

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2962

Appeal MA13-104

Town of LaSalle

October 8, 2013

**Summary:** The town denied access to certain portions of a tender bid regarding the construction of a fire hall and library on the basis that they were exempt under the third party information exemption in section 10(1), as well as sections 11 (economic interests) and 12 (solicitor-client privilege). In this order, the town's decision to deny access to the names of subcontractors, the Bid Bond and Surety's consent was not upheld and the information is ordered to be disclosed.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 10(1), 11 and 12.

**Orders and Investigation Reports Considered:** MO-2906

### OVERVIEW:

[1] The Town of La Salle (the town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

a copy of all tender and bid documents in relation to [a named construction company] successful bids for a Fire Hall project on Normandy Street in LaSalle and a Library project on Malden Road in

LaSalle, including a list of all subcontractors identified by [the named construction company] to work on these projects.

[2] The town issued a decision in which it advised the appellant that it would grant partial access to the Stipulated Price Bids for both projects (Project 11-123A and Project 11-123-C) submitted by the construction company (the affected party) severing only the names of the sub-contractors and dollar amounts contained in the bids. It also advised that it would withhold the Bid Bond and the Surety's Consent submitted by the affected party, relying on the mandatory third party information exemptions in sections 10(1)(a), (b) and (c) of the *Act* for all of the records.

[3] The appellant appealed this decision and paid the fee requested by the town. All of the information which is not subject to the section 10(1) exemption claim was disclosed to the appellant by the town at the conclusion of the mediation stage of the appeal.

[4] As further mediation was not possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the parties resisting disclosure of the information at issue, in this case the town and the affected party, initially. I received brief representations from the affected party. The town submitted representations on the application of section 10(1) to the records and in another letter, advised me that it also relies on the application of the discretionary economic interests exemption in section 11 and the discretionary solicitor-client privilege exemption in section 12 of the *Act*. This statement was not, however, accompanied by any submissions to how these exemptions might apply to the information at issue.

[5] The affected party advised that he was relying on the representations which he submitted to this office in appeal MA12-363, which resulted in Order MO-2906.

[6] Because of the manner in which I have addressed the application of the exemptions claimed for the records, it was not necessary for me to seek representations from the appellant.

[7] In this order, I do not uphold the town's decision to deny access to the records and order it to disclose the withheld information.

## **RECORDS:**

[8] The records at issue consist of the undisclosed portions of pages 1 and 6 of Stipulated Price Bid for Project 11-123-A and for Project 11-123C, as well as complete copies of the Bid Bond and Surety's Consent for each contract.

## **ISSUES:**

- A. Are the records at issue exempt from disclosure under the mandatory exemption in section 10(1) of the *Act*?
- B. Are the records at issue exempt under one or more of the discretionary exemptions in section 11 of the *Act*?
- C. Are the records at issue exempt under the discretionary exemption in section 12 of the *Act*?

## **DISCUSSION:**

### **Issue A: Are the records at issue exempt from disclosure under the mandatory exemption in section 10(1) of the *Act*?**

[9] The first issue for determination in this appeal is whether the information at issue qualifies for exemption under section 10(1) of the *Act*, which 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, 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; or

[10] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>1</sup> Although one of the central purposes of the *Act* is to shed light on the operations of

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<sup>1</sup> *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.<sup>2</sup>

[11] For section 10(1) to apply, the institution and/or the third 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; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 10(1) will occur.

[12] On June 26, 2013, I issued Order MO-2906 which arose from an appeal involving the town and a different requester from the appellant in the current appeal. In that order, I addressed the application of the section 10(1) exemption to the undisclosed portions of pages 1 and 6 of Stipulated Price Bid for Project 11-123-A and for Project 11-123C. I concluded that the exemption did not apply to this information, and ordered that it be disclosed to the requester in that appeal. In accordance with the order provisions of Order MO-2906, the town disclosed all of the information from pages 1 and 6 of the Stipulated Price Bids to the requester in that appeal.

[13] The parties resisting disclosure of the records at issue in this appeal, the town and the affected party, are relying on the submissions they provided to me in the earlier appeal to support their arguments in favour of a finding that this information was exempt under section 10(1).

[14] In the absence of additional representations or some other factual basis for coming to a different conclusion, it is not necessary for me to address the application of section 10(1) to this same information again in the current appeal. Accordingly, I will only consider the application of the third party information exemption in section 10(1) to the Bid Bond and Surety's Consent for each contract, which were not at issue in the appeal which gave rise to Order MO-2906.

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<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

## **Part 1: type of information**

[15] The affected party submits that the records contain information which qualifies as commercial information within the meaning of section 10(1). This type of information has been discussed in prior orders 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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

[16] Neither the town nor the affected party have directly addressed the application of section 10(1) to the Bid Bond and Surety's Consent documents, specifically. Rather, their representations address only the records identified originally as being at issue in a general way. However, I have reviewed the contents of these records and find that they contain information that qualifies as "commercial information" for the purposes of section 10(1).

[17] I find that the Bid Bond and Surety's Consent were submitted to the town by the affected party in response to two tenders initiated by the town for the construction of two buildings. The information relates directly to the submission of a bid by the affected party and, therefore, pertains to its commercial operations, as it is in the business of constructing buildings. Accordingly, the first part of the test under section 10(1) has been satisfied.

## **Part 2: supplied in confidence**

### ***Supplied***

[18] 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 [Order MO-1706].

[19] 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 [Orders PO-2020, PO-2043].

[20] Clearly, the information at issue was submitted to the town by the affected party as part of its "Stipulated Price Bid" made in response to the tender. Accordingly, I find that the information was supplied by the affected party to the town within the meaning of that term in section 10(1).

