Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2952

Appeal MA12-332

City of Toronto

September 25, 2013

Summary: The requester sought access to part of the appellant's submission in response to a request for quotation for the supply of occupational footwear to the city. The city issued a decision granting full access to the requested records. The appellant appealed the city's decision arguing that the records qualified for exemption under the mandatory third party information exemption in section 10(1) of the *Act*. This order finds that the records are not exempt under section 10(1) and it upholds the city's decision to disclose 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: PO-2435 and MO-2465.

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

Related Order: MO-2951.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the request for quotation (RFQ) submission of a named company for the supply of occupational footwear.

[2] The city located the responsive records. It then notified an affected third party of the request in accordance with section 21 of the *Act*, and invited the third party's views on disclosure of the responsive records.

[3] The third party provided representations to the city in which he raised the mandatory exemption in section 10(1) (third party information) of the *Act* and objected to the disclosure of the records.

[4] After considering the third party's representations, the city issued a decision granting the requester complete access to the responsive records. The city also advised the third party of its decision to grant access to the records and advised him of his right to appeal the decision to this office.

[5] The third party, now the appellant, appealed the city's decision to grant access to the price schedule contained within the RFQ in question.

[6] During the mediation stage of the appeal process, the appellant reiterated his objection to the disclosure of the records and his reliance on the mandatory exemption in section 10(1) of the *Act.* He asserted that disclosure of the records to the requester would reveal trade secret information about his company and that this information is commercial and financial in nature. The appellant also stated that he provided his RFQ submission to the city in confidence.

[7] The city maintained its position that the records should be disclosed, and it took the position that section 10(1) does not apply to the records at issue and that they should be disclosed to the requester.

[8] The requester advised the mediator that he wished to pursue access to the responsive RFQ records, including the price schedule.

[9] A mediated resolution of the appeal was not possible and the appeal was moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[10] The adjudicator originally assigned to this appeal sought representations from the appellant. As the party resisting disclosure of records which the city decided to disclose, the appellant in this appeal bears the burden of proving that the records at issue fall within the section 10(1) exemption. Despite being invited to provide representations, the appellant did not provide representations to support his position that the records are exempt under section 10(1) of the *Act.*

[11] The appeal was then transferred to me for final determination.

[12] In this order, I uphold the decision of the city and dismiss the appeal.

[13] I am issuing this order concurrently with related Order MO-2951, which involves the same parties as in this appeal but in opposite roles. The requester in this appeal is the appellant opposing disclosure of its RFQ submission in Order MO-2951, while the appellant in this appeal is the requester in Order MO-2951. Both this appeal and the appeal resulting in Order MO-2951 deal with the same RFQ process and the city's decision to disclose the requested records.

RECORDS:

[14] The records remaining at issue are the following five pages of the appellant's RFQ submission:

- page 1: Price Schedule "A"
- pages 2 through 5: Price Schedule, Part 2.

DISCUSSION:

[15] The sole issue for me to determine in this appeal is whether the mandatory exemption in section 10(1) of the *Act* applies to the information at issue in the price schedule records.

[16] 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; . . .

[17] 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]

[18] In order to establish that section 10(1) applies, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the city 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

[19] The 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]

[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.
[3] Order PO-2010.

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[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 type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[6]

[20] I adopt these definitions in this appeal.

[21] As noted above, the records consist of price schedules that relate to the sale of the appellant's merchandise to the city, which qualifies as commercial information, and contain information on the appellant's pricing practices, which qualifies as financial information. Accordingly, I find that the first part of the section 10(1) test has been met.

Part 2: supplied in confidence

[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.[7] 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]

[23] In order to satisfy the "in confidence" component of part two, the appellant, who is the sole party resisting disclosure, must establish that he had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[9]

[24] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, I must consider all the circumstances of the case, including whether the information was:

---

[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.
[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] Order PO-2020.

