Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2982

Appeal MA10-250

Regional Municipality of Waterloo

November 27, 2013

Summary: The appellant made a request to the Regional Municipality of Waterloo (the region) for records relating to an RFP issued by the region for the supply of turbo blower equipment for two wastewater plants. The region granted access, in part, to some records and denied access to other records, claiming the application of the mandatory exemption in section 10(1) (third party information). During the inquiry, the appellant raised the possible application of the public interest override in section 16 and responsiveness of some of the records. In this order, the adjudicator upholds the region's decision, in part, and orders it to disclose some of the records to the appellant. The adjudicator also determines that some of the records that the region claimed were non-responsive are responsive and orders the region to issue a decision letter to the appellant. The adjudicator also finds that the public interest override does not apply in the circumstances of this appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10, 16 and 17.

Orders Considered: PO-2435 and PO-3183.

OVERVIEW:

[1] In January of 2010, the Regional Municipality of Waterloo (the region) invited proposals for the supply of turbo blower equipment for two wastewater plants which required upgrading. In response, companies submitted proposals to the region. The

region subsequently accepted one company as the successful proponent and entered into a contract with it.

[2] This order disposes of the issues raised as a result of an access decision made by the region in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the bid of the successful company, and all correspondence and reports relating to that company and also to the requester's client, one of the other bidders on the contract.

[3] In response to the request, the region notified the company (the affected party) that was awarded the contract pursuant to section 21 of the *Act*. In turn, the company advised the region that it objected to the disclosure of its information. The region subsequently issued a decision letter to the requester, denying access to the records relating to the affected party, claiming the application of the mandatory exemption in section 10(1) (third party information) of the *Act*. Conversely, the region provided access to the records relating to the requester's client upon receipt of an authorization from the client.

[4] The requester (now the appellant) appealed the region's decision to this office. During the mediation of the appeal, the region advised the mediator that it was also claiming the application of the discretionary exemption in section 12 (solicitor-client privilege) to some of the records at issue, and that other records or portions thereof were non-responsive to the request.

[5] In response, the appellant advised that he was not seeking records identified as non-responsive or those claimed exempt under section 12. Consequently, those records for which section 12 was claimed are no longer at issue.

[6] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal sought and received representations from the region, the affected party and the appellant. Representations were shared amongst the parties in accordance with this office's *Practice Direction 7*.

[7] During the inquiry, the affected party provided consent to disclose some of the records, which were subsequently disclosed by the region to the appellant by way of a revised decision letter. Those portions of the records are no longer at issue in this appeal. In addition, in its representations, the affected party advised it had no objection to revealing the total bid price award or the "brochures and cut sheets" outlining the general nature of its products. Staff of this office contacted the region and was advised that the region had already disclosed the total bid price to the appellant, and that the "brochures and cut sheets" can be accessed on the region's publicly available website. This information is, therefore, no longer at issue.

[8] Also during the inquiry, the appellant appears to have raised the possible application of the public interest override in section 16, and argues that the responsiveness of some of the records remains at issue.

[9] The appeal was then transferred to me for final disposition.

[10] For the reasons that follow, I uphold the region's decision, in part and I order it to disclose some of the information at issue to the appellant. I also order the region to issue a decision letter with respect to some records it had identified as non-responsive to the request.

RECORDS:

[11] The records for which section 10(1) was claimed are at pages 1-29, 35-36, 38-39, 42, 49-50, 52-53, 55-81, 83-88, 90-96, 118-127, 148-152, 154-155, 157-181, 184, 201-202, 213-240, which consist of email communications, correspondence and a scoring sheet. There is also a CD at issue, which contains the affected party's qualification proposal. In addition, there is the issue of responsiveness of other records.

ISSUES:

A. What records are responsive to the request?

B. Does the mandatory exemption in section 10(1) apply to exempt the records, or portions thereof, from disclosure?

C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 10 exemption?

DISCUSSION:

Issue A: What records are responsive to the request?

[12] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
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> (a) make a request in writing to the institution that the person believes has custody or control of the record;

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

[14] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[15] In its representations, the appellant states that the region has not provided sufficient information to satisfy it that the records at pages 31-34, 37, 51, 82, 89-91, 92-96, 97-116, 129-143, 146-147, 188-190, 191-198 and 208-210 are non-responsive to its request. The appellant requests that I review these records and make a determination regarding responsiveness.

