Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2686

Appeal MA09-252

Regional Municipality of Durham

January 10, 2012

Summary: The appellant sought access to a copy of a proposal submitted to Durham Region in response to a tender. Portions of the record were denied under section 10(1) of the *Act*. This order upholds the region's decision, in part, and determines that the three-part test under section 10(1) was met in regard to portions of the record. The remaining portions of the record for which the test under section 10(1) was not met were ordered disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 10(1).

Orders Considered: MO-1237, MO-2197, P-269, PO-2435, PO-2755.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made to the Regional Municipality of Durham (the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

- All information included with bids provided to [the region] in response to a particular tender, including all references and any information that shows compliance with the general and technical specifications;

- A copy of a tender award report including any recommendation as to which tender should be accepted; and

- Any additional documents that discuss bids received or any irregularities with bids received in response to the tender.

[2] The region issued a decision in which it agreed to provide partial access to the records requested, with severances made pursuant to the third party information exemption in section 10(1) of the *Act*. The requester, now the appellant, subsequently filed an appeal of the region's decision with this office.

[3] During the mediation stage of the appeal, the appellant narrowed the scope of his request to the "bidder references" that were submitted to the region with each bid in response to the tender. During the course of mediation, the mediator notified all four bidders whose proposals were identified as responsive to the request. Three of the bidders consented to disclosure of the relevant records and the region subsequently released them to the appellant. The remaining record related solely to the fourth bidder, a distribution company (the affected party). The appellant then advised the mediator that he wished to pursue access to all of the severed portions of the affected party's proposal.

[4] At the conclusion of mediation, the file was moved to the adjudication stage of the process where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to this appeal sought and received representations from the region and the appellant. The affected party chose not to submit representations. Instead, the affected party advised this office that it wishes to rely on the position it had previously expressed to the mediator that it objects to the release of information in the record relating to its company and, in particular, to the release of the bidder references attached to its proposal. The affected party indicates that the bidder references comprise its client list and, as a result, it views this as confidential information.

[5] The appeal was then transferred to me for final disposition. I subsequently sought and received representations from a manufacturer (the second affected party). The appellant was provided with an opportunity to respond to the second affected party's representations, and did so.

[6] For the reasons that follow I uphold the region's decision, in part, and I order the region to disclose portions of the record to the appellant.

RECORD:

[7] There is one record at issue, comprised of the severed portions of the affected party's proposal in response to the tender. In particular, the information withheld is the affected party's pricing, product specifications and the manufacturer's client list.

ISSUE:

Does the third party information exemption at section 10(1) apply to the information at issue?

DISCUSSION:

[8] The region relies on the application of section 10(1)(a), (b) and (c), which 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, if the disclosure could reasonably be expected to,
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> (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; or

[9] 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.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. 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].

[10] For section 10(1) 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), (c) and/or (d) of section 10(1) will occur.

Part 1: Type of Information

[11] The region submits that the record contains trade secrets, commercial and financial information within the meaning of section 10(1). In particular, it argues that the record contains pricing information, as well as reference information relating to the affected party's clients. Both affected parties advised this office that the record contains the client list of the manufacturer. I note that the appellant's representations in this appeal refer only to the customer list contained in the records. The appellant concedes that customer lists can be considered to be commercial information.

[12] The types of information listed in section 10(1) have been discussed in prior orders:

> *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
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
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> *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].

> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[13] Based on my review, I find that the record contains pricing information, product information and a customer/client list. Past orders of this office have found that pricing information[1] constitutes "commercial" information for the purposes of section 10(1) as it relates to the buying, selling or exchange of merchandise or services. In this case, it relates to the pricing information of a particular product.

[14] Similarly, this office has found in past orders that product information[2] and customer lists[3] also qualify as "commercial" information as they too relate to the buying and selling of merchandise. The product information contained in the record describes the specifications of the product that the region is purchasing from the affected party. The customer list[4] appears to be the manufacturer's customer list and sets out the identity of customers who have purchased the same product made by the manufacturer in Canada and the United States.

[15] Therefore, I find that the record contains commercial information within the meaning of section 10(1) and has met part 1 of the test under section 10. Consequently, it is not necessary for me to determine whether the record also contains financial information or trade secrets, although I note that neither the region nor the affected party provided any evidence to demonstrate that the record contains trade secrets.

Part 2: Supplied in confidence

Supplied

[16] 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].

[17] 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].

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[1] Orders MO-1237 and MO-2197.
[2] Order P-269.
[3] See note 1.
[4] There is only one customer list contained in the record.

[18] 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].

[19] The region submits that the affected party supplied all the information contained in the record to the region. The region states that in a tender situation, negotiation, if any, is minimal. It argues that the information contained in the record is not the result of a negotiation, but rather represents the actual terms and conditions supplied by the affected party in response to the tender.

[20] The appellant submits that the customer list does not meet the requirements of being supplied because the manufacturer did not directly supply the customer list to the region; rather, the distribution company (the affected party) supplied the list to the region.

