

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2889

Appeal MA11-111

The Corporation of the Town of Cobourg

May 30, 2013

Summary:

The appellant sought access to a transportation services contract between the Town of Cobourg and an affected party. After notifying the affected party, the town denied access to the responsive record. The appellant appealed the town's decision. During the mediation stage of the appeal process, the town raised the application of section 10(1) (third party information) to the record, in its entirety, and under section 14(1) (personal privacy) to portions of it. The appellant subsequently narrowed his request to specific portions of the record. The adjudicator finds that the section 10(1) and 14(1) exemptions do not apply to the information at issue.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 2(1) (definition of "personal information"), 10(1), 14(1).

Orders and Investigation Reports Considered: PO-2435, PO-2453, MO-2715.

OVERVIEW:

[1] The Corporation of the Town of Cobourg (the town) received an access request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a "copy of contract and amendments with [a named party (the affected party)] for transportation services for the town of Cobourg, for 2010-2014."

[2] Prior to issuing an access decision, the town notified the affected party, in accordance with section 21(1) of the *Act*, seeking its views regarding disclosure of the responsive record. The affected party objected to the disclosure of its information contained in the record. The town subsequently issued an access decision advising the requester and the affected party of its decision to deny access to the responsive record, in its entirety, as "disclosure of the records could reasonably be expected to cause one of the harms listed in [the *Act*]."

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

[4] During the mediation stage of the appeal process, the mediator invited the affected party to consent to the disclosure of the record at issue. The affected party once again declined to provide its consent. The town confirmed its decision to deny access to the record in its entirety, raising the application of the mandatory exemptions in section 10(1) (third party information) to the entire record and section 14(1) (personal privacy) to some of the withheld information.

[5] The appellant confirmed that he is not seeking access to the names, positions, educational backgrounds and experience of those individuals listed in the record at pages 3A, 3B, and 3C. Accordingly, this information, denied under section 14(1), was removed from the scope of the appeal. However, the remaining information severed under section 14(1) continued to be at issue.

[6] The parties were unable to resolve the appeal during the course of mediation. The appeal was transferred to the adjudication stage of the appeal process for an inquiry, in which an adjudicator invites the parties to make written representations on the issues under appeal followed by the issuance of a written decision.

[7] I was assigned to adjudicate the appeal and I commenced my inquiry by issuing a Notice of Inquiry seeking representations from the town and the affected party on the application of the mandatory exemptions in sections 10(1) and 14(1).

[8] The town chose to not submit representations. The affected party submitted representations on the application of section 10(1). With regard to the application of the exemption in section 14(1), the affected party took the position in its representations that this exemption is no longer at issue since the appellant had indicated that he is no longer interested in any of the information to which section 14(1) had been applied.

[9] I then sought representations from the appellant. As it was my understanding, based on my review of the file, including the record at issue, that the appellant may still be interested in portions of pages 3B, 3C and 43 to which section 14(1) was applied (namely, those portions of the record that contain information about various payment rates), I sought representations from the appellant on the application of section 14(1)

to the information remaining at issue on pages 3B, 3C and 43, as well as the application of section 10(1) to all of the remaining information at issue in the record.

[10] The appellant responded with representations that addressed the application of sections 14(1) and 10(1) to the information at issue in the record. In his representations, the appellant clarified that he wished to narrow the scope of his request to include only the information at issue on pages 10-17, 41 and 43. The appellant confirmed that he was no longer interested in those portions of pages 3B and 3C at issue under section 14(1). The appellant also confirmed that he remained interested in the information remaining at issue on page 43 that had been withheld under section 14(1).

[11] In the discussion that follows, I find that section 10(1) does not apply to the information at issue on pages 10-17, 41 and 43 of the record and that section 14(1) does not apply to the information at issue on page 43 of the record. I order the disclosure of pages 10-17, 41 and 43, in their entirety, to the appellant.

RECORDS:

[12] There is one record at issue, a 54-page contract. Pages 10-17, 41 and 43 of that contract remain at issue. The town has claimed the application of section 10(1) to all of the above pages and section 14(1) to portions of page 43.

ISSUES:

- A. Does the mandatory exemption under section 10(1) apply to the withheld portions of the record at issue?
- B. Does page 43 of the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory exemption under section 14(1) apply to the withheld portions of page 43 of the record?

DISCUSSION:

A. Does the mandatory exemption under section 10(1) apply to the withheld portions of the record at issue?

[13] The town and the affected party claim that section 10(1) applies to the information remaining at issue in the contract between the town and the affected party: pages 10-17, that contain pricing information for both the five year agreement period and an five year optional extension term; page 41, titled Schedule "G", that provides the fare structure for regular transit; and page 43, titled Schedule "I", that provides a

summary of the payment rates set out on pages 10-17 for the five year agreement period and the five year optional extension term.

