Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2870

Appeal MA12-257

City of Markham

April 18, 2013

Summary: The requester sought access to contracts for the provision of waste, recycling and organics collection and disposal services by a third party to Markham. Markham granted full access to the two contracts. The third party appealed Markham's decision, arguing that the contracts were exempt under the mandatory third party information exemption in section 10(1). In this order, the adjudicator upholds Markham's decision that section 10(1) does not apply, and orders the disclosure of the records to the requester.

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: MO-1393, MO-1706, PO-2371, and PO-2435.

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848.

OVERVIEW:

[1] This order addresses an appeal under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) regarding a request to the Corporation of the Town of Markham (Markham) for access to:

> A copy of the contract/agreement between the Town of Markham and [named company] which was in force prior to October 7, 2010 when the agreement was renewed or amended by Council.

[2] Markham identified two records as responsive to the request and notified the named company of the request under section 21 of the *Act*.[1] After receiving the response of the named company/third party through its legal counsel, Markham decided to grant the requester full access to the responsive records and issued a decision accordingly.

[3] The third party appealed Markham's decision to this office, which appointed a mediator to explore settlement of the issues. A mediated resolution of the appeal was not possible. Since the original requester continued to seek access to the responsive records, the appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*.

[4] The adjudicator formerly responsible for this appeal commenced her inquiry by seeking the representations of the third party appellant and Markham, initially. The appellant provided representations in response to the Notice of Inquiry, while Markham did not. In its representations, the appellant indicated that it also wished to rely on the earlier submissions it provided to Markham in response to notification.

[5] Following completion of this stage of the inquiry, the appeal was transferred to me to conclude the inquiry. Upon review of the third party appellant's representations, I concluded that it would not be necessary to seek representations from the original requester.

[6] In this order, I find that section 10(1) of the *Act* does not apply to the records, and I uphold Markham's decision to disclose the records, in their entirety, to the requester.

RECORDS:

[7] The records at issue consist of two contracts between Markham and the appellant, which are referred to as the Agreement, dated December 1999, and an Amending Agreement, dated September 2004.

[1] Section 21(1)(a) provides third parties with an opportunity to make submissions to an institution with respect to the possible disclosure of information that may fit within section 10(1) of the *Act*.

DISCUSSION:

Does the mandatory exemption for confidential third party information in section 10(1) of the *Act* apply to the contracts at issue in this appeal?

[8] The third party appellant claims that the records are subject to the mandatory exemption in section 10(1) of the *Act*. The relevant parts of section 10(1) 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, where 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; or
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[9] Section 10(1) of the *Act* recognizes that in the course of carrying out public responsibilities, municipal bodies sometimes receive information about the activities of private businesses. The intent of section 10(1) is to protect the confidential "informational assets" of businesses or other organizations that provide information to such government institutions.[2] 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.[3]

[10] Section 42 of the *Act* provides that the burden of proof that a record falls within one of the specified exemptions in the *Act* lies with the head of the institution. Affected (third) parties who rely on the exemption provided by section 10(1) of the *Act* share the onus of proving that this exemption applies.[4]

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[2] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.).
[3] Orders PO-1805, PO-2018, PO-2371, and MO-1706.
[4] Order P-203.

[11] Markham's decision was to disclose the contracts, in their entirety. The only party resisting disclosure of the records in this appeal, therefore, is the company with which Markham signed the contracts. Consequently, the onus of proving that section 10(1) applies to the records lies with the third party appellant.

[12] For section 10(1) to apply, I must be satisfied that each part of the following three-part test is met:

> 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) or (d) of section 10(1) will occur.

[13] For the reasons set out below, I find that section 10(1) does not apply to the records.

Part 1: type of information

[14] The first requirement in the test for exemption under section 10(1) is that the records must contain one of the listed types of information.

[15] According to the appellant, both records contain commercial information concerning Markham's procurement of services for the collection, removal and disposal of curbside waste, recyclable and organic materials. The appellant submits that these records set out a detailed code for the supply of the collection and disposal services, including the responsibilities of each party. Further, the appellant argues that:

> There is little doubt that the fee rates set out in Schedule "B" of the Agreement, as well as Schedule "B" of the Amending Agreement constitute commercial and financial information. The prices listed in the schedules relate to the … selling and exchange of [the appellant's] services as well as the operation of its commercial business.

[16] The appellant also submits that the schedules contain financial information in the form of service fees, including an accounting for annual price escalations and hourly rates for the use of its vehicles. In support of the information qualifying as commercial and financial information for the purpose of part 1 of section 10(1), the appellant relies on Orders MO-1471 and PO-2806.

[17] In this appeal, I adopt the following definitions of these two types of information from past orders of this office:

> *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 (Order 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).

[18] Based on my review of the two contracts at issue, I am satisfied that they contain commercial information. Specifically, I am satisfied that the provisions of the contracts outline the terms, obligations and conditions of the buying, selling or exchange of services by Markham with respect to the appellant. These records represent the formalizing of the commercial relationship between Markham and the appellant for waste, recycling and organics collection and disposal services. Accordingly, I find that the records contain "commercial information" for the purpose of part 1 of the test in section 10(1).

