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

ORDER MO-2276

Appeal MA-050121-2

The Corporation of the City of Barrie

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/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Corporation of the City of Barrie (the City) for access to the following:

> All contracts and proposals with [named company #1], [named company #2], [named company #3] etc. that have to do with alternative voting methods for the City of Barrie from 1993 to present.

The appellant was granted partial access to the requested information. Access to the remaining records was denied pursuant to sections 10(1) (a), (b) and (c) of the *Act*. The appellant appealed that decision to this office, which resulted in appeal MA-050121-1.

During the course of the mediation of appeal MA-050121-1, the City referred to a draft unexecuted rental agreement that was not identified as a record in that appeal. The City was asked to provide a copy of the draft agreement to this office so that a determination could be made as to whether it fell within the scope of the request. As mediation did not resolve all of the issues on appeal, the file was transferred to the adjudication stage of the appeal process.

In Order MO-2070, Adjudicator Catherine Corban found, among other things, that the "draft proposed Election Tabulation Agreement" did fall within the scope of the request. As a result, she ordered the City to issue a decision letter with respect to the disclosure of the "draft proposed Election Tabulation System Agreement".

Following notification of the company with whom the agreement was to be entered into (the affected party), the City issued a decision granting the appellant partial access to the "draft proposed Election Tabulation Agreement". Access to the remaining information in this record was denied pursuant to sections 10(1)(a) and (c) of the *Act*.

NATURE OF THE APPEAL:

The appellant appealed the City's decision to deny access to portions of the "draft proposed Election Tabulation Agreement", and appeal MA-050121-2 was opened.

As the parties did not resolve this appeal through mediation, the appeal was transferred to adjudication.

An adjudicator previously assigned to this appeal sought representations from the City and the affected party, initially, and sent them a Notice of Inquiry, setting out the facts and issues on appeal. Both parties submitted representations.

The adjudicator then sent a copy of the Notice of Inquiry to the appellant, inviting representations. The previous adjudicator also provided the appellant with copies of the complete representations of the City and the non-confidential portions of the representations of the affected party.

The appellant did not submit representations, but indicated that he wished the submissions he made in Appeal MA-050121-1 to be considered in the current appeal.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS/ISSUES:

The record at issue is an unexecuted draft agreement identified as the "draft proposed Election Tabulation Agreement". The City has disclosed portions of this agreement to the appellant. The portions that remain at issue consist of 17 pages and include the following exhibits and attachments. The exemptions claimed for each portion are also identified.

- Exhibit B – Payment Schedule (page 3) (sections10(1)(a), (c))
- Exhibit C – Delivery, Installation and Training (pages 4-5) (sections 10(1)(a), (c))
- Exhibit D – User Documentation (page 7) (section 10(1)(a))
- Exhibit F – User Documentation (software licence agreement) (pages 8-10) (section 10(1)(a))
- Attachment to Exhibit F – User Documentation (page 11) (section 10(1)(a))
- Exhibit I – Terms and Conditions (pages 16-19) (sections 10(1)(a), (c))
- Exhibit K – System Lease Terms (pages 20-21) (sections 10(1)(a), (c))
- Attachment 1 to Exhibit K – System Lease Terms (page 22) (in part) (sections 10(1)(a), (c))
- Exhibit L – Customer Information (pages 23-24) (in part) (sections 10(1)(a), (c))

DISCUSSION:

THIRD PARTY INFORMATION

The City and affected party submit that the mandatory exemptions in sections 10(1)(a) and (c) apply to the portions of the record at issue.

In assessing this issue, I have taken into consideration the specific portions of the agreement to which the City and affected party object to disclosure. I have also considered this information in the context of the entire document.

Sections 10(1) (a) and (c) state:

> 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;
>
> (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) or (c) to apply, the City and/or affected party must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the 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) or (c) of section 10(1) will occur.

Part 1: type of information

The affected party takes the position that the record reveals "technical information", "commercial information" and "financial information". The City believes that the record also reveals "trade secrets". For the reasons set out below, I find that the record reveals commercial information. Previous orders have defined commercial information as follows:

> *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].

The City notes that the record pertains to the provision of electronic tabulation equipment to the City for municipal election purposes. The affected party indicates that the record outlines payment amounts for the provision of technical equipment and services associated with the use of that equipment, such as training and documentation relating to its operation, as well as the

terms and conditions under which the agreement would operate. I find that the record at issue, in its entirety, pertains to a proposed commercial arrangement between the City and the affected party. Accordingly, I find that the information in the record meets the definition of "commercial information".

Therefore the requirements of Part 1 of the section 10(1) test have been established.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the City and/or affected party must establish that the information was "supplied" to the City "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be "supplied" to an 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 (Orders PO-2018, MO-1706).

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 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.).

The rationale for this approach with respect to certain types of information, such as per diem rates, is noted by Assistant Commissioner Brian Beamish in Order PO-2435:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by MBS, the

> Government is bound to accept that per diem. This is obviously not the case. 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 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 is a form of negotiation.

Had the draft agreement at issue in this appeal been executed, I would find this line of reasoning to be similarly applicable. However, the affected party and the City both stress that this proposed agreement has never been executed. The City states that the record was submitted by the affected party in response to a Request for Proposals (RFP) issued by the City. In an affidavit sworn by the Deputy City Clerk, which the City attached to its representations, the Deputy City Clerk affirms that the draft agreement was not executed and that it has not been filed with the City's executed documents.