[16] In reply, the region states that it will not reintroduce the non-responsive records as they are outside of the scope and breadth of the request, and which were essentially taken "off the table" at an earlier time in the appeal process.

[17] As previously indicated, the appellant's request was for the affected party's bid, and all correspondence and reports relating to the affected party and to the appellant.

[18] I have reviewed the records listed above and find that the majority of them are responsive to the request, with three exceptions. The majority of the records relate to either the affected party or the appellant, both of whom responded to the request for proposals. I find that this information is clearly within the scope of the request. Contrary to the appellant's assertions, there are no portions on pages 90-91 marked as being non-responsive to the request. The region withheld portions of these two pages, claiming the application of the mandatory exemption in section 10(1), which I will address below.

[19] I also find that the portions of pages 89 and 92-96 that were withheld as being non-responsive are, in fact, non-responsive, as they relate to a third vendor who responded to the proposal, which is outside the scope of the request. In addition,

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[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

pages 191-195 are also non-responsive, as they relate to an entirely different project than the subject matter of the request for proposals.

[20] However, I find that the remaining pages are responsive to the request. Contrary to the region's argument, in making this determination, I am not bound by what records were "taken off the table" during the mediation of the appeal. I order the region to issue an access decision to the appellant in relation to pages 31-34, 37, 51, 82, 97-116, 129-143, 146-147, 188-190, 196-198 and 208-210.

Issue B: Does the mandatory exemption in section 10(1) apply to exempt the records, or portions thereof, from disclosure?

[21] The region relies on the application of the mandatory exemption in sections 10(1)(a), (b) and (c), which state:

> 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,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (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;

[22] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[4]

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[3] *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.).
[4] Orders PO-1805, PO-2018, PO-2184, MO-1706.

[23] 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), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[24] The types of information listed in section 10(1) have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
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> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
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> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture,

> engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
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> *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].
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[25] The region submits that the records contain "highly" scientific, technical, commercial and financial information as a requirement of the proposal. In particular, the region states that the bid document describes in detail:

- specifications for service capabilities, aeration performance curves, quality control manuals with related policies and procedures, test stand capabilities and several other attachments relating to various components of the blower make-up, including texts, diagrams, layout drawings and tables; and

- costing and pricing of the components of the equipment and associated services.

[26] Other records, the region argues, such as the correspondence and reports at issue, reveal trade secrets.

[27] The affected party submits that the records contain trade secrets, as well as commercial, financial and technical information not in the public realm, including the itemized pricing of its product and technical specifications relating to its product. The affected party further states:

> . . . the process by which [it] complies with the applicable electrical codes is a trade secret. The correspondence regarding UL/ULC/CSA electrical certifications contains trade secrets that are not now available to the public or to our client's competitors. The manner in which our client is

> able to meet those certifications has been developed over many years. It is a method, technique and process which is not generally known in the trade or business, and is not known to [its] competitors.

[28] Moreover, the affected party submits that the type of technical and pricing information that was requested by the region was quite detailed in nature and went "far beyond" what would usually be submitted in this type of bidding process.

[29] The appellant submits that the information it seeks does not qualify as commercial information merely because it is contained in a business proposal, even if it might have potential monetary value. In addition, the appellant argues that simply because the information was purchased from the affected party, does not make it commercial information for the purposes of section 10 of the *Act*.

[30] Further, the appellant submits that the records do not contain financial information. While the records contain costing/pricing for the components of the equipment and services, the appellant argues, they do not describe an actual financial obligation, nor one that would necessarily have come into existence. In addition, the appellant submits that although the terms of the affected party's bid quotation became the essential terms of a negotiated contract, they represented a quotation and not an amount that was to be paid, ultimately by the region.

[31] The appellant goes on to state that there is no scientific information in the records, as the information it seeks does not relate to the observation and testing of a specific hypothesis or conclusion.

[32] Lastly, the appellant states that the region has not provided any detailed evidence in support of its claim that the records contain trade secrets or technical information.

