Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2786

Appeal MA12-71

City of Sarnia

September 4, 2012

Summary: The city received a request for the proposals submitted by two companies in response to a Request for Proposal for software services. After notifying the companies, the city decided to grant access to the proposals, except for certain personal information in them. One company appealed the decision to grant access. The other company, the winning bidder, did not, and its proposal was disclosed, with severances. The requester did not appeal the decision to sever personal information. In this order, the city's decision is upheld in part. Some of the information in the proposal made by the appellant is covered by the mandatory third party information exemption in section 10(1) of the Act.

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

Orders and Investigation Reports Considered: Order MO-2193, MO-2141, MO-2465.

OVERVIEW:

[1] The City of Sarnia (the city) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to responses to a particular Request for Proposal (RFP) from two named businesses.

[2] As background, the city issued a RFP for the purchase of software for its Building and Planning Department. Four responses were received, two of which were ruled out

as failing to meet the core requirements of the RFP. In an open meeting, the city reviewed the results of the RFP. The report presented to city council by the Director of Planning and Building discussed in a general way the two remaining proposals, including their prices, and recommended that the city accept the proposal of the low bidder.

[3] The requester made a request under the *Act* for access to the proposals made by these two companies.

[4] Prior to issuing its decision, the city notified the two companies (the affected parties), in accordance with section 21(1) of the *Act*, seeking their views regarding disclosure of the responsive records. Upon receipt of their responses, the city issued an access decision to the requester and the affected parties advising of its decision to disclose the records in part. The city denied access to certain information about the affected parties' staff in the records pursuant to section 14 of the *Act*. The records were not immediately released to allow 30 days for the affected parties to appeal the decision, in accordance with section 39(1) of the *Act*.

[5] One of the affected parties (now the appellant) appealed the city's decision, claiming that section 10(1) of the *Act* applied to the requested record. The second affected party (the winning bidder) did not appeal the city's decision and the records relating to it were subsequently disclosed, with personal information severed, to the requester.

[6] The requester did not appeal the city's decision to grant partial access.

[7] As mediation did not result in a resolution of all the issues, the matter moved to the adjudication stage of the process. I have requested and received submissions from the appellant, the city and the requester. Based on those submissions and my review of the material before me, I have decided to uphold the city's decision in part, but withhold additional parts of the record based on section 10(1) of the *Act*.

RECORDS:

[8] The record at issue in this appeal is the 52-page RFP response submitted by the appellant. The first 41 pages comprise the appellant's completed RFP forms, and sections about the company profile, software, implementation method, support site, pricing, references and contact information. The last 11 pages are a sample software agreement. As the requester did not appeal the city's decision to withhold access to some information under section 14 of the Act, that information, consisting of information about the appellant's staff, is not at issue in this appeal.

THIRD PARTY INFORMATION

[9] The sole issue in this appeal is the application of the mandatory third party exemption in section 10(1) of the *Act*.

[10] Section 10(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, 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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[11] 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].

Representations

[12] The appellant submits that the record reveals trade secrets, technical, commercial and financial information and that this information was submitted in confidence to the city. The appellant states that it markets its products exclusively to the municipal market and in that market, there are only a few software competitors. In

this market, proposals are scored based mainly on pricing and the bidder's response to the software functional requirements.

[13] The appellant submits that providing a third party competitor with its pricing information will allow it to price its software to score better on a RFP and prejudice the appellant's ability to compete. Software pricing is its trade secret, according to the appellant. Further, the appellant submits that providing detailed information regarding its software solution functionality would also significantly impair its ability to compete. Although examples of some of its software screens are provided on its website, its proposal contains many more examples and a detailed explanation of them. Giving out that information to a third party competitor would be the same, it states, as inviting them into a presentation, which would unequivocally provide them with a competitive advantage at the appellant's expense. Competitors could use this information in future dealings with prospective customers to try to get them to include specific functional questions that would assist the competitor in scoring higher than the appellant.

[14] The appellant also made submissions on disclosure of information about its staff but, as this information is not sought by the requester, it is unnecessary to consider these submissions.

[15] The requester submits that responses to the RFP were based on provincial government agency requirements which are widely known. It also submits that any proprietary software information is kept within the vendor's source code or database development, and not made part of a written RFP response. Commercial information about the appellant, it states, is readily available on the appellant's website, and the financial summary has already been disclosed by the city. Further, the requester submits that trade secrets and copyrighted documents are protected under "other jurisdictions" (which I understand to be a reference to federal law in the area of intellectual property). The requester disagrees that disclosure of the response will have any effect on the appellant's ability to compete in the marketplace.

