

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-2896-I

Appeal MA12-144

Town of Halton Hills

June 10, 2013

Summary: The requester sought records relating to a Request for Proposal. The town denied access to portions of the records in reliance on the mandatory exemption in section 10(1) (third party information), the discretionary exemption in section 11 (economic and other interests of the institution) and the mandatory exemption in section 14(1) (personal privacy). This order does not uphold the application of the section 11 exemption, and partially upholds the application of the section 14(1) exemption, to one set of records. A determination about whether any of the records are exempt under section 10(1) is deferred pending further notification to the affected parties.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 11(c), 11(d), 14.

OVERVIEW:

[1] The Town of Halton Hills (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specified Request for Proposal (RFP). In particular, the requester sought access to "all submissions received for this RFP" and "all scorecards, notes, minutes from meetings, etc. related to the Town's evaluation and decisions pertaining to this RFP" (referred to here as the "evaluation records").

[2] Prior to making its decision, the town notified thirteen parties whose interests may be affected by disclosure of the requested records (the affected parties), in accordance with section 21(1) of the *Act*. Ten affected parties made submissions to the town objecting to any disclosure of the requested records, while three affected parties consented to partial disclosure of the requested records. The town subsequently issued an access decision advising the requester of its decision to disclose some of the submissions received for the RFP, in part, citing section 10(1) of the *Act* (third party information) to deny access to the remaining parts of the RFP submissions. The town denied access to the evaluation records pursuant to sections 10(1) and 11 (economic and other interests). In its decision letter, the town advised the requester that the fee for processing the request was \$243.40.

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

[4] During the mediation stage of the appeal process, the appellant narrowed the first part of her request to the RFP submission made by the affected party that was the successful candidate in the RFP process (the successful candidate) only. She continued to pursue access to the evaluation records. She confirmed that the fee charged by the town is not at issue in this appeal.

[5] As mediation did not resolve the appeal, it was transferred to the inquiry stage of the appeal process. I initially sought representations from the town and the thirteen affected parties on the issues set out in the Notice of Inquiry sent to them.

[6] Three affected parties, including the successful candidate, provided representations. The successful candidate provided representations detailing, by page number, the portions of its winning RFP submission that it sought to have withheld from the appellant on the basis of the exemptions at sections 10(1) and 14(1) (personal privacy) of the *Act*. The two other affected parties each objected to the disclosure of any responsive records pertaining to them.

[7] The town submitted representations in response to the Notice of Inquiry in which it effectively made a new decision on access. Its new decision is to grant partial access to both sets of records at issue in this appeal, while withholding portions of the winning RFP submission on the basis of sections 10(1) and 14(1) of the *Act*, and portions of the evaluation records on the basis of sections 11 and 14(1) of the *Act*.

[8] In view of this development, I again contacted the affected parties to notify them of the town's representations and to provide them with an opportunity to indicate whether they agree or disagree with the town's new position on disclosure. I understand that some of the affected parties contacted the town to clarify the nature of the information in which they have an interest and the town provided them with copies of the portions of the records relating to them, while severing the portions it claimed were exempt under sections 11 and 14(1).

[9] I subsequently received representations from the successful candidate and two affected parties (who are different affected parties than the two that responded to the original Notice of Inquiry).

[10] One affected party agreed to the town's proposed redactions to the portions of the record pertaining to it, while taking no position on disclosure of the winning RFP submission (as that record does not relate to it). The second affected party agreed to the town's proposed redactions to the portions of the record pertaining to it, but also proposed additional redactions. The second affected party also took no position on disclosure of the winning RFP submission, as that record does not relate to it.

[11] In its representations on the town's new position on disclosure, the successful candidate stated that it takes no exception to the town's representations but indicated that it continues to rely on its previous representations setting out its own proposed redactions to the winning RFP submission. Thus, in addition to the town's proposed redactions to this record, the successful candidate seeks to have additional information withheld. The successful candidate's proposed redactions include portions of the record revealing the number of employees, its competitive corporate philosophy, results of past bids, financial and other information concerning past projects and the names, titles and education and employment history of certain employees. As noted above, the successful candidate relies on sections 10(1) and 14(1) of the *Act* for its proposed redactions to this record. The successful candidate made no specific representations on the town's position on disclosure of the evaluation records.