[33] I have carefully reviewed the records and based on my review, I find that the majority of the records contain pricing information, other commercial information or technical information. Past orders of this office have found that pricing information[5] constitutes "commercial" information for the purposes of section 10(1), as it relates to the buying, selling or exchange of merchandise or services. In this case, some of the records relate to the pricing information of the affected party's services and merchandise. In addition, many of the emails contain information about the selling of the affected party's services to the region, which qualifies as commercial information.

[34] I find that, in addition, other records contain technical information, which, as previously stated, typically involves information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process,

[5] Orders Mo-1237 and MO-2197.

equipment or thing.[6] Based on my review of the records, I find that many of them contain information that would qualify as technical information, as there is a significant amount of information in the records about the design and technical specifications of its product. This information is included in the affected party's proposal and in email exchanges between the affected party and the region. Therefore, I find that the records at issue contain either commercial or technical information within the meaning of section 10(1) of the *Act* and have met part 1 of the test under section 10(1). Having found that the records contain either commercial or technical information, it is not necessary to determine whether the records also contain "trade secrets."

[35] Having met the first part of the three-part test, I will now determine whether the records were supplied in confidence to the region by the affected party.

Part 2: supplied in confidence

Supplied

[36] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[7]

[37] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[8]

[38] The region submits that the affected party's bid submission was supplied to it as part of the bid process, in order to satisfy the bid requirements and to describe the affected party's goods and services.

[39] The affected party submits that it supplied the records at issue in confidence to the region.

[40] The appellant argues that the affected party's tender documents form a contract and were therefore negotiated and not supplied. In support of its position, it cites the Supreme Court of Canada's decision in *Ontario v. Ron Engineering & Construction (Eastern) Ltd.*,[9] stating the a contract comes into existence when a contractor submits a compliant tender in response to an invitation to tender.

[41] The appellant also goes on to cite two orders of this office in support of its position. The first decision is Order PO-2435, in which Assistant Commissioner Brian

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[6] Order PO-2010.
[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] [1981] 1 S.C.R. 111.

Beamish rejected the Ministry of Health and Long-Term Care's position 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, which is a form of negotiation.

[42] The second decision is Order PO-2453, in which Adjudicator Catherine Corban stated:

> As the affected party was the successful bidder in the competitive selection process the terms outlined by the affected party presumably formed the basis of a contract for service between the affected party and the Ministry. 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 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.
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> [emphasis added]

[43] In reply, the affected party argues that this is not a case of a negotiated contract. The region, the affected party submits, had no part in negotiating or otherwise crafting the affected party's proposal. The affected party goes on to state that the records at issue are the same records that were supplied or would allow the drawing of accurate inferences with respect to the information actually supplied to the region. Finally, the affected party submits that while the proposal and pricing information might form part of a contract with the region that does not mean it was not first "supplied" to the region by the affected party.

[44] The affected party also relies on Order PO-2300, in which Adjudicator Bernard Morrow dealt with the application of the provincial equivalent of section 10(1) in relation to two proposals. He stated:

> In my view, it is clear that the information contained in the two proposal documents was supplied by the affected party to the Ministry in response to the Ministry's solicitation of proposals from prospective developers of a long-term care facility. The information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution (see Orders MO-1368 and MO-1504). Accordingly, I find that the records . . . meet the "supplied" requirement.

The proposal

[45] I find that the proposal was supplied by the affected party to the region. In Order PO-2755, Adjudicator Diane Smith dealt with the issue of whether a proposal submitted in response to a call for tenders was considered to have been supplied for the purposes of the equivalent provision to section 10(1) in the provincial *Act*. She found that a proposal containing only the contractual terms proposed by a bidder, and not the subject of negotiation, could not be characterized as having mutually generated terms. She found, therefore, that the proposal was "supplied" by the affected party to the institution for the purpose of the third party information exemption.

[46] In this case, the proposal does not consist of a final agreement between the affected party and the region; rather, it consists of the terms outlined by the affected party, containing the contractual terms proposed solely by the affected party. In my view, it is important to differentiate the proposal information submitted by the affected party in response to the RFP from the agreement that was entered into between the parties. The agreement entered into between the affected party and the region was not the subject matter of the request and is not at issue in this appeal. Applying Adjudicator Smith's approach, I find that the proposal was not the product of negotiation and, consequently, was not mutually generated by the region and the affected party.