- 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]

[25] As noted above, the appellant did not provide representations in response to the Notice of Inquiry that was sent to him by this office. However, he did provide submissions to the city when first notified under section 21 of the *Act* of the request. I will rely on these submissions to the city in this appeal, as well as the information that the appellant provided to this office during the mediation stage of the appeal.

[26] In the submissions the appellant provided to the city, the appellant refers to a previous order of this office that dealt with the same footwear RFQ at issue in this appeal conducted by the city in 2002, Order MO-1861. The appellant notes the decision in Order MO-1861 to disclose the records because the "in confidence" requirement was not satisfied. Both the appellant and the requester in this appeal were affected third parties in Order MO-1861, and the records at issue in Order MO-1861 were the city's RFQ records containing a product summary, a summary of rejected footwear by supplier, and a bidder's price comparison. The decision in Order MO-1861 turned on the presence of a notice provision in the RFQ which invited bidders to identify confidential information, and the fact that the parties opposing disclosure in that appeal did not identify any information as confidential.

[27] The notice provision in Order MO-1861 is identical to the notice provision found in the RFQ at issue in this appeal. The notice appears at page 22 of the RFQ and states:

> The Municipal Freedom of Information and Protection of Privacy Act (the Act) applies to all tenders, quotations and proposals submitted to the City of Toronto. Tenders, quotations and proposals will be received in confidence subject to the disclosure requirements of the Act. Bidders/proponents should identify any portions of their tender/quotation/proposal which contain a trade secret, scientific, technical, financial, commercial or labour relations information supplied in confidence and which will cause harm if disclosed.

[10] Orders PO-2043, PO-2371 and PO-2497.

[28] The appellant states that in response to the notice provision, he included the following notation on his RFQ submission:

> *Please Note: With respect to the Municipal Freedom of Information and Protection of Privacy Act [the appellant's company] considers the PRICE SCHEDULE in this quotation to include trade secrets, technical and commercial information that is being supplie[d] in confidence and which will cause harm if disclosed.*

[29] In the circumstances, I am satisfied that the records at issue were "supplied" by the appellant to the city in response to the RFQ issued by the city. I am also satisfied that the appellant, who has been through this RFQ process before and who is familiar with the notice provision contained therein, had a reasonable expectation that the parts of his RFQ submission which he identified as confidential in accordance with the notice provision in the RFQ at the time that he completed and delivered his RFQ submission, were being supplied to the city "in confidence" and would remain confidential.

[30] Accordingly, I find that part two of the test has been met.

Part 3: harms

[31] To meet this part 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.[11]

[32] 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.[12]

[33] 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).[13] 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*.[14]

[34] As I have noted above, the appellant was invited to provide representations during the inquiry into this appeal but chose not to.

---

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

Analysis and findings

[35] In the absence of any representations from the appellant on this part of the test, I am left to consider the records themselves and the materials in the appeal file, including the submissions the appellant provided to the city after receiving notice of the request. In these submissions, the appellant asserts that disclosure of the information at issue could reasonably be expected to cause the harms noted in sections 10(1)(a), (b) and (c). He also submits that while the total or global costs of a successful RFQ submission are generally revealed to the public, the specific unit cost pricing is not revealed in order to maintain a competitive process.

[36] Regarding section 10(1)(a), he states that disclosure of the records would "clearly and significantly prejudice [his company's] competitive position" because the requester would know the precise details of "the merchandise (safety footwear) designed, sourced and supplied and would have the detailed unit pricing of the specially designed merchandise." He continues that the requester would also have the unit pricing of the generic footwear he is offering, and would thus be able to calculate his business margins and be in a position to unfairly compete with his company for future business. The appellant asserts that disclosure would "dramatically affect [his] business, resulting in lost sales and reduced profits." The appellant relies on Order M-572 to argue that his competitors could use the information in the records to enhance or design their own proposals bypassing the considerable expense of research and development, and develop a strategy to use against his company in future bid situations.