[12] In this order I do not uphold the application of section 11 to the evaluation records. I uphold the application of section 14(1) to personal information relating to the employment history of certain individuals, but do not uphold its application to information that amounts to business identity information under section 2(2.1) of the *Act*.

[13] In rejecting the application of section 11 to the withheld portions of the evaluation records, I must go on to consider whether section 10(1) may apply to that information, as those portions contain information in which the affected parties have an interest. However, as the notification packages the town sent to the affected parties severed these portions, the affected parties have not yet had a chance to consider their position on the application of section 10(1) to those portions, or to make representations on them. The result of this interim decision, therefore, is that the town will be directed to provide notice to the affected parties of the potential disclosure of those portions in which they have an interest.

RECORDS:

[14] The records are grouped as follows:

1. Winning RFP submission (64 pages). I will defer my determinations with respect to this record pending further notification as a result of my findings below.
2. Evaluation records (155 pages). This group consists of a chart summarizing the financial submissions of all thirteen affected parties, notes of meetings in which town's evaluation committee reviewed the proposals by the affected parties, notes of interviews with the shortlisted affected parties, correspondence, interview questions, and scoresheets/evaluation spreadsheets for all affected parties.

ISSUES:

Issue A: Does the discretionary exemption at section 11 apply to the records?

Issue B: Did the institution exercise its discretion under section 11? If so, should this office uphold the exercise of discretion?

Issue C: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

Issue D: If the records contain personal information, does the mandatory exemption at section 14(1) apply?

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Issue A: Does the discretionary exemption at section 11 apply to the records?

[15] The town submitted detailed representations on the application of the section 11(c) and (d) exemptions, and took the position that the disclosure of the evaluation records (scorecards, notes and minutes) qualify for exemption under these sections.

[16] The relevant provisions of section 11 read:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

[17] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.

[18] As acknowledged by this office in many past orders, the disclosure of procurement information must be approached with an "appreciation of the commercial realities of a procurement process and the nature of the industry in which procurement occurs."¹

[19] The strength of the institution's or affected party's evidence in support of non-disclosure must, however, be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability.² 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 11.³

[20] Thus, for sections 11(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.⁴

[21] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁵

¹ Orders PO-2987, MO-1888.

² Orders PO-2987, MO-2496-I.

³ Orders MO-1947 and MO-2363

⁴ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

⁵ Order MO-2363.

[22] The town's submissions describe three categories of information whose disclosure could give rise to the harms described in sections 11(c) or (d).

Section 11(c): prejudice to economic interests

[23] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁶

[24] The town submits that disclosure of the first category of information in the evaluation records could reasonably be expected to prejudice its economic interests or competitive position, within the meaning of section 11(c). This category includes details of the pricing provided by the bidders in relation to the current project, as well as pricing on previous projects performed by them. Information about the pricing proposals for the current project is found in a chart covering all bidders, as well as handwritten on the evaluation spreadsheets by members of the evaluation committee. These spreadsheets also include information about previous projects performed by some bidders, in some instances noting the value of these projects.

[25] The town states that disclosure of such bid details and pricing information will dissuade these bidders, some of whom are "very significant names in industry," from bidding on future RFPs tendered by the town. As a result, the town submits, the resultant decrease in competition "can only result in an increase in the cost of future Projects".

[26] One of the affected parties echoes the town's submission above. It expresses a concern about the potential release of the following type of information:

- Full financial history of the company;
- Previous projects, including project values, contract information, photos, etc.;
- Worker safety records;
- Cost estimate including breakdown; and
- Personal employee information and resumes.

[27] This company submits that release of this information would be detrimental to the public "for future projects with similar RFP's":

If the bidders hear about this information becoming public, it is likely that some or all of them may not return for future RFP's. This will result in

⁶ Orders P-1190, MO-2496-I and MO-2233.

higher bid closing numbers, due to fewer bidders. The information contained in the request can be used against other bidders by any number of companies/agencies/etc. and we strongly discourage the distribution of such information.