[47] In sum, I find that the proposal was "supplied" by the affected party to the region for the purposes of the second part of the test under section 10(1).

The emails and correspondence

[48] At the outset, I note that portions of the affected party's proposal are duplicated at pages 159-171 and 232-235. As I have already made a finding regarding whether the proposal was supplied for the purposes of section 10(1), my findings apply equally to these pages.

[49] In addition, it is noteworthy that many of the email communications and the correspondence are duplicated in the records at issue.

[50] On my review of the records, I am satisfied that pages 1-4, 6-21, a portion of page 23, 25-29, 35, 55-80, 84-86, 118-127, 151-152, 172-181, 184, 201-202 and 213-224 of the email communications and correspondence contain information that was supplied to the region by the affected party for the purposes of section 10(1) of the *Act*. In particular, I am satisfied these records, which consist of emails and/or correspondence between the affected party and the region contain commercial and/or technical information that was supplied to region by the affected party as part of the RFP process.

[51] However, I find that the remaining emails for which the exemption was claimed were not supplied by the affected party to the region for the purposes of section 10(1). These pages are:

- 5, 22, the majority of 23, 24 (duplicate of 22), 38, 39, 42, 49-50, 52-53, 81, 83 (duplicate of 50), 87 (partial duplicate of 83 and 49), 88, 148, 149 (essentially a duplicate of 52-53), 154-155, 157-158 (duplicate of 154-155), 172-173 (essentially a duplicate of 154-155), 225, 229-231, 238-239 and 240 (partial duplicate of 5).

[52] These emails consist mainly of communications between region staff or between region staff and consultants the region hired to assist in developing the RFP.[10] The emails set out next steps, the development and revision of addendums, and in one case, refer to the appellant. Some of the emails were sent to the affected party from the region regarding an addendum, providing it with the RFP and/or asking it to provide the region with information. One email was sent from the affected party to the region. However, other than a portion of it, the subject matter of the email is the appellant, not the affected party. Having reviewed the above listed emails carefully, I find that they were not supplied to the region by the affected party, nor do the "inferred disclosure" and "immutability" exceptions apply. These emails do not reveal *non-negotiated* confidential information that was supplied by the affected party to the region. Because the second part of the test under section 10(1) has not been satisfied and no other exemptions have been claimed with respect to these records, I order the region to disclose these pages to the appellant.

The scoring sheets

[53] Other records consist of scoring sheets at pages 90-96 (partially duplicated at pages 226-228), portions of which were withheld under section 10(1). Portions of these scoring sheets are quite detailed and I am satisfied that, although they were created by region staff and/or its consultants, the content of portions reflects the commercial and technical information that was supplied by the affected party to the region in its proposal in response to the RFP. Therefore, while the scoring sheets were not supplied by the affected party to the region, some of the information in the scoring sheets reveals the non-negotiated information that had been supplied by the affected party to the region. Consequently, the inferred disclosure exception applies and some of the withheld portions of this record were "supplied" by the affected party for the purposes of section 10(1). This information is located at pages 90-91 and 95-96.

[54] However, the withheld information at pages 92-94 simply reflects the region's evaluation and score of the affected party's proposal. The evaluation of the proposal was not supplied by the affected party to the region for the purposes of the second part

[10] The information regarding the consultants' roles was provided to this office by region staff.

of the section 10(1) test, in my view. Conversely, it is the region which evaluated the affected party's proposal. The information at pages 92-94 simply reflects the numerical or pass/fail scoring and does not reveal underlying non-negotiated information the affected party supplied to the region. Therefore, I order the region to disclose the portions of pages 92-94 that were withheld under section 10(1) to the appellant.

[55] I will now determine whether the information that I have found to have been supplied by the affected party to the region was done so "in confidence."

In confidence

[56] 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.[11]

[57] 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; or
- prepared for a purpose that would not entail disclosure.[12]

[58] The region states that the affected party's proposal was not marked as confidential, but argues that generally accepted practices used in the purchasing profession assign a high degree of implied confidentiality to the information submitted by bidders in order to preserve the integrity of the purchasing process and encourage competitive bidding. It states:

> The Region's purchasing practices rely on similar principles because proprietary information is often supplied to satisfy the bid requirements and to wholly describe goods and services. In this exchange of

[11] Order PO-2020.
[12] Orders PO-2043, PO-2371 and PO-2497.

