

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2819

Appeal MA12-35

Regional Municipality of Durham

December 11, 2012

Summary: The appellant requested a copy of a particular contract entered into between the municipality and a named consulting company. The municipality denied access to the contract on the basis of section 10(1) (third party information). In its representations, the municipality withdrew its reliance on section 10(1) for the contract, except for specific pricing information. Although the third party objected to disclosure of the entire contract, it did not make representations. The adjudicator found that section 10(1) did not apply to any portion of the contract as it was a negotiated document and therefore, not "supplied" to the municipality, thus failing to meet the second part of the three-part section 10(1) test.

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

OVERVIEW:

[1] The appellant submitted a request to the Regional Municipality of Durham (the municipality), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the contract between the municipality and a named consulting company (the third party), entered into about September 2011.

[2] The municipality located a document entitled "Agreement for Consulting Services" (agreement) and issued a decision letter in which it denied access to the

requested record, citing the mandatory exemption at section 10(1) (third party information) of the *Act*.

[3] The appellant appealed the municipality's decision.

[4] During the mediation stage of the appeal, the mediator contacted the third party to determine whether it would consent to disclosure of the record. The third party objected to disclosure of all information contained in the agreement. The appeal was not resolved during the mediation stage and accordingly, the file was forwarded to the adjudication stage of the appeal process.

[5] I sought representations from the municipality and the third party, initially. The municipality submitted representations in response. In them, the municipality indicates that it no longer objects to disclosing the majority of the agreement. The municipality maintains that the unit prices should continue to be redacted from the record. As a result of this change in position, I notified the third party and provided it with a copy of the municipality's submissions, and extended the due date for receipt of representations. The third party did not submit representations.

[6] I subsequently sought representations from the appellant and provided him with a copy of the submissions made by the municipality, in their entirety. The appellant did not submit representations in response.

[7] The sole issue in this appeal is whether the mandatory exemption at section 10(1) applies to the record at issue.

[8] In this order, I conclude that because the agreement is a negotiated document, it was not "supplied" to the municipality. Moreover, I find that the pricing information does not fall within the "immutability" or "inferred disclosure" exceptions. Accordingly, I find that it does not meet the second part of the section 10(1) test. As all three parts of the section 10(1) test must be met, I find that section 10(1) does not apply to the record, in its entirety.

RECORDS:

[9] The record at issue is an agreement between the municipality and the third party.

DISCUSSION:

Does the mandatory exemption at section 10(1) apply to the records?

[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,

- (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.¹ 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.²

[12] 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

¹ *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.).

² Orders PO-1805, PO-2018, PO-2184, MO-1706.

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

[13] The municipality claims that the record at issue contains trade secrets, commercial and financial information as it pertains to the pricing of the goods and services provided by the third party.

[14] These three 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

- (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.³

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

³ Order PO-2010.

⁴ Order PO-2010.

⁵ P-1621.

type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁶

[15] Based on the municipality's representations and my review of the record at issue, I find that it qualifies as commercial information as it pertains to the buying and selling of goods and services. Accordingly, the first part of the test has been met.

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.⁷

[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.⁸

[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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.⁹

[19] 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.¹⁰

[20] The municipality does not address the entire agreement, but reserves its submissions only to the unit price information contained in it. The municipality takes

⁶ Order PO-2010.

⁷ Order MO-1706.

⁸ Orders PO-2020, PO-2043.

⁹ 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.).

¹⁰ Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).

the position that the third party "supplied all the reference information" to it. The municipality indicates that the record at issue is "an agreement to provide a web-based software portal solution associated with branding requirements and support for the Family Services Division being supplied by the third party."

[21] The municipality claims that the pricing information in the record "is not the result of a negotiating process but are the actual terms and conditions supplied by the third party..." Relying on Order P-807, which held that "where an agreement is not made as a result of negotiation and where the disclosure of the terms of the agreement would disclose the same information provided by the third party, the exemption applied," the municipality submits that the same principles apply in the current appeal.

Analysis and findings

[22] The pricing information is contained on page 13 of the agreement. Although the municipality no longer claims the section 10(1) exemption for the rest of the agreement, it remains at issue. Accordingly, I have reviewed the entire agreement.

[23] In the absence of submissions regarding the agreement generally, and based on the authorities cited above, I find that it does not meet the "supplied" test, as it consists of mutually generated, agreed-upon terms, which I find to be the product of a negotiation process.

[24] I do not find the municipality's submissions regarding the pricing information to be persuasive. Order P-807 was decided in 1994. Since that time numerous orders have taken a different approach, which, as I noted above, has been approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. This approach has been discussed in detail in previous orders of this office.

[25] In Order PO-2384, Adjudicator Steve Faughnan provided a detailed analysis of this issue with respect to price-cost structure. In that case, the institution claimed that a "pricing sheet" that was submitted in the tender submission was copied into the final contract. Adjudicator Faughnan stated:

A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1)¹¹ is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

¹¹ Section 17(1) is the provincial *Act* equivalent to section 10(1).

[26] As I indicated above, the only exceptions to this general rule are described as the "inferred disclosure" and "immutability" exceptions. Accordingly, I have also considered whether these exceptions apply to the pricing information contained in the agreement.

[27] In Order PO-2435, Assistant Commissioner Brian Beamish discussed the immutability of information contained in a contract, which in that case pertained to the per diem rate paid to consultants. He found that:

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.

[28] I agree with the approaches taken in these previous decisions and conclude that the circumstances in the current appeal are similar to those considered above. I find that the pricing information set out in the agreement is an essential term of the agreement. Consistent with the analysis and findings in the above orders, I find that the pricing information does not fall within the "immutability" or "inferred disclosure" exceptions. Moreover, I find that it was a negotiated term of the agreement even though it was the same information provided by the third party, since, as stated by Adjudicator Faughnan, "its presence in the contract signifies that the other party agreed to it."

[29] Accordingly, I find that neither the agreement, nor any specific details relating to pricing, has been "supplied" by the third party for the purposes of part 2 of the section 10(1) test.

[30] Since all three parts of the test must be met before the section 10(1) exemption applies, I find that section 10(1) does not apply to the record at issue.

ORDER:

1. I order the municipality to disclose the record to the appellant, by providing him with a copy of it by **January 18, 2013** but not before **January 11, 2013**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the municipality to provide me with a copy of the record disclosed to the appellant.

Original signed by: _____

Laurel Cropley
Adjudicator

_____ December 11, 2012