

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2951

Appeal MA11-491

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: M-845 and MO-1861.

Related Order: MO-2952.

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information regarding a specified request for quotation (RFQ) for safety and occupational footwear:

From the submission made by [named company], I request copies of the following pages of their quotation: Pages 1, 10, 14, 15, 20, 21, 28, 34, 41 through 58, 65, plus pages 2, 3, 4, 5 of the Price Schedule which was part of Addendum No. 1 for this quotation.

[2] The city located records that were responsive to the request. It notified the named company and obtained its views on disclosure. The city then issued a decision granting complete access to the responsive records. In making its decision, the city noted the similar circumstances in Order MO-1861, which dealt with the same RFQ several years earlier, and the present appeal. The city also noted the finding in Order MO-1861 that the bidders in the 2002 RFQ at issue in that appeal, had no reasonable expectation of confidentiality because they had an opportunity at the time they submitted their quotations to identify any information they viewed as confidential and did not avail themselves of that opportunity. The city stated the same circumstances were present in the current appeal, as the named company had the opportunity to identify confidential information in its submission and did not identify any such information.

[3] The named company, now the appellant, appealed the city's decision.

[4] During the mediation stage of the appeal process, the appellant asserted that the records contained proprietary information that should be protected by the mandatory exemption in section 10(1) (third party information) of the *Act*. The requester provided a copy of the Quotation Request document issued by the city in respect of the RFQ.

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

[6] The adjudicator originally assigned to this appeal sought and received representations from the appellant and the requester. The representations of the requester relied on the finding in Order MO-1861, which dealt with the same RFQ some years earlier, to argue that the records should be disclosed. The requester stated that the appellant was a party to the appeal that resulted in Order MO-1861 and the circumstances in the current appeal were similar to those in Order MO-1861.

[7] The requester's representations were provided to the appellant, along with an opportunity to submit reply representations addressing whether and why this appeal should be decided differently than MO-1861. The appellant did not submit reply representations.

[8] This appeal was then transferred to me for final disposition.

[9] In this order, I uphold the city's decision to disclose the records.

[10] I am issuing this order concurrently with related Order MO-2952, which involves the same parties as in this appeal but in opposite roles. During the inquiry into this appeal, the appellant filed a request with the city for access to parts of the requester's RFQ submission to the city. When the city decided, as it did in this appeal, to disclose the responsive records, the appellant's request also resulted in an appeal to this office. That appeal is the subject of my related Order MO-2952.

RECORDS:

[11] The records at issue are comprised of the severed portions of page 65 of the appellant's response to the RFQ and pages 2, 3, 4 and 5 of Addendum 1 to the RFQ.

DISCUSSION:

[12] 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.

[13] 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; . . .

[14] 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

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.).

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

[15] 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

[16] The various types of information listed in section 10(1) have been discussed in prior orders. The only relevant type in this appeal is the following:

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

[17] I adopt this definition in this appeal.

[18] 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. Accordingly, I find that the first part of the section 10(1) test has been met.

Part 2: supplied in confidence

[19] 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

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

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order MO-1706.

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

[20] In order to satisfy the “in confidence” component of part two, the appellant, which is the sole party resisting disclosure, must establish that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[21] 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:

- 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.⁸

Representations

[22] The appellant does not address this issue in its representations. It makes no submissions at all on how the information was supplied and whether the second part of the section 10(1) test has been satisfied. Rather, it simply asserts that it is essential that its tender information remain confidential.

[23] In his representations, the requester addresses the “in confidence” part of the test only. As I noted above, he relies on Order MO-1861 and its analysis of the “in confidence” requirement to assert that the records at issue were not provided “in confidence” as required to satisfy part two of the test. The requester includes a multi-page excerpt from Order MO-1861 in his representations to support his assertion. The excerpt reveals the following:

- The finding in Order MO-1861 that the information at issue in that appeal was not provided “in confidence” due to a notice provision in the RFQ that

⁶ Orders PO-2020 and PO-2043.

⁷ Order PO-2020.

⁸ Orders PO-2043, PO-2371 and PO-2497.

alerted bidders to the *Act's* application to all quotations and directed bidders to identify confidential portions of their quotations.

- The finding that the notice provision in the RFQ was "a clearly worded formalized policy regarding the disclosure of information supplied pursuant to an RFQ." The adjudicator in Order MO-1861 also stated:

I concur with the appellant that the affected parties had an opportunity at the time they completed and submitted their quotations to identify any information they viewed as confidential. None of the affected parties did so. Having been invited to explicitly identify confidential information and having chosen not to do so, I am not persuaded that the affected parties had an implicit reasonable expectation of confidentiality.

- Order MO-1861 adopted the reasoning of Adjudicator Laurel Cropley in Order M-845. In Order M-845, Adjudicator Cropley held that where a notice provision exists in an RFQ that places the onus on the bidder to identify confidential information, and the bidder does not identify any confidential information in its RFQ submission, that bidder will be found not to have a reasonably held expectation of confidentiality with respect to the contents of the submission for the purposes of the "in confidence" part of the section 10(1) test. Following Order M-845, Order MO-1861 held that the second part of the test was not met.

[24] The requester also notes that the appellant was an affected third party in the appeal that resulted in Order MO-1861. He concludes his representations by asserting that the information at issue should be disclosed because the appellant in this appeal had an opportunity to identify confidential information but did not.

Analysis and findings

[25] While I accept that the records at issue were supplied by the appellant to the city in satisfaction of the "supplied" requirement of this part of the test, I am not satisfied that the records were supplied "in confidence" as required to meet the second part of the section 10(1) test.

[26] As I have noted above, both the city and the requester referred 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 decision in Order MO-1861 to disclose the records was based on the finding that the "in confidence" requirement was not satisfied. 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, whereas the records in this appeal are part of the appellant's RFQ submission to the city. 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.

[28] I also note that at page 6 of the RFQ, there is an additional notice to bidders under the heading "Ownership and Disclosure of Quotation Documentation" which states:

The documentation comprising any Quotation submitted in response to this RFQ, along with all correspondence, documentation and information provided to the City by any Bidder in connection with, or arising out of this RFQ, once received by the City:

- (a) shall become the property of the City and may be appended to purchase order issued to the successful Bidder;
- (b) shall become subject to the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"), and may be released, pursuant to that Act.

Because of *MFIPPA*, prospective Bidders are advised to identify in their Quotation material any scientific, technical, commercial, proprietary or similar confidential information, the disclosure of which could cause them injury.

[29] The evidence before me indicates that the appellant did not identify any confidential information in its RFQ, despite the two clearly worded notice provisions in the RFQ. The evidence also establishes that the appellant was a party in Order MO-1861, which dealt with the same RFQ and notice provision, and therefore, it was aware

of the decision and reasoning in that order. In the face of this evidence, and in the absence of any representations from the appellant addressing the second part of the test and the finding in Order MO-1861, I find that part two of the section 10(1) test has not been met.

[30] As all three parts of the test must be met to establish that the records qualify for exemption, I find that the records are not exempt under section 10(1).

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: _____
Stella Ball
Adjudicator

September 25, 2013