> information, there is an implied expectation of confidentiality between the Region and the bidder.

[59] The affected party submits that it supplied the records to the region in confidence, although it was aware that the bottom line tender figure would be revealed to the public. However, the affected party argues, it had a reasonable expectation that the pricing and technical components of that bid would be kept confidential and not be revealed.

[60] The appellant states that the RFP in this matter specifically provided that the bid was subject to the *Act* and that if the bidder believed that all or part of the proposal should be protected from release, it should have clearly marked those portions as confidential.[13] The appellant submits that several orders of this office have found that an important piece of evidence in determining if the information in a bid was submitted "in confidence" is whether there is a notice provision in the RFP that alerts proponents to the fact that their bids are subject to the access provisions of the *Act,* and which asks them to specifically identify any information in the bids that could cause them injury if disclosed. The affected party argues that in general these orders have held that if such notice provision exists in an RFP, a bidder's response to this provision is evidence of its confidentiality expectations and that if a bidder fails to follow the direction in the RFP, it could not have a reasonable expectation of confidentiality with respect to the information in the bid.

[61] In reply, the affected party states that its proposal was supplied to the region in confidence and that in any procurement process there is an implicit expectation of confidentiality.[14] Because proposals contain some form of trade secrets, or scientific, technical, commercial, financial or labour relations information, it argues, there is an implicit expectation of confidentiality.

[62] The affected party states:

> If every proposal submitted to a municipality could be released to the public upon request, no private sector entity would submit a proposal, especially on those municipal projects that are more technical in nature. If submitting a proposal could result in all of your trade secrets or confidential information being revealed, why would anyone submit a proposal and potentially lose any competitive advantage they might have? It would be nonsensical, which is exactly why s. 10(1) of the *Act* exists in the first place.
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> [my emphasis]

[13] Paragraph 28 of the RFP.
[14] Order MO-2164.

[63] The affected party goes on to state that it has always kept the information at issue confidential, even prior to submitting it to the region and has fought to keep it confidential at every instance thereafter. The affected party relies on Order PO-2618, in which Adjudicator Frank DeVries held that although parties who seek to do business with the government must be prepared to submit to a higher and more transparent level of disclosure, it does not mean that there ought to be no expectation of confidentiality with respect to proposals.

[64] Lastly, the affected party provides commentary from Kevin McGuinness and Stephen Bauld in their text, *Municipal Procurement, 2nd ed.*[15] in which they state that the narrow interpretation given to the confidentiality of supplier information by this office might undermine the competitive position of a supplier.

[65] The region did not address this aspect of the second part of the test in section 10(1) in its reply representations.

[66] Based on my review of the information which I have found to be "supplied" and the representations of the region and the affected party, I am satisfied that this information was supplied with a reasonably-held expectation that it would be treated in a confidential manner by the region. The very nature of the information itself leads to that conclusion. The information relates to various matters that go directly to the root of the RFP proposal made by the affected party, describing in detail the technical aspects of its products and services, and the commercial calculations it has made regarding the services it would be providing under the terms of its proposed contract with the region. In my view, given the competitive nature of the industry in question, it is reasonable to find that the parties intended this information be kept confidential once it was supplied to the region.

[67] Further, the reference to the *Act* in the RFP does not negate the reasonable expectation of confidentiality that a proponent submitting a bid may hold, given that the *Act* explicitly protects the confidential informational assets of third parties such as the affected party. I do not accept as a general proposition that a company submitting a response to a RFP proposal should expect that its information will be, as a matter of course, disclosed to the public through an access request.

[68] This finding of confidentiality also applies to the emails I have found to be supplied and portions of the scoring sheets, as these records capture information that was supplied to the region by the affected party as part of the RFP process.

[69] Having found that the information was "supplied in confidence," the second part of the test in section 10(1) has been met and I will determine whether the third part of the test has been met.

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[15] (Toronto: LexisNexis Canada Inc., 2009 at pp. 754-755).

