Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2833

Appeal MA12-255

City of Ottawa

January 24, 2013

Summary: The requester sought access to specific information about discounts contained in the tenders for the city's towing contracts. One of the towing companies that submitted a tender appealed the city's decision to disclose its information, claiming the application of the mandatory third party information exemption in section 10(1). This order upholds the city's decision and orders disclosure of the records.

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

Orders and Investigation Reports Considered: Orders MO-2299, MO-2435, PO-2435, PO-3009-F.

OVERVIEW:

[1] The City of Ottawa (the city) received a request from a towing company pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) seeking access to the:

> Tender submission of [named towing company] for tender [#2]. Specifically looking to see Page 7 Item #9 as this affects the total value of the tender submission and should not be excluded under any commercial

> confidentiality clauses of the *MFIPPA* regulations. Also, I would like to please see the official results of this tender as well as [#1].

[2] The city located responsive records, which contained the information of the requester and two other towing companies. The city issued a decision granting partial access to the records, citing sections 10(1)(a) and (c) (third party information) and 11(c) and (d) (economic and other interests) of the *Act*.

[3] The requester appealed the city's access decision and appeal file MA11-554 was opened. During mediation, the requester raised the application of the public interest override in section 16 of the *Act*.

[4] The appeal in file MA11-554 was not resolved at the mediation stage. Accordingly, the appeal was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues, to the city and the two other towing companies[1] seeking their representations. In response, the city decided to disclose the records in their entirety to the requester towing company. The city gave notice of its intention to disclose the records to the requester and the two other towing companies (the second and third towing companies).

[5] The requester and the second towing company did not respond to either the Notice of Inquiry or the city's letter about its decision to disclose the records in full. The third towing company (the appellant) appealed the city's decision to disclose the records, providing representations in support of the application of sections 10(1)(a), (b) and (c) to the information at issue in the records. As the appeal in MA11-554 was resolved by the city's decision to disclose the records in full, appeal file MA11-554 was closed.[2] The appellant's appeal is being adjudicated in this appeal file, MA12-255 by this office.

[6] I then sent a copy of the appellant's representations to the city and the requester, along with a Notice of Inquiry. Only the city provided representations in response. I provided the appellant with a copy of the city's representations and sought and received reply representations from the appellant.

[7] In this order, I find that the third party information exemption in section 10(1) does not apply and I order the city to disclose the information at issue in the records to the appellant.

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[1] Not the requester towing company.

[2] As a result, the application of the discretionary exemptions in section 11(c) and (d) were no longer at issue.

RECORDS:

[8] The information at issue in the records is the prompt payment discount submission by the appellant in its winning Form of Tender (the tender), dated June 13, 2011. Also at issue is the prompt payment discount information for the appellant and the second towing company in two "Report on Tender Opening for Towing Services for Transit Vehicles" (the reports), dated June 16, 2011.

DISCUSSION:

Do the mandatory exemptions at sections 10(1)(a), (b) or (c) apply to the records?

[9] Section 10(1) states in part:

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

[10] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

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[3] *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.).
[4] Orders PO-1805, PO-2018, PO-2184, and MO-1706.

[11] 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

[12] The appellant submits that the records contain commercial, financial, and trade secret information. The city submits that the records contain commercial and financial information. These types of information listed in section 10(1) have been discussed in prior orders:

> *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].
>
> *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,
>
> (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].

[13] The appellant submits that the information on pricing fees was developed considering the nature of its operations, overhead, economies, and contingencies, for purposes of the tender to the city. It goes on to argue that the information at issue is "commercial information" as it relates solely to the buying, selling or exchange of services. It also states this information is financial information regarding the revenue to be generated through the implementation of its methodology, approach and/or processes.

[14] Finally, the appellant also submits that:

> As it is "proprietary information" developed by and for our client's specific circumstances and to suit the needs of the City of Ottawa, using methodologies tailored to its own processes in supplying the services, it is a trade secret, not generally known in the trade or business of supplying towing services.

[15] The city submits that prompt payment discount information is "commercial information" as it relates to the cost of services to be provided to the city. It also submits that it is "financial information" as it consists of a specified discount to be applied to invoices provided that the city processes payment within a specified time frame.