[19] I am also satisfied that the records contain the financial information of the appellant for the purposes of the first part of the test under section 10(1). In particular, Schedule "B" of both agreements includes specific details about the pricing and fees to be applied to Markham's payments to the appellant under the contracts.

[20] Accordingly, I find that the requirements of part 1 of the section 10(1) test are established for the records in that they contain commercial information, as well as some financial information. I will now consider whether the records qualify as having been "supplied in confidence" to Markham for the purpose of part 2 of the test in section 10(1).

Part 2: supplied in confidence

[21] In order for me to find that the second part of the test under section 10(1) has been met, I must be satisfied by the evidence that the appellant "supplied" the information at issue to Markham in confidence, either implicitly or explicitly.

Supplied

[22] 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] 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]

[23] The contents of a contract involving an institution and a third party will not usually qualify as having been "supplied" for the purpose of section 10(1) because contracts are viewed as mutually generated, rather than "supplied" by the third party. This is the case even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not, therefore, considered to be "supplied."[7] This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above, and several other decisions.[8]

[24] 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 a third 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.[9]

Representations

[25] The appellant acknowledges that this office normally views the contents of contractual agreements between institutions and third parties as not having been "supplied" for the purpose of section 10(1). The appellant argues, however, that Markham erred in its access decision by applying "an excessively narrow and literal interpretation of the word 'supplied' which defeats the legislative purpose of protecting certain kinds of third party information…"

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[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.
[7] Orders MO-1706, PO-2371, PO-2384.
[8] *Supra*, footnote 2. See also Orders PO-2018, 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. Loukidelis*, [2008] O.J. No. 3475 (Div. Ct.).
[9] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis*, (cited above).

[26] The appellant suggests that in making its determination on the "supplied" issue, Markham ought to have asked itself:

- if it possessed the information before it was provided by the appellant; and
- if not, how would it have obtained that information had it not been provided by the appellant?

[27] Markham's decision is challenged because, in the appellant's view, staff "automatically concluded" that:

> … any third party information contained in a contract could not be said to have been "supplied" to the municipality, regardless of the nature of that information or how the information came into the possession of the municipality.
>
> If proprietary and confidential information came into the municipality's possession from the [appellant] and there was no other way for the municipality to have gained that information, the information should have been treated as "supplied."

[28] The appellant submits that Markham did not consider whether the immutability and/or inferred disclosure exceptions apply in the circumstances of this appeal, such that the terms of the contracts are to be considered "supplied" under section 10(1) of the *Act.* The appellant opposes disclosure because the agreements "contain proprietary information concerning [our] operating philosophy and methodology," as well as cost structure. According to the appellant:

> The Agreement includes detailed and extensive provisions with respect to [our] business and operating procedures which are embodied in Section 2 (Contractor's Responsibilities), Section 7 (Customer Service Procedures), Section 21 (Replacement and Additions to Existing Recycling Fleet), and Section 22 (Collection Equipment Modifications). Further, Schedule "B" to the Agreement contains detailed information about the [appellant's] service fees and unit prices. The Amending Agreement includes additional information about the [appellant] in the form of amendments to the above sections and schedule of the Agreement.

[29] The appellant maintains that the agreements were negotiated on a confidential basis and that both parties understood that the content, term and scope of the agreements would not be disclosed.

[30] The appellant notes that the requester is one of its competitors and maintains that disclosure of the records in this instance would not, therefore, enhance government transparency or accountability, as the *Act* intends. Further, the appellant

submits that the *Act*'s purpose is "not to disclose a private business entity's confidential information, contractual or otherwise, in order to provide a competitive advantage to another business entity."

Analysis and findings

[31] At issue in this appeal are the contracts signed in 1999 and 2004 by Markham with the appellant for the supply of collection, removal and disposal services of waste, recyclables and organic materials.

[32] As the appellant acknowledges, a long line of orders from this office has held that the terms of a contract between an institution and a third party are not usually considered to have not been "supplied" for the purpose of the second part of the test under section 10(1). The appellant also submits, correctly in my view, that the determination of whether information has been "supplied" ought not to be the result of an "automatic conclusion," based on the type of document in which the information appears.

[33] However, section 10(1) protects sensitive business information in a contract only where it is demonstrably the same confidential "informational asset" originally supplied by a third party, and not where the evidence points to that same information representing the negotiated intention of the parties.[10] Section 10(1)'s protection of the "informational assets" of a third party, therefore, requires review of the quality and nature of the information in the particular circumstances of each request to make this determination.

[34] Past orders are clear that absent persuasive evidence to the contrary, information in a contract is considered negotiated, not "supplied," despite having been initially drafted or delivered by a single party.[11] Indeed,

> ... information may originate from a single party and may not change significantly - or at all - when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied". The intention of s. 21(1)(b) [BC's equivalent to section 10(1) of the *Act*] 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, fortuitously, was not changed.[12]

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[10] Order MO-1450.
[11] Orders MO-1706 and PO-2371.
[12] See Order PO-2371, which provides a review of BC Order 01-20. This summary of the BC Commissioner's reasons in Order 01-20 is excerpted from the decision of *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 (B.C.S.C.).