Part 3: harms

[70] 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.[16]

[71] 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.[17]

[72] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1).[18]

[73] 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.*[19]

[74] The region provided representations on this exemption and submits that disclosure of the records could reasonably be expected to prejudice the affected party's competitive position and would result in undue loss to affected party and undue gain to the appellant. The region goes on to state:

> The space in which this particular product and related services is offered is relatively small, with very few competitors having high quality equipment to satisfy municipal waste-water requirements. Any undue advantage the requester could glean from the information could unduly harm the [affected party].

[75] The region also argues that bidders' willingness to submit confidential information to it may be undermined when competitors are able to access confidential information through the freedom of information process.

[76] The affected party advises that its industry spans North America and beyond and disclosure of the records at issue would cause it significant prejudice. In particular, the affected party argues that it has devoted a significant amount of resources to

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[16] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[17] Order PO-2020.
[18] Order PO-2435.
[19] *Ibid*.

developing its product specifications and component pricing. As there are a limited number of companies in this specialized field, the affected party states, the technical and pricing details each participant has developed are "closely guarded trade secrets" and to simply "hand" this information to a competitor would effectively negate those efforts and be detrimental to it across North America.

[77] The affected party goes on to describe the second harm that would be caused, should the records be disclosed, which is that similar information would no longer be supplied to institutions, raising the possible application of section 10(1)(b). The affected party states:

> There would in our submission be a significant likelihood that not only our client, but other companies with knowledge of that potential, would refuse to provide the type of information that is in dispute in response to tender requests in Ontario if doing so meant that all confidentiality would be lost. This could result in fewer bids, higher prices, and a disadvantageous result for municipalities in this Province. We strongly suggest that it was never the intention of the *Act* to promote this result, and in fact the third party information exemption was designed to protect precisely the type of information that is the subject of this appeal.

[78] The affected party also submits that the disclosure of the records would cause the appellant undue gain and it undue loss. The affected party argues that the appellant would have an advantage in bidding on future projects in this and other jurisdictions, because it would have the confidential pricing and technical information. The affected party states:

> In fact, there is really no other rational reason for the appellant/requester to be pursuing this appeal other than to gain an advantage which it seeks. There is no juridical reason to grant this undue gain to the competitor at the expense of our . . . confidentiality and proprietary interests.

[79] The appellant states that the high threshold of "detailed and convincing evidence" has not been satisfied by the region or the affected party, with respect to sections 10(1)(a) and (c), as neither have specified what harm they allege would be caused by the disclosure of the records. The affected party relies on Order PO-2453 in which Assistant Commissioner Beamish drew a distinction between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have actually been signed. He also determined that a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice a competitive position or result in undue loss.

[80] The appellant goes on to argue that because the region has already accepted the affected party's proposal, the release of the information contained in it will not affect the affected party's competitive position in regards to the contract it entered into with the region.

[81] Further, the appellant believes that the affected party did not comply with the region's tendering requirements and as such, any competitive position the affected party acquired through "non-compliance" should not be protected.

[82] Regarding section 10(1)(b), the appellant submits that disclosure of the requested information would not result in similar information no longer being supplied to the region, as there will continue to be financial motivation to enter into contracts with the region. The appellant states that companies that do business with public institutions understand that certain information regarding proposed developments will be made public. The appellant states:

> It is unreasonable to assume that companies would cease to submit tender requests in Ontario, knowing of a very small potential that their information may be disclosed.

[83] In reply, the affected party goes into more detail about the harm caused to its competitive position by the disclosure of particular sections of its proposal, as follows:

Description	**Harm**
Covering letter	The cover letter explains how it complies with a particular specification, which is not known in the Canadian market. Competitors would learn how to do this.
Bid, sections 1 to 3.2	The price breakdown would allow a competitor to see how it breaks down its bids and they could, in turn alter their bids.
Bid, section 5.0 to 5.1	This shows specific performance data of its equipment. A competitor could use this information to best present their information against the affected party.
Bid, section 11.0	If disclosed could prejudice its competitive position.
Bid, section 12.0	Pricing on its air bearings, which if disclosed could prejudice its competitive position.
Scope of supply	Shows detailed breakdown of its pricing and how it meets technical specifications in the RFP. Also shows evidence of its