[21] The two affected parties did not provide representations as to whether the record was "supplied" by the affected party to the region.

[22] In Order PO-2755, Adjudicator Diane Smith dealt with the issue of whether a proposal submitted in response to a call for tenders was considered to have been supplied for the purposes of the equivalent provision to section 10(1) in the provincial *Act*. She found that a proposal containing only the contractual terms proposed by a bidder, and not the subject of negotiation, could not be characterized as having mutually generated terms. She found, therefore, that the proposal was "supplied" by the affected party to the institution for the purpose of the third party information exemption. I adopt Adjudicator Smith's approach for the purpose of this appeal.

[23] In this case, the record at issue is not a final agreement between the affected party and the region; rather, it is the proposal containing the contractual terms proposed solely by the affected party. Applying Adjudicator Smith's approach, the proposal was not the product of negotiation and, consequently, was not mutually generated by the region and the affected party.

[24] Therefore, I am satisfied that the information at issue contained in the proposal, including the manufacturer's customer list, was supplied to the region by the affected party for the purpose of section 10(1) of the *Act*.

In confidence

[25] In order to satisfy the "in confidence" component of part two of the test under section 10(1), 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].

[26] 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 [Orders PO-2043, PO-2371, PO-2497]

[27] The region submits that the affected party had a reasonable expectation of confidentiality at the time that it supplied its proposal to the region in response to the tender. The region relies on its Purchasing By-law #68-2000, section 17.1, which states that:

> No employee, or any appointed or elected official, shall divulge the prices paid or quoted to the Region for goods, works and/or services unless Council may otherwise direct, except that the total price in the case of public tenders may be revealed, as well as any prices included in public reports to Committee and Council.

[28] In the case of this tender, there has been no public disclosure of the pricing information contained in the record, and no similar disclosure in any report to Council.

[29] The region further submits that apart from being expressly stated to be confidential pursuant to the by-law, the record is also implicitly confidential due to the region's practice of not publicly disclosing tender information supplied to it. Therefore, the affected party would have had a reasonable expectation that its pricing information would remain confidential.

[30] Both affected parties advised this office that they view the customer/client list as confidential and proprietary third party information that should not be shared with the general public.

[31] The appellant submits that the customer/client list does not represent the affected party's customer list, but rather the manufacturer's customer list. The appellant states that the affected party is not the manufacturer of the product and the fact that the region did not argue that the manufacturer's customer list should remain confidential is "illustrative of the fact" that the customer list has never been considered to be confidential information.

[32] In addition, the appellant submits that the affected party has "attempted to use" the experience of the manufacturer, rather than its own experience and, if so, such information is not confidential. The appellant also adds that this type of client information is not confidential under United States' freedom of information laws. Furthermore, the appellant states that at the time of the bid, the region requested references to confirm that similar work had been performed for institutions in the past. The customer list was provided to fulfill the region's request for references and is not confidential because it does not contain the names of parties in contracts involving an institution. Lastly, the appellant submits that there can be no expectation of confidentiality where the manufacturer provided its entire customer list to the affected party, the distributor, who, in turn, supplied it to the region.

[33] In reply, the region states that its representations regarding the confidentiality of client lists include client lists sent to the region by its bid proponents regardless of the form in which they are submitted. Any client list supplied by a bidder as part of a tender proposal would be protected given that the information forms part of a submission that is protected as third party information under the *Act*. In addition, the region submits that the *Act* applies to this request and not American law.

[34] I agree with the region that American legislation is not relevant in this appeal and that any determination regarding the disclosure of the record should be considered under the *Act*.

[35] I have considered the representations of the parties, the region's by-law with respect to the non-disclosure of detailed pricing information and the region's practice of maintaining the confidentiality of tender proposals. In the circumstances of this appeal, I accept the position of the region that the record was supplied to it with a reasonably-held expectation of confidentiality, with one notable exception.

[36] Two pages of the record set out the specifications of the product that is the subject matter of the tender. At the bottom of each of those pages, there is reference to the manufacturer's website. I note that the manufacturer's website contains the identical pages and specifications as those contained in the record. Given that this information is easily accessible on a publicly-available website, I find that any expectation that this information would be treated confidentially is not reasonable. Accordingly, I conclude that it was not supplied in confidence for the purposes of section 10(1). As no other exemptions have been claimed for this information, I will

order the region to disclose the two pages relating to the product's specifications to the appellant.

[37] However, as stated above, I find that the remainder of the information, including the customer list, the pricing information and some of the product specifications, was supplied in confidence for the purposes of section 10(1) of the *Act* and that part 2 of the test has been met.

Part 3: harms

[38] To meet this part of the test, the institution and/or 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.)].

[39] 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].

[40] With respect to harms enumerated in section 10(1)(a) of the *Act*, the region states that the affected party would inherently be prejudiced by the release of the information at issue, but that the affected party is better able to provide evidence in support of that position.