[35] Here, the disputed portions of the agreements allegedly contain "detailed and extensive" information about the appellant's "business and operating procedures," "proprietary information" about its operating philosophy and methodology and also confidential "service fees and unit prices." I do not agree. I accept that some details or provisions in the agreements may appear in the same form they were provided to Markham during the negotiations leading to the contracts. However, based on my review of these records, including the specific provisions identified by the appellant, I find that the information in these agreements is similar to that contained in the type of supply contracts reviewed in past orders and found to have been negotiated, rather than "supplied." Both records set out mutually agreed-upon terms of reference, responsibilities, and procedures for the appellant's supply of collection, removal and disposal services to Markham. In my view, there is nothing contained in these two agreements which would distinguish them from the class of record referred to as the end product of a negotiation process.[13]

[36] Although the terms may reflect the operating procedures and/or approach employed by the appellant in supplying the required collection and disposal services to Markham, I do not accept the submission that these terms contain the appellant's "proprietary" information. Apart from identifying certain sections of the contracts as being of particular concern, the appellant does not provide sufficiently detailed evidence as to their content to persuade me that the service descriptions and responsibilities outlined are proprietary to the appellant, as opposed to being rather standard terms of this type of contract, as they appear. Based on the material before me, therefore, I am not satisfied that disclosure of any of the terms of the agreements would reveal, or permit the drawing of accurate inferences with respect to, any underlying non-negotiated confidential information supplied to Markham by the appellant.[14]

[37] I am also not persuaded that the agreements fit within the "immutability" exception to the "supplied" component of part 2 of the test in section 10(1). Specifically, I have not been provided with sufficient evidence to conclude that any of the information, including payments prescribed in Schedule "B" to both agreements, represents the appellant's "fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract" or

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[13] Order PO-2435.

[14] See Orders MO-1706 and PO-2371, both of which review BC Order 01-20, where BC's Information and Privacy Commissioner ordered the release of a contract regarding an exclusive sponsorship agreement between the University of British Columbia (UBC), its student society and a named third party for the supply of cold beverage products to UBC. The BC Commissioner spoke of an "exception to a general rule" called "inferred disclosure" in which negotiated information is not "supplied". In explaining the concept, he stated: "If the disclosure of information in a contract with a public body would permit an accurate inference to be made of underlying confidential information supplied by the contractor to the public body – such as the contractor's non-negotiated costs for materials, labour or administration – that inferred disclosure of information can be protected […].

something akin to its financial statements.[15] As the records do not contain this type of information, I find that the information in the agreements does not fit within the "immutability" exception.

[38] In the circumstances of this appeal, I find that the two contracts at issue do not meet the "supplied" requirement in part 2 of the section 10(1) test. Therefore, it is not necessary for me to address the "in confidence" component of part 2 of the section 10(1) test before concluding that this part has not been established. Further, since all three parts of the test under section 10(1) must be met in order for the exemption to apply, I find that section 10(1) does not apply to the records, and I order that they be disclosed to the original requester.

[39] In closing, I will address the appellant's concern about disclosure of information to a competitor. It is true that the purposes of the *Act* do not include disclosing the confidential information of a business "to provide a competitive advantage to another business entity." However, institutions are required to provide access to information in their custody or control "in accordance with the principles that information should be available to the public;" and that "necessary exemptions from the right of access should be limited and specific." The *Act* expressly recognizes that third party business information should be protected if it fits within the scope of the mandatory exemption in section 10(1). However, individuals or corporations doing business with government institutions must recognize that sometimes their business objectives are balanced with the concurrent objective of transparency in public matters. In turn, the important interest taxpayers have in knowing the terms of the agreements entered into by institutions on their behalf is acknowledged and affirmed.[16] The fact that this balancing under the *Act* may sometimes result in information being disclosed to the competitor of a party was addressed by Adjudicator Sherry Liang in Order MO-1393, as follows:

> … I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the "intimate details of our operation (costs and constraints) to our direct competition." There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the "informational assets" of the affected party and not of the Town. In these circumstances, the record is not exempt from the *Act*'s purpose of providing access to government information.

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[15] The "immutability" exception in use in Ontario regarding the third party information exemption was also reviewed in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, cited above, paragraphs 72 to 79.

[16] Orders PO-2435, PO-2758, MO-2490 and MO-2852.

[40] I agree. Section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace; however, it does not eliminate the prospect of disclosure of third party information that does not meet the requirements for exemption. Accordingly, given my finding that the requirements for the application of section 10(1) have not been met, I uphold Markham's decision that the agreements at issue do not qualify for exemption from disclosure under the *Act*.

ORDER:

1. I order Markham to disclose the records to the original requester by sending him a copy by **May 24, 2013**, but not earlier than **May 17, 2013**.

2. In order to verify compliance with this order, I reserve the right to require Markham to provide me with a copy of the records disclosed to the requester in accordance with provision 1 above.

Original signed by: April 18, 2013
Daphne Loukidelis
Adjudicator