[16] The requester also states that the appellant was aware its response was subject to the provisions of the *Act*, and it quotes from the city's RFP: "All responses to this Request for Proposal will be treated confidentially in compliance with the provisions of the Municipal Freedom of Information and Protection of Privacy Act."

[17] The city also submits that some of the information in the response is available on the appellant's website and, therefore, does not meet the requirement of having been supplied "in confidence". The city takes the position that the appellant did not provide it with sufficiently detailed and convincing evidence to establish a reasonable expectation of harm.

[18] In its reply submissions, the appellant agrees that a municipal RFP process is subject to the *Act*. However, it submits that the city should not be able to rely on the

Act to release all aspects of a competitive bid, where to do so would reveal trade secrets and intellectual property. Further, although it agrees that some of the RFP requirements are based on provincial requirements, all software is coded to handle these requirements differently, and this information is a trade secret. It maintains that releasing information about how software handles functional requirements will provide a competitive advantage to the receiving party and thus cause damages.

[19] The appellant, in reply submissions, acknowledges that the description of its implementation methodology and training is general in nature and can be released (Section 4 Implementation Method).

Analysis

[20] For section 10(1) to apply, the appellant 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

[21] The types of information listed in section 10(1) have been discussed in prior orders. Relevant to this appeal are the following:

> *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,
>
> (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].

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].

[22] As indicated above, the requester and the city do not dispute that the proposal contains the type of information referred to in section 10(1). Rather, both stress that some of the information is available on the appellant's own website. Whether or not the information has been disclosed elsewhere may be relevant to the issue of harm from disclosure, but does not alter whether it may be considered technical, commercial or financial information. I am satisfied that the entirety of the record constitutes commercial information as it is a proposal by the appellant to sell its software products and services, providing details of its business and products in an effort to secure a commercial contract.

[23] Some of the information in the record is also technical or financial information but, for the purposes of this order, it is unnecessary to provide a detailed analysis of this part of my findings. I also find it unnecessary to consider whether any part of the proposal meets the definition of "trade secrets", in addition to constituting commercial information.

Part 2: supplied in confidence

Supplied

[24] 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].

[25] 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].

[26] In order to satisfy the "in confidence" component of part two, the party 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].

[27] 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; and
- prepared for a purpose that would not entail disclosure [Orders PO-2043, PO-2371, PO-2497].

[28] The parties do not dispute that the information in the record was supplied by the appellant to the city, insofar as it is the appellant's response to a RFP issued by the city.

[29] I am satisfied that, in general, the appellant supplied the information in the response with an expectation that it would be treated as confidential, and solely for the purpose of responding to the RFP. The record is marked throughout as "Confidential to the City of Sarnia". There is no indication that the appellant has disseminated the proposal beyond the city.

[30] The reference to the *Act* in the RFP does not negate the reasonable expectation of confidentiality that a proponent submitting a bid may hold, given that the *Act* explicitly protects the confidential informational assets of third parties such as the appellant. I do not accept as a general proposition that a company submitting a response to a RFP proposal should expect that its information will be, as a matter of course, disclosed to the public through an access request. Further, although it may be that responses to the RFP are based on the municipality's requirements with respect to information captured and visual display, which are widely known, this does not preclude the fact that the details of a proponent's method for meeting these requirements may not.

[31] Turning to the record at issue, I find however that there can be no reasonable expectation of confidentiality with respect to information submitted as part of the appellant's response that is already available through its website. Much of the written text in Section 3 (Software Implementation) consists of general descriptions of the features of its software that are taken verbatim from the appellant's own website. This information does not qualify as having been supplied "in confidence."

[32] I also find that there can be no reasonable expectation of confidentiality with respect to the total bid price, which has been disclosed at a public meeting, the appellant's references, which are based on contracts referred to in its website (Section 7), its Company Profile (Section 3), which again is similar to information published on its website, and Section 8 (Vendor Contact Information). I will, therefore, order this information to be disclosed.

[33] Apart from the above, I am satisfied that the record contains information that meets the requirements of "supplied in confidence" under part 2 of the test, and I will turn to consider whether it also meets the "harms" component.

Part 3: harms

General principles

[34] To meet this part of the test, the party resisting disclosure 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.)].

