the RFP process under which the records were prepared and delivered to the Municipality by the Ministry and by the Municipality to the Ministry, which also indicates that these records were in fact prepared and delivered as part of a negotiation process.

This appeal also raises the somewhat unusual situation where an institution under the *Act* has responded to an RFP by a provincial Ministry (itself an institution under the *Freedom of Information and Protection of Privacy Act*). The Ministry asked for proposals and the Municipality responded. In this instance, the essential direction in which confidential information would normally travel would be from the Municipality to the Ministry – *i.e.* the *Ministry* is the entity to whom, for the most part, the information has been sent.

Considering all of the circumstances, I find that the Municipality has not established that the information in the records was “received” in confidence and therefore sections 9(1)(b) and (d) do not apply.

As well, with respect to section 9(1)(d), the aspect of the records being received from “an agency of a government” has not been satisfied. Neither the Municipality, the Ministry nor the records themselves provide any information to support a finding that the records were received from any identified “agency” within the meaning of section 9(1)(d). The representations and the records relate to information passing between the Municipality and the Ministry. In that instance, section 9(1)(d) does not apply.

I will next turn to whether the records are exempt under section 10(1) as claimed by the Municipality.

THIRD PARTY INFORMATION

As previously stated, the Municipality also denied access to the records on the basis of section 10(1) of the *Act*.

The relevant part of section 10(1) reads:

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 [*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) to apply, the institution and/or the third party must satisfy **each part** of the following three-part test:

- the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
- the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

The Municipality provided only brief representations to support its assertion that the records were exempt under section 10(1). The Municipality's position was that disclosure of the records "...could reasonably be expected to prejudice significantly the contractual negotiations of the Government of Ontario" and that the information was supplied in confidence.

In my view, the exemption under section 10(1) is not applicable to the records at issue in this appeal. This office has long held that Section 10(1) is designed to protect the confidential "informational assets" of **businesses or other organizations** that provide information to institutions. This finding has been upheld in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.). In this case, the parties are two public bodies, not businesses or other non-public castor organizations.

This view is supported by the ability an institution has to exempt records from disclosure under section 9. That section may be claimed to exempt information received in confidence by municipal institutions from government bodies, as opposed to business entities. I also note that where the objective of denying access is to protect the business interests of an institution such as the Municipality, the exemption found in section 11 of the *Act* (economic and other interests) exists for this purpose.

Quite apart from the fact that the section 10(1) exemption was not intended to apply in this situation, I also find that it is not supported on the facts of this case. In the discussion above, I found that the records were not exempt under section 9 because they were not "received" in confidence. I found that "received in confidence" is analogous, in the circumstances of this appeal, to "supplied in confidence" under section 10(1). Under the section 9(1) analysis, I reviewed in detail the meaning of "supplied" in confidence and in particular, the approach that essential contractual terms are considered to be the product of a negotiation process and therefore are not considered to be "supplied".

In the section 9(1) analysis, I concluded that the records were not "received in confidence" because they constitute a negotiated agreement and were mutually generated rather than "received". The same analysis applies to whether they were "supplied" under section 10(1): as negotiated contracts, the information they contain was not "supplied" and I therefore find that the records do not meet part 2 of the test. As well, for the reasons outlined above in the section 9 analysis, I find that the records were not supplied "in confidence". Part 2 of the test is clearly not met and, because all three parts must be satisfied, the records are not exempt under section 10(1).

In summary, I find that the records are not exempt under sections 9(1)(b) and (d) or section 10(1) and I will order them disclosed to the appellant.

ORDER:

1. I order the Municipality to disclose the responsive records before **May 29, 2007** but not earlier than **May 24, 2007**.
2. I will provide the Municipality with copies of the records found non-responsive to the appeal. These records are not to be disclosed to the appellant.
3. To verify compliance with this order, I reserve the right to require the Municipality to provide me with a copy of the material disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Beverly Caddigan
Adjudicator

_____ April 24, 2007