

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2906

Appeal MA12-363

Town of LaSalle

June 26, 2013

Summary: The town denied access under section 10(1) to a list of subcontractors submitted by a bidder in response to an RFP for the construction of several buildings by the town. In this order, the town's decision to deny access to the list of subcontractors is not upheld.

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

Orders and Investigation Reports Considered: MO-2883, MO-2193, MO-2465, PO-1722.

OVERVIEW:

[1] The Town of LaSalle (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

Under the Freedom of Information Act, we request a copy of the bid submitted by [named company] for the subject tender.

[2] In response to the access request, the town identified a thirteen-page document entitled "Stipulated Price Bid" as the sole responsive record. The town notified the named company (the affected party) in accordance with section 21(1) of the *Act*, seeking its position on the disclosure of the record. Upon receipt of the affected party's response, the town issued an access decision to the requester and the affected party

denying access in full to the record pursuant to the mandatory third party information exemption in section 10(1)(a),(b), and (c) of the *Act*.

[3] The requester (now the appellant) appealed the town's decision.

[4] During the mediation, the mediator contacted the affected party, which consented to the disclosure of some of the information contained in the record. Upon receipt of the consent of the affected party, the town issued a revised access decision granting partial access to the record, while denying access to other portions pursuant to sections 10(1)(a),(b), and (c).

[5] Also during mediation, the appellant advised that he is not pursuing access to those portions of pages 1, 11 (Bid Bond) and 12 (Surety's Consent) of the "Stipulated Price Bid" that were denied under sections 10(1)(a),(b), and (c) of the *Act*. Accordingly, the information withheld on pages 1, 11, and 12 of the record are no longer at issue. However, the appellant confirmed with the mediator that he wishes to pursue access to the information withheld on page 6 of the "Stipulated Price Bid" that was denied under sections 10(1)(a),(b), and (c) of the *Act*.

[6] As further mediation was not possible, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the town and the affected party, initially, as they bear the onus of demonstrating the application of the exemption claimed for the undisclosed information. I provided the appellant with a complete copy of the town's representations and a summary of the submissions of the affected party. The appellant also provided me with representations.

[7] In this order, I do not uphold the town's decision to withhold the information at issue because it is not exempt under the mandatory third party information exemption in section 10(1).

RECORDS:

[8] The records remaining at issue are the undisclosed portions of information on page 6 of the "Stipulated Price Bid" document, consisting of the names of certain sub-contractors.

DISCUSSION:

Does the mandatory exemption at section 10(1)(a), (b) or (c) apply to the records?

[9] The sole issue for determination in this appeal is whether the information at issue, the names of the sub-contractors which were included in the bid document submitted to the town by the affected party, qualifies for exemption under section 10(1) of the *Act*.

[10] Section 10(1)(a), (b) and (c) state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (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

[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 *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 and MO-1706.

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) and/or (c) of section 10(1) will occur.

Part 1: type of information

[13] In the submissions made to the town following its notification under section 21, the affected party submits that the records contain information which qualifies as commercial, financial and labour relations information within the meaning of section 10(1). These types of information have been discussed in prior orders as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

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].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- names, duties and qualifications of individual employees [MO-2164]
- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation³

[14] The affected party does not address this aspect of the three-part test under section 10(1) in his representations. The town relies on the decision in Order MO-2193 in which the adjudicator upheld the Town of Orangeville's decision to deny access to a list of subcontractors which was included in a bid submission by a contractor. The appellant does not address this part of the test under section 10(1) in any detail.

Analysis and findings

[15] In Order PO-1722, Adjudicator Laurel Cropley made the following finding with respect to a list of subcontractors which was included in a bid tender made in response to a tender call issued by Management Board of Cabinet, stating that:

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services (Order P-493). I am satisfied that the bids, which were submitted in response to a tender call, contain information pertaining to the buying, selling or exchange of merchandise or services and that they relate directly to the commercial operations of the third parties. Further, I find that the names of the subcontractors, which formed part of the bid document, qualify as 'commercial information'. Therefore, I find that the first part of the section 17(1) test has been met.