Analysis/Findings

[16] At issue in this appeal is the prompt payment percentage discount rate the appellant proposes to provide the city in its tender for the provision of towing services. As this information relates to the selling of the appellant's services, I conclude that it qualifies as commercial information for the purposes of the first part of the test under section 10(1). As it also relates to the appellant's pricing information, it qualifies as financial information as well.

[17] However, this information is not a trade secret. It is not embodied in a product, device or mechanism and the granting of a prompt payment discount is a concept that would be generally known in business.

[18] Therefore, part 1 of the test has been met for the information at issue in the records.

Part 2: supplied in confidence

Supplied

[19] 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.[5]

[20] 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.[6]

[21] 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.[7]

[22] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[8]

In confidence

[23] 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.[9]

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[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.
[7] See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.).
[8] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).
[9] Order PO-2020.

[24] 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[10]

Representations

[25] The appellant submits that the information was supplied and that it was not a result of a negotiation process. It states that:

> Although there may have been negotiations respecting the levels of service, the development of the pricing fees and how they would be applied was [the appellant's] response to the bid request and was not the product of negotiation. To release that pricing fee structure would be to allow a requestor to draw accurate inferences respecting the methodology and processes used by [the appellant] in the operations of its businesses and thereby give the requestor a competitive edge or understanding of [the appellant's] businesses.

[26] The appellant also submits that the information was supplied in confidence. It refers to a provision in the RFT[11] that reads:

> The City of Ottawa is subject to the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990 c. M.56 as amended ("MFIPPA") with respect to, and protection of, information under its custody and control. Accordingly, all documents provided to the City in response to this Request for Tender may be available to the public unless the party submitting the information requests that it be treated as confidential.

[10] Orders PO-2043, PO-2371 and PO-2497.
[11] RFT page 25, paragraph 17.

> All information is subject to MFIPPA and may be subject to release under the Act, notwithstanding your request to keep the information confidential.

[27] The appellant states that it verbally requested that the information be held in confidence and that even though there was a public opening of the bids, there was no disclosure of the calculations contained therein.

[28] The city states that:

> … any prompt payment information contained on the responsive records would have been implicitly supplied by the appellant to the city in confidence through the request for tender process.
>
> The appellant towing company would have provided this information to the city at page 7 of the Tender and would likely have understood the rationale for the city in collecting this financial and commercial information was to determine the lowest bid. It would also understand that the successful bidder would be obligated to incorporate any prompt payment discount when invoicing the city.
>
> City staff would have transcribed any prompt payment discount information from the Tender onto the Report on Tender Opening. The total cost for each of the three Schedules which appears on the Report on Tender Opening is derived from the Tender but excludes the detailed price break-down that otherwise appears on the Tender. The city submits that in this context, the towing company reasonably contemplated that financial and commercial information will be used solely for the purposes specified above without the city necessarily disclosing any detailed price breakdowns or prompt payment information. The city submits that the records were prepared for a purpose that would not entail disclosure as only the overall totals would have been disclosed. Prompt payment information was treated as confidential by the city consistently, not made accessible by the public, and only accessed by staff that require the information in the performance of their job.

Analysis/Findings

[29] At issue in this appeal are the percentage discount terms to be provided to the city for its prompt payment of the towing companies' invoices. This information is contained in the excerpt from the appellant's Request for Tender (RFT) response (the tender). It is also contained in the reports on the bids prepared in response to the tenders submitted by the towing companies. The reports contain both the appellant's and the second towing company's percentage discount amounts.

[30] In this appeal, the appellant's RFT response (the tender) included the following information:

> 9. Prompt Payment Discount:
>
> The City of Ottawa follows a policy whereby in the absence of prompt payment discount terms, all invoices from vendors will be paid on a Net 30 day basis, meaning payments will be made by the City within 30 days of receipt of invoice, or the acceptance of the goods and services, whichever date is later.
>
> Suppliers are encouraged to offer a cash discount for prompt payment, which will be taken into consideration in the award of this contract, provided that the minimum number of working days for payment is fifteen (15).
>
> Should a discount be offered within a timeframe less than fifteen (15) working days, the discount will not be taken into consideration in the award of this contract, although it may be taken by the City in return for processing payment within the stated timeframe.
>
> A Prompt Payment Discount of [information at issue] is offered for payment within [information at issue] working days, following receipt by the City of the invoice and receipt and acceptance of the goods/services to the satisfaction of the City, whichever date is later, in the sole opinion of the City.
>
> 10. Tender Acceptance:
>
> Tenders shall remain open for acceptance by the City for a period of not less than sixty (60) days from the Tender Closing Date of this Request for Tender.
>
> Notification of the City's formal acceptance of a bidder's tender shall as a rule be conveyed with the issuance of a Purchase Order(s) to the successful bidder's firm for the provision of the goods or services specified. The Contract thereby being confirmed by the Purchase Order shall affirm, as the Contract, the successful bidder's tender and be inclusive of all specifications, terms and conditions of this Request for Tender. The successful bidder shall thereafter be known as the Contractor. [Emphasis added].

[31] Contrary to the position taken by the appellant, it is clear that the prompt payment discount terms contained in the records formed part of its winning bid, which also formed part of the contract between the city and the appellant.

[32] Adjudicator Colin Bhattacharjee in Order MO-2435 considered the issue of "supplied" concerning a proposal that later formed part of an agreement between the institution and two affected parties. Relying on Orders PO-2018, MO-1706, PO-2371 and PO-2435, Adjudicator Bhattacharjee stated that:

> [The Region] submits that the information in the contracts that were executed between itself and the two companies was not negotiated and "simply directly copied from the Proposal into the contract document." Consequently, it appears to be suggesting that the two companies "supplied" the information in the contracts to the Region, for the purposes of section 10(1)...
>
> Although the Region submits that the information in the contracts was "simply directly copied from the Proposal," this does not mean that the information in the contracts was not subject to any negotiation…
>
> In my view, if the Region had judged the two companies' joint bid to be too high in terms of price or otherwise unacceptable, it had the option of not selecting that bid and not executing contracts with the two companies. In other words, the Region had the opportunity to accept or reject the bid, which is a form of negotiation. In such circumstances, I find that the information in each contract, including the pricing information, was mutually generated rather than "supplied" by the two companies…
>
> In my view, none of the information in the contracts falls within the scope of these two exceptions. In short, I find that the information in the contracts was the product of a mutual negotiation process between the Region and the two companies. It cannot be said that these companies "supplied" the information in these contracts to the Region. Part 2 of the section 10(1) test has, therefore, not been satisfied with respect to this information.

[33] In Order MO-2299, Adjudicator Frank DeVries considered whether a proposal, which was appended as a series of schedules to an agreement, was supplied. He stated:

> …the parties subsequently chose to incorporate these records into the agreement entered into between them. The agreement clearly refers to

these three schedules as forming part of the agreement, and as containing certain terms of the agreement.
In my view, by incorporating these documents in to the agreement, and by having them form part of the agreement, these documents can no longer be considered to have been "supplied" by the third party. Rather, these documents constitute the agreed, negotiated terms of the agreement.

Again, I have also carefully reviewed these records to determine whether any portions of them fit within the situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply (the "inferred disclosure" and "immutability" exceptions). On my careful review of these records, I find that the exceptions do not apply to any of the information contained in them. These three schedules, which form part of the agreement, do contain some "background" information as to why these records were provided, and the basis upon which some of the information in them is provided. I consider this information to be in the nature of the type of information found in a "preamble" to a contract, which essentially sets the framework for why the clauses in the contract were negotiated. I do not consider these portions of the schedules to fit within the "inferred disclosure" and "immutability" exceptions.

I have also carefully examined the table which forms part of Schedule F, as well as various references to amounts set out in some portions of the schedules (particularly Schedule F). As identified above, if a third party has certain fixed costs that determine a floor for a financial term in the contract, the information setting out the fixed or "overhead" cost may be found to be "supplied" for the purpose of section 10(1). Accordingly, I carefully considered whether the various amounts referred to in the schedules (including identified "base amounts" and other references to various costs) identified any such "fixed" costs. However, on my review of this information, including a reference to an amount in Schedule F which suggests that the "base amounts" are not fixed costs but calculated estimates, and in the absence of any other specific evidence on this issue from the parties, I find that none of the information fits within the exceptions. In addition, although there is a reference to certain identified costs in Schedule F, and the proposed methods of resolving issues surrounding those costs, by incorporating Schedule F and its terms into the contract, the parties have negotiated these amounts and issues. In my view, the exceptions identified above do not apply to the information in Schedules F, G and H, and I find that they were not "supplied" by the third party for the purpose of section 10(1).