Section 11(d): injury to financial interests

[28] In support of its claim that section 11(d) applies, the town alleges that disclosure of certain financial and scoring information (the second category), along with subjective "candid" comments by the evaluation committee (the third category), could reasonably be expected to be injurious to the town's financial interests. With respect to both categories, the town submits that the members of the evaluation committee had a reasonable expectation that their comments, records and notes would be treated confidentially, and were told as such in their instructions. Without such an expectation, it states, the members of the committee would have been reluctant to provide their candid assessment of each bidder.

[29] With reference to two specific comments by way of example, which contain information about previous projects performed by a bidder, the town states that these comments made by a member of the committee are not substantiated. If the entries are accurate (and assuming these comments would not have been made without the assurance of confidentiality), the town may have awarded the tender to a bidder that did not merit it. Alternatively, if the comments were not accurate, their disclosure could have adverse effects for the town or the members of the committee.

Analysis

[30] In the circumstances of this appeal, I find I have not been provided with clear and convincing evidence establishing a reasonable expectation of the harms described in section 11(c) and (d), for any of the three categories of information of concern to the town.

[31] The first category is the financial information about each of the bids, as summarized in a chart as well as referred to in the evaluation spreadsheets. Although the town states that disclosure of these costing details will "most certainly" result in fewer bids on future projects, resulting in the harm described in section 11(c), it provides no other support for this broad statement and I find that this statement alone does not provide clear and convincing evidence in support of this exemption claim.

[32] As indicated above, one of the affected parties supported the town's concern about the impact of disclosure of certain information on the willingness of companies to participate in future RFPs but, in expressing this concern, it identified a number of types of information, most of which are absent from the evaluation documents. For instance, it objects to disclosure of the "full financial history of the company"; however, this

information is not found in the evaluation records. Further, although the records mention prior projects undertaken by this affected party, there is no information about the project values or other contract information. There is also no information about "worker safety records" in the records at issue.

[33] One of the types of information listed by this affected party, the personal information of its employees, is in any event exempt from disclosure under section 14(1) (see below). I thus do not place great weight on this affected party's submission as to the harms that may follow from disclosure, and do not find it to be clear and convincing evidence in support of the application of this exemption.

[34] The second category of information includes notes made by members of the evaluation committee about the bidders during the course of their assessment of the proposals, as well as scoring information. The town's submission on this category of information is essentially that the members of the committee understood that their comments, records and notes would remain confidential and that without this understanding, they would have been reluctant to provide candid assessments. This, in its submission, could reasonably be expected to result in harm to the town's financial interests within the meaning of section 11(d).

[35] I am not convinced that this amounts to clear and convincing evidence of a reasonable expectation of harm as asserted. It would be reasonable to expect that members of such committees, all of whom in this case are town employees, will continue to perform their roles responsibly, provide any necessary rationale for their assessments and act with the best interests of the town in mind. I am not convinced that the willingness or ability to provide candid assessments would be so greatly affected by disclosure of this information that these individuals would withhold important information as part of their assessments, leading to a reasonable expectation of harm to the town's financial interests. I also find the town's submission about other adverse consequences from disclosure of potentially inaccurate information to be speculative.

[36] The third category of information overlaps with the above, and includes subjective comments made by members of the evaluation committee in their notes. The town's submissions on the application of section 11(d) to this information are the same as those made with respect to the second category. For the same reasons given above with respect to the second category, I am not convinced that there is clear and convincing evidence that disclosure of this information could reasonably be expected to result in injury to the town's financial interests.

[37] Accordingly, I find that disclosure of these records could not reasonably be expected to result in the harms described in sections 11(c) and (d). The evaluation records therefore do not qualify for exemption under section 11.

Issue B: Did the institution exercise its discretion under section 11? If so, should this office uphold the exercise of discretion?

[38] As I have found that the section 11 exemption does not apply, it is unnecessary to consider this issue.