	manufacturing costs related to special equipment required in the RFP. Competitors could use this information against the affected party.
Quality manual	This is an unpublished manual of how it pursues quality control and is proprietary in nature.
Testing – attachment G	This is an internal document, setting out a particular procedure on how to accomplish a test. A competitor could use this information against the affected party.
Service and Training – attachment H	This contains confidential information about its service personnel.
Blower Start Up Forms – attachment K	This is not published and sets out how it executes its start-up procedures. Disclosure would prejudice its competitive position.
Other submitted documentation	Describe how to build the blower system down to the exact brand and model of every component. This would be exceedingly detrimental if a competitor were to learn its "trade secrets" in this regard.
Price profile – cover page and covering letter	Same as the harm described above in relation to the cover page and covering letter.
Price profile proposal bid – contains the same information as portions of the bid, above	Same harms as described above in the bid.

The proposal

[84] I have reviewed the records carefully and taken all of the parties' representations into consideration. I agree with the affected party that the technical information contained in the records is proprietary and that disclosure of it could reasonably be expected to prejudice its competitive position and/or cause it undue loss, as set out in sections 10(1)(a) and (c). I also agree that disclosure of this technical information could result in undue gain to a competitor. Consequently, I find that part three of the test in section 10(1) has been met with respect to the following technical information that is contained in the proposal, and is therefore exempt from disclosure under section 10(1) of the *Act*:

- the covering letter;
- bid – sections 5.0 to 5.1 and section 11;

- scope of supply;
- quality manual;
- attachments G, H, K; and
- the "other submitted documentation" described in the table, above.

[85] Conversely, I find that sections 1.0, 2.0, 3.0-3.2, 4.0, 6.0, 7.0, 8.0, 9.0, 10.0 and 12 of the proposal have not met the threshold of part three of the section 10(1) test and, therefore do not qualify for exemption from disclosure.

[86] The affected party argues that disclosure of the pricing information could prejudice its competitive position, as a competitor could use the pricing information to alter their bids.

[87] I find that the affected party has not provided the kind of "detailed and convincing" evidence required to satisfy part 3 of the section 10(1) test with respect to the portions of the proposal listed above that contain pricing information. The allegations of harm in its representations have not demonstrated that a "reasonable expectation of harm" exists if the pricing information in the record is disclosed.

[88] In addition, as set out in the table above, the affected party has not provided sufficiently detailed evidence of the harms that could reasonably be expected to happen should sections 4.0, 6.0, 7.0, 8.0, 9.0 and 10.0 of the proposal be disclosed, which consist of general information. Therefore, I find that the threshold for the harms contemplated in sections 10(1)(a) and (c) has not been met with respect to the information in these sections of the proposal.

[89] The affected party's argument that disclosure of the pricing information could reduce its competitiveness in future RFPs has been rejected in previous orders of this office. In Order PO-2435, Assistant Commissioner Beamish commented as follows on the argument that the ability of competitors to prepare more competitive proposals constitutes "harm" under the provincial equivalent of section 10(1):

> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:
>
> > …a broad exemption for all information relating to businesses would be both unnecessary and undesirable.

> Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money.

. . .

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 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP [e-Physician Project], there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA [Service Level Agreement] and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies,

> whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.
>
> While I can accept the Ministry's [Ministry of Health and Long-Term Care] and SSHA's [Smart Systems for Health Agency] general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a), (b) and (c), this is not such a case. Simply put, I find that the institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a), (b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of the contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs . . . The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[90] In Order PO-3183, Adjudicator Donald Hale, relying on Order PO-2435, came to a similar conclusion in respect of a proposal submitted in response to a RFP for the provision of legal services to a hospital. In ordering the proposal disclosed, Adjudicator Hale found that "the fact that disclosure of the proposal may result in a more competitive bidding process in the future does not result in significant prejudice to the affected party's competitive position or result in an undue loss to it." Adjudicator Diane Smith came to the same conclusion in Order PO-3264.

[91] I agree with and adopt the reasoning of Assistant Commissioner Beamish and Adjudicators Hale and Smith and find that the threshold for the harms contemplated in sections 10(1)(a) and (c) has not been met with respect to the general and pricing information in the proposal.