[34] The appellant states that it verbally requested that the information at issue be held in confidence; however, this information is still subject to the access provisions in the *Act*.[12] As I stated in Final Order PO-3009-F:

> Furthermore, the weight of judicial authority is to the effect that it is not possible to contract out of the *Act*.[13] In the context of an access request under the *Act*, in order to be withheld from disclosure, a record must fall outside the institution's custody or control, or alternatively, it must be excluded from the application of the *Act* under section 65 or an analogous provision, or qualify for an exemption according to its terms.

[35] Based on my review of the appellant's information at issue in the records, I find that it was not supplied in confidence to the city within the meaning of part 2 of the test under section 10(1). In making my determination, I took into account the fact of the inclusion of the affected party's bid made in response to the RFT into the contract.[14] I also find that the "inferred disclosure" and "immutability" exceptions do not apply to this information. This information does not represent a fixed or immutable amount, but is instead information related to a percentage amount offered by the appellant to the city. If the city had judged the appellant's percentage amount or terms unacceptable, it had the option of not selecting that bid and not entering into a contract with the appellant. As stated in Order MO-2435, the city had the opportunity to accept or reject the appellant's bid, which is itself a form of negotiation.

[36] Therefore, I find that the information relating to the appellant in the records was not supplied to the city. As this information was not supplied, part 2 of the test under section 10(1) has not been met and this information is not exempt. However, for the sake of completeness, I will also consider below whether part 3 of the test has been met with respect to the appellant's information in the records.

[37] Also at issue in this appeal is the prompt payment information of the second towing company. This company was an unsuccessful bidder for the towing contract and it did not provide representations in response to the Notice of Inquiry.

[38] The RFT provided that all documents provided to the city in response to the RFT may be available to the public, unless the party submitting the information requests

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[12] RFT paragraph 17, set out above, and section 4(1) of *MFIPPA*.

[13] See, in this regard *St. Joseph Corp. v. Canada (Public Works and Government Services)*, [2002] F.C.J. No. 361 at paragraphs 51-55 (T.D.); *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, [2003] F.C.J. No. 348 at paragraphs 14-19 (T.D.); *Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue - M.N.R.)*, [2003] F.C.J. No. 1308 at paragraphs 122-124 (F.C.); *Ontario (Ministry of Transportation)*, [2004] O.J. No. 224 at paragraph 33 (Ont. Div. Ct.); affirmed (Ont. C.A.), [2005] O.J. No. 4047; application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

[14] Orders MO-2435 and MO-2299.

that it be treated as confidential. In this appeal, I have no evidence that the second towing company requested that its information be kept confidential.

[39] The records which contain the second towing company's information, the reports, are forms signed by a representative of the city's Supply Branch. The reports are titled "Report on Tender Opening" and state that the purpose of these forms is to announce and record every bid received before the closing date on the project. These forms contain the price offered by the towing companies for its services. The city has disclosed all of the information in the reports, except the prompt payment discount information relating to the towing companies.

[40] The information at issue formed part of the information that was made available by the city in its public opening of tenders. Although the information of the second towing company may have been supplied to the city, I have no evidence to find that it was supplied in confidence. In particular, I have no evidence that the second towing company prepared the information for a purpose that would not entail disclosure and communicated this information to the city on the basis that it was confidential and that it was to be kept confidential. Nor do I have evidence that this information was treated consistently by the second towing company in a manner that indicates a concern for its protection from disclosure prior to the information being communicated to the city by this towing company.[15]

[41] Therefore, I find that part 2 of the test under section 10(1) has also not been met for the information of the second towing company. For the sake of completeness, I will also consider below whether part 3 of the test has been met for this information.