³ P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[16] I adopt this finding for the purposes of the current appeal and conclude that the list of the subcontractors at issue in this appeal also qualifies as “commercial information” under section 10(1). I find that the Stipulated Price Bid, which includes the list of subcontractors at issue, was submitted in response to a tender process initiated by the town. The information relates directly to the submission of a bid by the affected party and therefore pertains to its commercial operations, as it is in the business of constructing buildings. Accordingly, the first part of the test under section 10(1) has been satisfied.

Part 2: supplied in confidence

Supplied

[17] 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].

[18] 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].

[19] Clearly, the information at issue was submitted to the town by the affected party as part of its “Stipulated Price Bid”. Accordingly, I find that the information was supplied by the affected party within the meaning of that term in section 10(1).

In confidence

[20] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

[21] 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.⁴

[22] The town indicates that it consistently treats bid submissions in a confidential fashion and does not disclose them publicly “in order to protect the integrity of the tendering process.”

[23] The affected party submits that it provided the bid in question in a sealed envelope with the understanding that it would be reviewed only by the town and the architectural firm retained by the town as its consultant.

[24] The appellant has not addressed this aspect of the test under section 10(1).

[25] Based on the representations of the affected party and the town, I am satisfied that the bid documents were submitted to the town with a reasonably-held expectation that they would be treated in a confidential fashion. I find that the past practices of the town would have given the appellant a reasonable expectation that his tender would be treated with confidence. As a result, I find that the second part of the test under section 10(1) has been met with respect to the information relating to the subcontractors which is at issue in this appeal.

Part 3: harms

General principles

[26] 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.⁵

[27] 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].

⁴ Orders PO-2043, PO-2371 and PO-2497

⁵ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[28] 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* [Order PO-2435].

Section 10(1)(a) and (c) prejudice to competitive position/undue loss or gain

[29] The affected party argues in support of its position that the disclosure of the remaining information could reasonably be expected to result in harm to its relationship with the subcontractors listed therein. It goes on to submit that this will give rise to corresponding harm to its competitive position in the construction industry. The affected party then argues that:

If these documents are released there will be a trust broken between me and my sub trades. Their special pricing to me because of past relations will [be] ruined once other contractors see my pricing compared to theirs.

[30] Based on this statement, it would appear that the affected party is concerned primarily with the disclosure of pricing information, rather than the names of the subcontractors which remains the only information at issue in this appeal.

[31] The town argues that because it is focussed on getting the best possible price, "it is essential that the sub-contractors and their prices remain confidential to ensure that such information cannot be exploited by another sub-contractor."

[32] I find some guidance in the approach taken in Order PO-1722, where Adjudicator Cropley made the following findings with respect to the disclosure of the names of subcontractors found in a bid document:

A number of previous orders of this office have considered the application of section 17(1) (and its municipal equivalent in section 10(1)) to the names of subcontractors (Orders M-602, P-166 and P-610). In all of these cases, the exemption in section 17(1) was not upheld with respect to lists of subcontractors on the basis that the parties did not establish a reasonable expectation of harm. I note that similar arguments as those made by MBC were made in Order M-602 and were not considered to establish sufficient evidence of harm in that case. Although these previous decisions are not conclusive on this issue, I have found them of assistance in arriving at my conclusions in the current appeal primarily because none of these orders has outlined any argument or discussion which would serve to support MBC's position in this regard.

In considering MBC's submissions, I find that it has failed to draw a sufficient nexus between disclosure of the names of the subcontractors and the loss of contracts or business. I find that MBC has not provided

evidence which is detailed and convincing, nor has it described a set of facts or circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17, in particular sections 17(1)(a) and/or (c) would occur if the names of the subcontractors were disclosed. Further, none of the arguments presented by MBC is supported by the third parties although they were provided with an opportunity to do so. Therefore, I find that the subcontractors' names are not exempt under section 17(1) and should be disclosed to the appellant.