The affected party indicates that the record was supplied by it directly to the City in 2003 upon a request by the City for additional equipment under an existing contract. It notes that the draft agreement was supplied to the City for its consideration and confirms that the document was not executed. While acknowledging the line of reasoning in previous orders of this office discussed above, the affected party submits that the circumstances of this case are different.

In the representations he submitted in response to Appeal MA-050121-1, the appellant expressed extreme dissatisfaction with the ballotless voting system used by the City since 1995. The appellant is angry that the contracts entered into for the election equipment stipulate that the equipment could not be tested. He decries what he perceives as the lack of transparency in the election process, the diminishment of public accountability, the cost and inconvenience to and alienation of the public resulting from the use of the "ballotless computer touchscreen method".

I note at the outset that the appellant's representations relate to the records at issue and the submissions made by the other parties in appeal MA-060121-1. The appellant chose not to respond to the particular record at issue in the current appeal. In my view, it is relevant that the record at issue in the current appeal was never executed. It does not pertain to "**contracts entered into"**. Although the record at issue is drafted in the form of an agreement, that in itself does not bring it within the reasoning of the above orders. I am satisfied that the record was supplied to the City by the affected party for the proposed purpose of entering into negotiations. However, I have no evidence before me that any such negotiations were either entered into or are reflected in the record at issue. Rather, the parties with knowledge of such activity clearly indicate that the record at issue does not contain negotiated information, but remains the document supplied to the City. In the circumstances, I find that the portions of the record at issue were supplied to the City by the affected party within the meaning of part 2 of the section 10(1) test.

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]

The City and affected party both note that portions of the record at issue are explicitly marked as "confidential" and submit that the remaining information was supplied with a reasonably held implicit expectation of confidence. The affected party refers to confidentiality notices in the portions of the record at issue as the basis for its position that its expectation was that all of the information would be held in confidence. The affected party indicates further that it has consistently treated the information in the record at issue as confidential. In this regard, the affected party states that it maintains internal safeguards and controls over such agreements and they are divulged to its own personnel only on a "need-to know" basis. Moreover, it states that all such agreements are kept in a secured office of filing cabinet, to which access is restricted.

The City contends that the draft agreement has not been disclosed, nor is it available from sources to which the public has access as it is not a formal signed agreement. The City indicates that it has similarly treated the record as being confidential in nature. It notes that the record is held in the Deputy Clerk's office and access to the draft agreement has not been provided to other staff members except for the City Clerk and the Records and Information Supervisor. The City states further that that the affected party verbally requested that the record at issue be treated confidentially at the time it was supplied to the City.

The appellant does not make any submissions that specifically address whether the record at issue was supplied "in confidence".

The portions of the record at issue contain detailed information relating to the costs and services proposed under the draft agreement. Based on the submissions made by the City and affected party and the contents of the record itself, I am satisfied that the affected party supplied the record to the City with a reasonably held expectation that the information contained in the record would be held in confidence. Accordingly, I find that the record was "supplied in confidence" within the meaning of part 2 of the section 10(1) test. Therefore the requirements of Part 2 of the section 10(1) test have been established.

Part 3: harms

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

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

The affected party notes that the draft agreement includes information regarding its products and services that it was offering to the City. Having never executed the agreement, the affected party is concerned that release of the information contained in the portions of the draft agreement which have not been disclosed to a competitor or prospective customer will cause prejudice to contractual negotiations between it and other existing and future customers. The affected party's primary concern is that release of these specific terms and conditions that it offered to the City will become known to its competitors, as well as other existing and potential customers. The affected party identifies its major competitors, and notes that they offer similar products and services in Canada, and that it competes in the marketplace with these companies. The affected party submits that should the information at issue be released, its competitors will gain commercial information relating to its business strategies and contracts that are not otherwise available to them.

The City essentially reiterates the affected party's concerns, and adds:

> The exempted information represents know-how developed by [the affected party] at their own expense. [The affected party] would be deprived of the value of this investment if a competitor could access this information at no cost to itself and exploit it for its own commercial purposes in competing with [the affected party].

> …Competitors could also use the information to pinpoint strengths and weaknesses within [the affected party's] business practices thereby allowing them to be more competitive in the field…
>
> If the knowledge of the agreement offered to the [City] is made available it may interfere with [the affected party's] negotiating positions and strategies with other customers, as terms offered to the [City] may not necessarily be offered in the regular course of doing business.

As I indicated above, the record at issue is in draft form and has never been executed. Portions of the draft have been disclosed to the appellant, and the undisclosed portions remain at issue. I accept the arguments made above that the undisclosed portions reflect certain business strategies and terms proposed at the outset of the negotiating process. I also accept that knowledge of this information could reasonably be expected to significantly prejudice the affected party's competitive position *vis-a vis* its competitors in what appears to be a small and extremely competitive field. Moreover, I am persuaded that knowledge of the affected party's initial proposed position on these items could reasonably be expected to interfere significantly with its contractual or other negotiations with current or future customers. Accordingly, I find that disclosure of the record at issue could reasonably be expected to result in the harms identified in section 10(1)(a) of the *Act*, thus satisfying Part 3 of the section 10(1) test.

Having found all three parts of the section 10(1) test to be met, I find that the undisclosed portions of the record at issue are exempt under section 10(1) of the *Act*.

ORDER:

I uphold the City's decision.

Original Signed by: February 14, 2008
Laurel Cropley
Adjudicator