***In confidence***

[21] 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 [Order PO-2020].

[22] 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.<sup>3</sup>

[23] The town indicates that it consistently treats bid submissions in a confidential fashion and does not disclose them publicly "in order to protect the integrity of the tendering process."

[24] The affected party submits that it provided the bid in question, including the Bid Bond and Surety's Consent documents, in a sealed envelope with the understanding that it would be reviewed only by the town and the architectural firm retained by the town as its consultant.

[25] Based on the representations of the affected party and the town, I am satisfied that the bid documents were submitted to the town with a reasonably-held expectation that they would be treated in a confidential fashion. I find that the past practices of the town would have given the affected party a reasonable expectation that his tender would be treated with confidence. As a result, I find that the second part of the test

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<sup>3</sup> Orders PO-2043, PO-2371 and PO-2497.

under section 10(1) has been met with respect to the Bid Bond and Surety's Consent which is the only information remaining at issue under section 10(1) in this appeal.

### **Part 3: harms**

#### ***General principles***

[26] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.<sup>4</sup>

[27] 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 [Order PO-2020].

[28] 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* [Order PO-2435].

#### ***Section 10(1)(a) and (c) prejudice to competitive position/undue loss or gain***

[29] The affected party's representations filed in the earlier appeal address his concerns about the disclosure of certain information about the subcontractors he included in his bid submission. Neither he nor the town has addressed why the disclosure of the Bid Bonds and Surety's Consent could reasonably be expected to result in the harms contemplated by sections 10(1)(a), (b) or (c).

[30] Based on my review of these documents, I find that there is nothing on their face which would address the harms aspect of the section 10(1) exemptions claimed. It is not apparent from an examination of the documents that their disclosure could reasonably be expected to result in the kinds of harms described in section 10(1).

[31] As a result, I find that the third part of the test under section 10(1) has not been satisfied. As all three parts of the test must be met in order for the exemption to apply, I find that the Bid Bonds and Surety's Consent documents are not exempt under section 10(1). I will address the possible application of the discretionary exemptions in sections 11 and 12 to these records below, despite the fact that they were raised late in the inquiry process.

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

**Issue B: Are the records at issue exempt under one or more of the discretionary exemptions in section 11 of the *Act*?**

[32] Section 11 states:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
- (b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;
- (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;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
- (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;
- (h) questions that are to be used in an examination or test for an educational purpose;
- (i) submissions in respect of a matter under the *Municipal Boundary Negotiations Act* commenced before its repeal by the *Municipal Act, 2001*, by a party municipality or other body before the matter is resolved.



[33] 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 . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[34] For sections 11(b), (c), (d) or (g) 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.<sup>5</sup>

[35] The town has not provided me with any evidence to support its claim that the remaining information at issue qualifies for exemption under any subsections of section 11. I have reviewed the information at issue in the records with a view to determining whether it could fit within the ambit of any of the subsections listed in section 11 and have concluded that they cannot. As a result, I find that section 11 has no application to the information at issue in this appeal.

**Issue C: Are the records at issue exempt under the discretionary exemption in section 12 of the *Act*?**

[36] Section 12 states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[37] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

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<sup>5</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

## **Branch 1: common law privilege**

[38] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.<sup>6</sup>

### ***Solicitor-client communication privilege***

[39] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.<sup>7</sup>

[40] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[41] The privilege applies to “a continuum of communications” between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.<sup>8</sup>

[42] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.<sup>9</sup>

[43] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.<sup>10</sup>

### ***Litigation privilege***

[44] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.<sup>11</sup>

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<sup>6</sup> Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

<sup>7</sup> *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

<sup>8</sup> *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

<sup>9</sup> *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

<sup>10</sup> *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

<sup>11</sup> Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (cited above).

[45] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] as follows:

A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.

. . . . .

[For this privilege to apply], there must be more than a vague or general apprehension of litigation.

[46] The town has provided me with a letter indicating that it has been served with a Statement of Claim by one of the sub-contractors hired by the affected party with respect to one of the construction projects described in the tender bid documents that comprise the records in this appeal. The town indicates that the Statement of Claim has been forwarded to its solicitor "and as such, the town would raise the Section 12 exemption of Solicitor-Client privilege" in addition to its claim under section 11. The town has not, however, provided any submissions which might provide further elucidation of its claim that the records relating to the withheld information in the Stipulated Price Bids might fall within the ambit of the solicitor-client privilege exemption in section 12.

[47] In the absence of any specific representations respecting the application of the section 12 exemption to the records, I find that I am unable to make a finding that it applies to the information in the records before me. In addition, I have reviewed the information at issue in order to determine whether, on their face, they contain information which is subject to the exemption. Again, I am unable to make such a finding in this case. As a result, I find that the records are not subject to exemption under section 12. The fact that these documents may eventually find their way into evidence in a civil trial does not bring them within the ambit of section 12 and they are not, accordingly, subject to that exemption.

[48] By way of summary, I find that the information at issue is not exempt from disclosure under sections 10(1), 11 or 12 and I will order that it be disclosed.

**ORDER:**

1. I do not uphold the town's decision and order it to provide the appellant with the undisclosed portions of pages 1 and 6 of Stipulated Price Bid for Project 11-123-A and for Project 11-123C, as well as complete copies of the Bid Bond and Surety's Consent for each contract by no later than **November 13, 2013** but not before **November 8, 2013**.
2. I reserve the right to require the town to provide me with a copy of the record which is disclosed to the appellant.

Original Signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ October 8, 2013