[37] With respect to section 10(1)(b), the appellant states that disclosure of the records would act as a "barrier and disincentive to future competitive bidding by suppliers of safety footwear to the city" as suppliers "would not be inclined to expend resources, time and effort to prepare competitive bids" and the city would thus lose the benefit of obtaining competitively priced bids for safety footwear. The appellant asserts that disclosure would therefore disadvantage municipal taxpayers.

[38] Finally, the appellant submits that disclosure would result in undue loss to his company as contemplated by section 10(1)(c). He relies on Order M-145 to argue that disclosure would result in lost sales and profits for his company, while his competitors would experience corresponding gains in their financial position.

[39] Bearing in mind the appellant's decision not to provide representations in this appeal, and having reviewed the appellant's submissions to the city and all of the information contained in the materials before me in this appeal, I find that I have not been provided with detailed and convincing evidence of harm as required to satisfy the last part of the test under section 10(1).

[40] The orders mentioned by the appellant in his submissions to the city are orders that were issued almost two decades ago, prior to this office's adoption of the words "detailed and convincing" to describe the quality and cogency of the evidence required to satisfy the onus of establishing a reasonable expectation of harm.[15] In this appeal, the appellant has not provided detailed and convincing evidence to establish that disclosure of the records could reasonably be expected to result in harm to his company's competitive position or in undue loss to his company, or in similar RFQ information no longer being supplied to the city. At best, the appellant's submissions to the city contain general assertions about the alleged harms that are speculative, and that mostly repeat the words of the *Act.*

[41] Previous orders of this office have consistently held that the disclosure of information contained in proposals, including unit prices, that could give competitors an advantage over third parties by giving them the ability to adjust future bids, does not automatically establish the harms in sections 10(1)(a) and (c).[16] This finding was articulated by Assistant Commissioner Brian Beamish in Order PO-2435 where he considered the provincial equivalent of section 10(1) and stated:

> While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1)(a), (b) and (c), this is not such a case. Simply put, I find that the institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a), (b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.
>
> I also accept that the disclosure of this information 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 process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

---

[15] Following the decision of the Court of Appeal for Ontario in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.) at paragraph 26.

[16] Orders PO-2435 and MO-2465.

[42] I adopt Assistant Commissioner Beamish's reasoning in this appeal. I accept that disclosure of the appellant's pricing and product details may subject his company to more competitive bidding processes for future contracts. However, following the reasoning of Assistant Commissioner Beamish, I do not accept that increased competition for government contracts establishes a reasonable expectation of significant prejudice to the appellant's competitive position. I also note that the RFQ in this appeal has been completed and the appellant was one of the successful bidders, as was the requester. Furthermore, the appellant was granted access to the price schedule information in the requester's RFQ submission by the city on the grounds that it too did not qualify for exemption under section 10(1), a decision that I uphold in related Order MO-2951. Accordingly, the parties will be on equal competitive footing regarding any future RFQs because they will be aware of each other's pricing as a result of this order and Order MO-2951. Finally, this appeal is almost identical to the one dealt with in Order MO-1861, in which the parties in this appeal were also parties, the same occupational footwear RFQ of the city was at issue, and the records at issue, similar to those at issue in this appeal, were ordered disclosed. The appellant's evidence does not identify any resulting harm from the disclosure ordered in MO-1861.

[43] For the reasons set out above, I find that the appellant has failed to establish part three of the test under section 10(1). I also find that the records themselves do not establish the harms. Moreover, this is not a case where exceptional circumstances exist such that the alleged harms can be inferred. Accordingly, I uphold the city's decision to disclose the records on the basis that they are not exempt under the third party information exemption in section 10(1) of the *Act.*

ORDER:

1. I uphold the city's decision to disclose the records and I dismiss this appeal.

2. I order the city to disclose the records at issue to the requester by **October 30, 2013**, but not before **October 25, 2013**.

Original signed by: September 25, 2013
Stella Ball
Adjudicator