Part 3: harms

[42] The appellant states that disclosure of the prompt payment discount information would allow competitors access to the appellant's confidential present pricing fee structure. These competitors could then use this information to bid on towing contracts; thereby, putting the appellant at a competitive disadvantage and result in a loss of profits. The appellant states that:

> …the competitive process becomes unfairly skewed if some competitors have the proprietary information developed by [the appellant] and are able to use that to adjust their bids. It is submitted that this situation will not only result in direct quantifiable damage to [the appellant] but will prejudice the bidding process for the City of Ottawa…
>
> The competitive bid process is the one recognizable method to obtain the competitive bids. It has been tried and tested over the years as being fair.

[15] Orders PO-1816 and MO-2489.

> It is not the mandate of *MFIPPA* to intervene in the process to allow disclosure of proprietary information to attempt to make the bidding process more transparent by prejudicing one bidder.

[43] The city states that the appellant is best placed to provide detailed and convincing evidence that is required by the harms test, as it is most familiar with the towing business in the City of Ottawa and how disclosure of prompt payment discount related information may affect its business.

[44] The city also states that the prompt payment discount information is too general to create any reasonable probability that its disclosure could significantly prejudice competition or otherwise reasonably be expected to result in harms and prejudice to the towing company that submitted the information.

[45] In reply, the appellant states that the city has not stated in what way "there is no detailed and convincing evidence". It states that:

> Obviously, as the harm will not occur until the disclosure is made, there can be no "evidence" as such, as evidence attests to something that has taken place, which the disclosure has not. The only thing [the appellant] could and did do in its submission was to advise of the circumstances of the development of its information and show logically and reasonably how that information could be used to [its] detriment.

Analysis/Findings

[46] To meet part 3 of the test, the appellant must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[16]

[47] 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.[17]

[48] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1).[18]

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[16] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[17] Order PO-2020.
[18] Order PO-2435.

[49] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[19]

[50] The information at issue concerns the percentage prompt payment discount offered by the appellant and the second towing company to the city for two specific towing contracts. The appellant states in its representations that this information is related to its present fee structure. The percentage prompt payment discount the appellant or the second towing company may offer in the future may vary. The prices for the towing companies' tenders with the city have already been publicly disclosed by the city. The information at issue is not a pricing fee structure, but a percentage discount the appellant or the second towing company is offering the city if it pays their invoices earlier than the due date.

[51] I agree with the city that this is general information. The RTF asks for this information to be provided by proponents. The percentage discount referred to in the records that was offered to the city in 2011 may not be the same percentage discount for prompt payment offered by the appellant or the second towing company in other contracts, including future contracts with the city or other customers.

[52] I find that disclosure of the prompt payment discount in the records could not reasonably be expected to provide the appellant or the second towing company's competitors with information that could put the appellant or the second towing company at a competitive disadvantage in future contracts resulting in a loss of profits.

[53] I further find that disclosure of the prompt payment discount information in the records could not reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the appellant or the second towing company under section 10(1)(a). Nor could disclosure reasonably be expected to result in undue loss or gain to the appellant or the second towing company under section 10(1)(c).

[54] In Order PO-2435, Assistant Commissioner Brian Beamish, in considering whether the third party information exemption applied to "per diem" rates, 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

[19] Order PO-2435.

> process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[55] I agree with Assistant Commissioner Beamish's reasoning in this appeal. I note that the information at issue is also not part of a tender in progress. 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. Disclosure of the information at issue could not reasonably be expected to result in similar information no longer being supplied to the city by proponents who are seeking to conduct business with the city.

[56] Therefore, I find that disclosure of the prompt payment discount could not reasonably be expected to result in similar information no longer being supplied to the city under section 10(1)(b).

[57] I find that I have not been provided with "detailed and convincing" evidence to establish a "reasonable expectation of harm" in this appeal. Accordingly, I find part 3 of the test under sections 10(1)(a), (b) and (c) has not been met.

[58] As both parts 2 and 3 of the test under section 10(1) have not been met, section 10(1) does not apply and the information at issue in the records is not exempt. Therefore, there is no need for me to consider whether the public interest override in section 16 applies to allow disclosure of the information at issue in the records.

ORDER:

1. I order the city to disclose the information at issue in the records to the requester by **February 28, 2013** but not before **February 22, 2013**.

2. In order to verify compliance with order provision 1, I reserve the right to require the city provide me with a copy of the records sent to the requester.

Original Signed by: January 24, 2013
Diane Smith
Adjudicator