PERSONAL PRIVACY

Issue C: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[39] In order to determine whether the personal privacy exemption at section 14(1) applies, it is first necessary to decide whether the record 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 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.⁷

[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 (3) 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.⁸

[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.⁹

[44] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.¹⁰

[45] The town submits that the evaluation records contain the names and positions of identifiable individuals and, in some instances, information about their employment

⁷ Order 11.

⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁹ Orders P-1409, R-980015, PO-2225 and MO-2344.

¹⁰ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

history. The town does not address the application of section 2(2.1) of the definition of "personal information".

[46] None of the affected parties made submissions specifically on these portions of the evaluation records.

[47] On my review of the evaluation records, I find that some of the information about identifiable individuals falls squarely under section 2(2.1), insofar as it simply names the individual who is the contact person for an affected party. This information therefore does not qualify as personal information.

[48] However, in other cases, references to named employees are accompanied by other information about their work experience, either in the same part of the record, or elsewhere in the records. The town has submitted that this information qualifies as "employment history" within the meaning of subsection (b) of the definition of personal information. The town also severed telephone numbers of some individuals, on the basis that it is their personal information. I accept the town's submissions and, on the basis of my review and in the absence of any evidence or submissions suggesting otherwise, find that the above-described information qualifies as the personal information of these employees.

Issue D: Does the mandatory exemption at section 14(1) apply to the information at issue?

[49] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[50] I find that the only exception that might apply to the information is paragraph (f), which provides for an exception to the mandatory exemption if disclosure would not constitute an unjustified invasion of personal privacy.

[51] The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[52] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.¹¹

¹¹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[53] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring *disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.¹²

[54] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹³

[55] No party has made representations with respect to the application of the presumptions and factors in section 14. In this case, based on my finding that some of the personal information in the records relates to employment history, it is arguable that disclosure of this information would be presumed to be an unjustified invasion of privacy under section 14(3)(d). But even if no presumption applies, I have been referred to no factors under section 14(2) favouring disclosure of the information.

[56] In the circumstances, therefore, it has not been established that any of the exceptions to the mandatory personal privacy exemption applies and the information at issue is exempt from disclosure.

CONCLUSION

[57] I find that section 11 does not apply to the information at issue in the evaluation records. However, I will not order disclosure of the information, pending my determination of whether it is exempt under section 10(1).

[58] I find that some of the information claimed to be personal information is not personal information. Again, I will not order disclosure of the information, pending my determination of whether it is exempt under section 10(1). The information that I have determined qualifies as personal information is exempt from disclosure under the mandatory section 14(1) exemption.

[59] I will order the town to provide written notice to the affected parties of the potential disclosure of the information in the evaluation records for which the sections 11 and 14(1) exemption claims were not upheld, and I will provide those parties with an opportunity to make submissions on the application of section 10(1) to that information.

¹² Orders PO-2267 and PO-2733.

¹³ [Order P-99].

[60] I defer my decision on disclosure of the winning RFP submission and the other records remaining at issue, pending this further notification.

ORDER:

1. I uphold the application of the section 14(1) exemption to the information I have determined is personal information. Along with a copy of this order, I am providing the town with a copy of the evaluation records highlighting the personal information that I have found exempt under this section.
2. I find that section 14(1) does not apply to information I have determined is not personal information.
3. I find that section 11 does not apply to the evaluation records.
4. I order the town to provide written notice to the affected parties of the potential disclosure of the portions of the evaluation records in which they have an interest, for which the sections 11 and 14(1) exemption claims were not upheld. This notice must be provided to the affected parties by **July 2, 2013**, and a copy of it sent to my attention.
5. By providing the affected parties with a copy of this order, they are invited to submit representations on the possible application of the section 10(1) exemption to the information I have not found exempt under sections 11 and 14(1). The affected parties should refer to the discussion of the section 10(1) exemption and the sharing of their representations in the Notice of Inquiry previously sent to them. Their submissions must be received by me within 3 weeks of the date of the notice from the town.
6. I remain seized of the issues in this appeal pending final determination of all outstanding issues.

Original signed by: _____
Sherry Liang
Senior Adjudicator

_____ June 10, 2013