[41] In support of its position respecting section 10(1)(b), the region submits that it has a long-standing by-law[5] in place, which provides that it does not divulge the prices paid by or quoted to the region for goods, works and/or services unless Council may otherwise direct. The by-law provides that the total price of tenders may be disclosed, however. The region passed this by-law to assure companies responding to requests for proposals that their competitive pricing would not be revealed, in order to protect the companies' competitive advantage. The region also submits that there is a strong public interest in ensuring that it receives the best prices for goods and services and that, if the information is supplied, it must be kept confidential in order to ensure suppliers continue to provide the lowest possible bid for these goods and services.

[42] The region made no representations on the harms set out in section 10(1)(c) of the *Act*.

[5] Purchasing By-Law #68-2000, s. 17.1.

[43] The affected party made no representations on the harms set out in section 10(1)(a), (b) and (c).

[44] The second affected party, the manufacturer, made representations on the harms set out in section 10(1) in relation to the customer list only. In particular, the second affected party states that disclosure of the customer list could harm its business and give a competitive edge to its competitors.

[45] The appellant submits that the affected party has not provided "detailed and convincing" evidence to establish a reasonable expectation of harm. The appellant states that all institutional awards are public knowledge and the sharing of any list of awards cannot be detrimental. In addition, the appellant submits that the "only way" disclosure of a customer list could do harm is if the customer list confirms that the successful bidder does not have the requisite experience to be awarded the tender; lack of experience, the appellant argues, is not protected commercial information.

[46] In Order PO-2435, Assistant Commissioner Brian Beamish conducted an extensive analysis of the harms test of the provincial equivalent provision to section 10(1). In particular, he discussed the type of evidence required to successfully claim this exemption. He stated:

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific."
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> Both the Ministry and SSHA make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms.

[47] Assistant Commissioner Beamish also indicated in Order PO-2435 that the reason behind the need for "detailed and convincing" evidence to support the harms is the need for public accountability in the expenditure of public funds.

[48] Applying Assistant Commissioner Beamish's approach to the section 10(1)(a) and 10(1)(c) claims in this appeal, I conclude that I do not have sufficiently "detailed and convincing" evidence before me about how the disclosure of the pricing information and the remaining product specifications would cause the harms set out in these sections of the *Act*. The only evidence before me is a very general statement from the region that the affected party would "inherently be prejudiced." As stated above, the affected parties did not provide any representations or evidence describing the harms they may suffer if the pricing information or product specifications were to be disclosed. I find that the region's statement does not constitute evidence that is sufficiently "detailed and convincing" to substantiate this exemption. Consequently, I find that the pricing information and product specifications contained in the record is not exempt under section 10(1)(a) or 10(1)(c).

[49] Conversely, I am satisfied that disclosure of the manufacturer's customer list could cause the harms set out in section 10(1)(a) and 10(1)(c) of the *Act*. Customer lists are commercially valuable to third parties that hold them and their disclosure would give competitors an advantage over them.

[50] Turning to section 10(1)(b), the region has submitted that disclosing the affected party's competitive pricing would place it at a competitive disadvantage. The region also stated that there is a strong public interest in ensuring that it receives the best prices for goods and services and that any information supplied must be kept confidential in order to ensure that its suppliers continue to provide the lowest possible bid for these goods and services.

[51] In Order PO-2435, Assistant Commissioner Beamish also considered whether the third party information exemption applied to "per diem" rates. He stated:

> I also accept that the disclosure of [per diem rates] could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[52] I agree with and adopt Assistant Commissioner Beamish's reasoning. In this case, the information sought is not part of a tender in progress. As indicated above, the fact that a tender process may become more competitive in the future, due to the disclosure of pricing information, does not significantly prejudice prospective proponents and, in my view, would not result in similar information no longer being supplied to the region by proponents who are seeking to conduct business with the region.

[53] Consequently, I conclude that the region has not provided me with "detailed and convincing" evidence that section 10(1)(b) applies to the pricing information contained in the record. This is particularly so because the affected parties have provided no evidence on this exemption at all.

[54] Accordingly, I find that the requirements of the part 3 harms test of sections 10(1)(a),(b) and (c) have not been satisfied with respect to the pricing information and the product specifications.

[55] Because all three parts of the test must be established in order for a record to qualify for this exemption, I find that the above portions of the record do not qualify for exemption, and should be disclosed to the appellant.

[56] However, I also find that the requirements of the part 3 harms test of sections 10(1)(a) and (c) have been satisfied with respect to the customer list and I uphold the region's decision to withhold that list from the appellant.

ORDER:

1. I uphold the region's decision in part. The customer list is not to be disclosed.

2. I order the region to disclose the remaining portions of the record to the appellant by **February 14, 2012** but not before **February 8, 2012**.

3. In order to verify compliance with order provision 2, I reserve the right to require that the region provide me with a copy of the record sent to the appellant.

Original Signed By: January 10, 2012
Cathy Hamilton
Adjudicator