[33] However, neither the affected party nor the town has provided me with an explanation of how the disclosure of the names of the subcontractors alone could reasonably be expected to result in the type of harm envisioned by sections 10(1)(a) or (c). It is not apparent from the representations received from the town and affected party how harm to the affected party's competitive position could follow the disclosure of the names of the subcontractors. It is also not clear, based on the information provided to me, why any undue loss or gain could reasonably be expected to follow from the release of the subcontractors' names. As was the case in Order PO-1722, the affected party and the town have failed provide sufficient evidence of the connection between the disclosure of the information, the subcontractors' names, and the harms alleged.

[34] The town relies on the decision in Order MO-2193 in support of its contention that the names of subcontractors fall within the ambit of the third party exemption in section 10(1)(a). In that case, Adjudicator Diane Smith found that the names of certain subcontractors, along with a myriad of other commercial information, had been supplied to the institution with a reasonably-held expectation of confidentiality. She went on to find that the subcontractors' names, along with other information, fell within the section 10(1)(a) exemption, adopting the findings of an earlier decision in Order MO-2151. The order does not provide much in the way of analysis or discussion on this point, but Adjudicator Smith was satisfied that part three of the test under section 10(1) was met.

[35] Conversely, I have found above that the evidence tendered by the affected party in this appeal was not sufficiently detailed to satisfy the requirements of all three parts of the test under section 10(1). I have not been provided with similarly strong evidence in this appeal to enable me to make a similar finding; nor does the record itself lead me to such a conclusion. As a result, I find that sections 10(1)(a) and (c) have no application to the information remaining at issue in this appeal.

Section 10(1)(b) similar information no longer supplied

[36] The affected party suggests in the representations made to the town in response to its section 21 notification that the disclosure of the names of the subcontractors "will

result in my firm not being as receptive to submit similar information to the Town of Lasalle.”

[37] In Order MO-2283, Assistant Commissioner Brian Beamish addressed the possible application of section 10(1)(b) to information submitted by third parties in response to an RFP issued by the City of Oshawa (the city) for the construction of a sports and entertainment facility. The city and one affected party in that case took the position that disclosure of the information at issue would result in the information no longer being supplied as contemplated by section 10(1)(b). In that order Assistant Commissioner Beamish stated:

In effect, the City is taking the position that companies will no longer provide the type of information that is necessary in order for the City to evaluate expressions of interest and proposals. In other words, companies will consciously submit incomplete or inadequate bids if they believe that certain information in these bids could become public. In my view, this is an exaggerated and entirely hypothetical proposition. Given the scope of projects put up for public bid, and the value of those projects, detailed and convincing evidence is required that companies will withdraw from the bidding process. That has not been provided.

[38] I agree with the reasoning outlined by Assistant Commissioner Beamish and adopt it for the purposes of this appeal.

[39] In my view, a contract to construct large building projects for a municipality is potentially profitable and, in keeping with the reasoning in Order MO-2283, requires detailed and convincing evidence to demonstrate that a potential tenderer could reasonably be expected to withdraw from the bidding process for such contracts. The affected party in this case merely asserts that it may “not [be] as receptive to submit similar information to the town”, but provides no evidence to support its claim. I find that the affected party’s representations on the possible application of section 10(1)(b) are general and highly speculative and do not satisfy the “detailed and convincing” evidentiary standard accepted by the Court of Appeal in *Ontario (Workers’ Compensation Board)*.⁶

[40] As all three parts of the test under sections 10(1)(a), (b) and (c) must be met in order for the information to be exempt, I find that the section 10(1) exemption does not apply to the information remaining at issue. No other mandatory exemptions apply to the names of the subcontractors and the town has not claimed any discretionary exemptions. Accordingly, I will order the names of the subcontractors on page 6 of Appendix B of the record to be disclosed to the appellant.

⁶ cited above.

ORDER:

1. I do not uphold the town's decision and order it to provide an unsevered copy of page 6, Appendix B to the affected party's "Stipulated Price Bid" to the appellant by no later than **August 2, 2013** but not before **July 26, 2013**.
2. I reserve the right to require the town to provide me with a copy of the record which is disclosed to the appellant.

Original Signed by: _____
Donald Hale
Adjudicator

_____ June 27, 2013