[14] 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, 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;
- (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.

[15] 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 the disclosure of confidential information of third parties that could be exploited by a competitor in the market place.²

[16] For section 10(1) to apply, the institution and/or affected 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;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2581 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

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

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

[17] Past orders of this office have defined commercial information 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.³ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁴

[18] I adopt this definition for the purposes of this appeal.

[19] The record at issue relates to a commercial contract for the provision of transportation services by the affected party to the town. The portions of the record at issue contain pricing information related to the provision of these services. The affected party describes this information as commercial information, as it relates to the “exchange of services between [it and the town] that resulted in the creation of a contract between the parties that is the responsive record in this appeal.” I find that these portions of the record contain commercial information for the purposes of section 10(1).

[20] Accordingly, the first part of the test for the application of section 10(1) has been met.

Part 2: Supplied in Confidence

Supplied

[21] 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

[22] 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

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order MO-1706.

⁶ Orders PO-2020, PO-2043.

[23] 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)*.⁷

[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 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

[25] 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

[26] 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

[27] As stated above, the town declined to make representations.

⁷ *Supra* note 5. 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*, [2008] O.J. No. 3475 (Div. Ct.).

⁹ Order PO-2020.

¹⁰ Orders PO-2043, PO-2371, PO-2497.

[28] In its representations, the affected party submits that "much of the information in question" is "immutable information" that it supplied to the town within the meaning of section 10(1). The affected party adds that where such information is not immutable, its disclosure would "necessarily reveal immutable [information] supplied to the [t]own by [the affected party]."

[29] With regard to the particular information at issue, the affected party states:

- Pages 10-17 provide a detailed description of the affected party's "costing estimates" for a five year term that are based on "fixed rates" for operating vehicles that were not the subject of negotiations between the parties. To disclose this information would "necessarily disclose the fixed vehicle operating costs" that it supplied to the town. In particular, disclosing the "estimated annual hours and the estimated annual rate would necessarily reveal the fixed costs upon which the estimated annual rate is based."
- Page 41 (Schedule "G") contains information regarding the "fare structure" to be charged by the affected party. It is "based upon the fixed operating costs of [the affected party], which were not the subject of negotiation between the parties." Disclosure of this information "would reveal the fixed costs used to generate the fares."
- Page 43 (Schedule "I") "lists in detail the payment rates over the term of the agreement." The rates are based upon the affected party's fixed operating costs and disclosure of this information "would reveal [the affected party's] operating costs."

[30] With regard to the "in confidence" part 2 of the test, the affected party states that it supplied this information to the town in confidence, or at least with a reasonable expectation that it would be held in the strictest confidence and used only to determine the suitability of its bid for the service contract.

[31] Turning to my analysis, while I accept that the affected party had an implicit – and perhaps even an explicit – expectation of confidentiality when it submitted its bid, I find that the information at issue was not supplied for the purposes of the section 10(1) exemption.

[32] Numerous decisions of this office have considered whether pricing information contained in a contract or bid proposal meets the "supplied" portion of the section 10(1) test. The most recent line of decisions have clearly established that pricing information that is contained in a third party bid, which is then accepted by an institution and included in a contract for services, is "negotiated" information. By accepting the pricing as stated in the bid and including it in a contract for services, the institution has agreed

to it and the pricing information constitutes the essential terms of a negotiated agreement.¹¹

[33] In Order PO-2435, Assistant Commissioner Brian Beamish considered the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to government RFP's, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. After carefully reviewing the records and representations, he rejected that argument and concluded that the government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. 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 [Vendor of Record] 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. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.¹²

[34] Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part two of the test under section 17(1) (the equivalent to section 10(1) in the provincial *Act*) to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other items, the record at issue in PO-2453 contained the successful bidder's pricing for various components of the services to be delivered as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were not "supplied" pursuant to part 2 of the test under section 17(1), Adjudicator Corban stated:

Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a

¹¹ See PO-2435, PO-2453 and MO-2715

¹² Order PO-2435, page 7.

contract for services, the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

Additionally, having reviewed the information at issue, I do not find, nor have I been provided with any evidence to show, that any of the information at issue is "immutable" or that disclosure of the information, including the pricing information, would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied to the Ministry by the affected party. I have also not been provided with any evidence to show that the pricing information reflects the affected party's underlying costs. In fact, in my view, the information contained in the record itself appears to point to the opposite conclusion that the amounts charged by the affected party are for the provision of particular services.¹³