[35] 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].

[36] On my review of the representations of the parties and the record at issue, I find that disclosure of parts of the record could reasonably be expected to result in significant prejudice to the competitive position of the appellant. I accept the appellant's assertion that it markets its products exclusively to municipalities and that, within this market, there is a limited number of competitors. The appellant has identified the bases on which these competitors distinguish themselves in RFP processes, including the detailed pricing structure and detailed explanations of how the functional requirements will be met.

[37] Section 3 of the proposal contains the detailed information about how the appellant's software handles the functional requirements of the RFP, including examples of screen shots. While the appellant's website also includes sample screenshots, they appear to be visual representations of some of the different pages generated by some of its software, but with details obscured. I accept that disclosure of the detailed screen shots found on pages 7, 9 to 16 and 18 to 24 in Section 3 Software Implementation, text on pages 10 and 11, and the information on pages 24 and 25 starting with the first complete paragraph on page 24 could reasonably be expected to prejudice significantly the competitive position of the appellant in future RFP processes, for the reasons described above.

[38] My conclusions are consistent with the approach taken in Order MO-2193, which exempted from disclosure information in proposals described, quoting from Order MO-2141, as

> … the specific detail contained in those portions of the proposal that identify the specific information relating to the affected party's proposed approach to the project. In my view, the unique information contained in those small portions of the proposal discloses a particular approach to the project taken by the affected party.

[39] Based on the appellant's representations, I also accept that disclosure of the detailed pricing found in Section 6 could reasonably be expected to prejudice significantly its competitive position. I have considered Order MO-2465, which was relied on by the city in its representations. I find the circumstances present in that appeal distinguishable from those before me. In Order MO-2465, the unit pricing contained in a proposal formed the basis of the contract between the winning bidder and the municipality. In assessing the claim that disclosure of this information could reasonably be expected to result in the harms contemplated in section 10(1), the adjudicator stressed the need for accountability in the expenditure of taxpayer money. I find the circumstances of this case, involving a proposal made by a non-winning bidder, and revealing details of its pricing and software proposal, closer to those in Order MO-2193, than in Order MO-2465.

[40] As I have indicated, the appellant now agrees that the description of its implementation methodology and training in Section 4 is general in nature and I find no reason to conclude that its disclosure could reasonably lead to the harms described in section 10(1). The information in this section will be ordered to be disclosed, with the exception of the information about the appellant's staff which the city has decided to withhold.

[41] I have found that some of the information in Section 1 (the total bid price) was not supplied in confidence. I see no basis to conclude that disclosure of the remaining information in that section could reasonably lead to the harms in section 10(1). This section does not reveal any detail about the appellant's pricing structure or software solutions. I will therefore order all of Section 1 to be disclosed.

[42] Section 9 consists of template documents and do not provide information about the appellant's software solutions or detailed pricing apart from some hourly rates for services. None of the representations speak specifically to the harm that could ensue from disclosure of this section, and I am not satisfied that its disclosure could reasonably be expected to lead to the harms described in section 10(1).

[43] The appellant did not provide specific submissions on Section 5 and on my review of the representations and the information in this section, I am not satisfied that its disclosure could reasonably be expected to lead to the harms in section 10(1). Again, this section does not provide details about the appellant's specific software solutions or detailed pricing and I accept the city's submission that it describes features which are typical in software applications.

[44] In sum, I find the following information to be exempt from disclosure under section 10(1)(a):

- the detailed screen shots found on pages 7, 9 to 16 and 18 to 24 in Section 3 Software Implementation, text on pages 10 and 11, and the information on pages 24 and 25 starting with the first complete paragraph on page 24; and
- Section 6 Solution Pricing.

[45] I will order the remaining information in the record to be disclosed to the requester, with the exception of the information the city decided to withhold.

ORDER:

1. I uphold the city's decision in part. I do not uphold the city's decision to disclose the information referred to in para. [44] above. That information is exempt under section 10(1)(a) of the *Act*. For the sake of clarity, I will provide the city with a highlighted copy of the record identifying the

information I have found to be exempt, plus the information it decided to withhold under section 14.

2. I order the city to disclose the remaining information to the requester no later than **October 9, 2012** but not before **October 4, 2012**.

3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the record disclosed to the requester pursuant to Provision 2, upon my request.

Original signed by: September 4, 2012
Sherry Liang
Senior Adjudicator