[35] The above excerpt from Order PO-2453 emphasizes that the exemption in section 10(1) is intended to protect information belonging to an affected party that *cannot* change through negotiation, not that which could, but was not, changed.¹⁴

[36] Finally, in Order MO-2715, Assistant Commissioner Beamish revisited this issue in the context of pricing information contained in a contract between a government agency and the selected vendor for the installation of red light cameras in the city of Hamilton. In finding that the pricing information did not meet the supplied test under section 10(1), Assistant Commissioner Beamish states:

Following my reasoning in Order PO-2435, I find that the "Item Unit Costs" and "Estimated Unit Costs" in Schedule A and the "Unit Costs" and "Total Costs" from the Price Detail Form cannot be considered to have been "supplied" to the city. Even though the affected party claims that there was no negotiation over the price, the fact that the city had the option to accept or reject the affected party's bid in response to the RFP leads me to conclude that the costs were subject to negotiation.

Furthermore, I am not convinced that the disclosure of the information withheld from Schedule A and the Price Detail Form would somehow permit an individual to accurately infer the non-negotiated confidential information that the affected party supplied to the city. According, based on my review of Schedule A and the Price Detail Form, I find that the information withheld reflects the negotiated agreement between the city

¹³ Order PO-2453, page 7.

¹⁴ See *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.); Orders PO-2371, PO-2433 and PO-2435.

and the affected party for the provision of services to operate the red light cameras.¹⁵

[37] I accept the approach taken in the above decisions and apply it in this case. While the affected party has argued that the pricing information at issue was not the subject of negotiations between the parties, I find that this information represents negotiated terms since the town had the option to accept or reject the affected party's pricing in consummating an agreement. As well, with regard to the affected party's argument that revealing the pricing information would reveal its fixed operating costs, I am not convinced that this is the case. In particular, with regard to the "costing estimates" and "fixed rates" set out in pages 10-17 and the "payment rates" provided in page 43, I am not satisfied that disclosure of this information would provide insight into the affected party's underlying fixed operating costs, including costs for gas, insurance and staffing, that form the basis of these rates. Finally, with regard to the "fare structures" set out in page 41, I am not convinced that this information, which is clearly already in the public domain, would reveal the affected party's underlying costs.

[38] Accordingly, having found that the information at issue on pages 10-17, 41 and 43 was not supplied, the affected party has not met part two of the test for the application of section 10(1). As all parts of the test for the exemption under section 10(1) must be satisfied, the information at issue is not exempt and must be disclosed in full to the appellant, subject to the possible application of section 14(1) to the information withheld on page 43.

B. Does page 43 of the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[39] In order to determine whether section 14(1) of the *Act* may apply to the information at issue on page 43 of the record, it is necessary to decide whether this page contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to

¹⁵ Order MO-2715, page 13.

financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[40] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

[41] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[42] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

[43] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

[44] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[45] As previously stated, the town declined to provide representations in this appeal. The affected party provided representations on the application of section 10(1) to page 43, but declined to provide representations on the application of section 14(1), including the threshold question of whether any of the information at issue qualifies as "personal information", despite being invited to do so. Accordingly, in determining whether the information at issue on page 43 qualifies as "personal information", and is exempt under section 14(1), I am required to conduct my analysis and make findings primarily on the basis of my review of the information in question.

[46] Having carefully reviewed page 43, I find that the information contained on that page does not qualify as personal information since the information is not about an identifiable individual. The information on this page is "commercial information". The affected party has itself asserted, in the discussion of the section 10 third party exemption above, that the information at issue constitutes "commercial information" and I reached that conclusion in my discussion of that exemption.

[47] In my view, it is clear that the information on page 43 constitutes "commercial information" that sets out the "payment rates" to be paid by the town to the affected party pursuant to the terms of a transportation services agreement. I have no evidence before me that suggests that the disclosure of this information would reveal personal information about an identifiable individual, such as, the hourly wage rates of individual drivers, or that an assiduous observer could discern any personal information from the payment rates.

[48] Therefore, I conclude that the information at issue on this page is not personal information. Having reached this conclusion, I need not examine the application of the exemption in section 14(1), as set out in issue C above, since that exemption can only apply to personal information.

[49] Accordingly, I will order the release of the information on page 43 to the appellant.

ORDER:

1. I find that pages 10-17, 41 and 43 of the record at issue do not qualify for exemption under section 10(1) and that page 43 does not qualify for exemption under section 14(1).
2. I order the disclosure of pages 10-17, 41 and 43 in their entirety to the appellant by **July 5, 2013** but not before **June 28, 2013**.
3. I remain seized of this matter to enable me to verify compliance with Provision 2 of this order.

Original Signed By: _____

Bernard Morrow
Adjudicator

_____ May 30, 2013