[92] I am also not persuaded by the argument that disclosure of the information I have found to be supplied in confidence could reasonably be expected to result in similar information no longer being supplied to the region in the context of future projects, as contemplated by section 10(1)(b). I find that there is a lack of detailed evidence to support the region's and the affected party's assertions on this issue.

[93] In my view, companies doing business with public institutions, such as the region, understand that the proposed pricing is often an important part of a competitive selection process. I find that it is simply not credible to argue that the region would be provided with less information of this nature in future bidding situations. In addition, I do not accept that the prospect of the release of the type of information contained in the portions of the records which I have found do not qualify under section 10(1)(a) or (c) could reasonably be expected to result in a reluctance on the part of companies to participate in future projects.

[94] Accordingly, I am not satisfied that it is reasonable to expect that companies will no longer supply similar information to the region, and I find that the requirements for section 10(1)(b) have not been met.

The emails, correspondence and scoring sheets

[95] Although the affected party did not provide representations with respect to the emails, correspondence and scoring sheets, I have reviewed those records and find that the portions that I have found to be "supplied in confidence" contain technical information which would be reasonably expected to prejudice the affected party's competitive position and/or cause it undue loss, with two exceptions. Other than the two exceptions, which I will detail below, the remaining information in the emails and scoring sheets has met the third part of the test in section 10(1) and is therefore exempt from disclosure.

[96] I find that three pages contain information that does not meet the third part of the section 10(1) test and is not exempt from disclosure. In particular, page 127 is a facsimile transmittal sheet sent from the affected party to the region, which contains very general information, the disclosure of which would not cause the type of harm contemplated by section 10(1).

[97] In addition, portions of the scoring sheets at pages 90-91 contain pricing information of the affected party, including some corrections to the calculations. As was the case with the pricing information in the proposal, the affected party and the

region have not provided sufficiently "detailed and convincing" evidence to satisfy part three of the section 10(1) test.

[98] In sum, the general and pricing portions of the proposal, the facsimile transmittal sheet at page 127 and the pricing information in portions of pages 90-91 do not qualify for the exemption under section 10(1). As no other exemptions have been claimed with respect to these records, I order the region to disclose these records to the appellant, as set out in the order provisions below.

Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 10(1) exemption?

[99] I have found that some portions of the proposal, the emails, correspondence and scoring sheet qualify for exemption under section 10(1). The appellant takes the position that the public interest override in section 16 of the *Act* applies to all of the information withheld by the region and that it should be disclosed.

[100] Section 16 of the *Act* states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[101] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[102] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[20]

[103] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[21] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to

[20] Order P-244.
[21] Orders P-984 and PO-2607.

the information the public has to make effective use of the means of expressing public opinion or to make political choices.[22]

[104] A public interest does not exist where the interests being advanced are essentially private in nature.[23] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[24]

[105] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[25]

[106] Any public interest in *non*-disclosure that may exist also must be considered.[26] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[27]

[107] The appellant submits that it has made the request for the records at issue to address its concerns that the affected party failed the pass/fail criteria for the RFP because one of its products is not CSA certified and that it failed to meet the minimum manufacturer experience required under the RFP. The appellant states:

> These concerns hit directly to the integrity of the bidding/tendering and procurement process and warrant a further investigation, which can only be facilitated by the release of information relating to that process.

[108] In support of its position, the appellant cites Orders P-984 and PO-2453.

[109] In response, the region states that this office has long maintained a high threshold for establishing a compelling public interest[28] in the subject of the request. In addition, the region argues, the matter of awarding the contract in this particular case has never been a public issue; nor has the region's purchasing practices. The region goes on to state that its decision to withhold information under section 10(1) was based on the affected party's response to the request, and adds that the appellant has been provided sufficient information to determine whether the bid process was fair. In addition, the region argues that a public interest does not exist where the interests being advanced are essentially private in nature such as those of the appellant in this case. Further, the region states that the party who was awarded the bid successfully satisfied all of the criteria in the selection process, including the CSA certification which the appellant questions.

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[22] Orders P-984 and PO-2556.
[23] Orders P-12, P-347 and P-1439.
[24] Order MO-1564.
[25] Order P-984.
[26] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[27] Orders PO-2072-F, PO-2098-R and PO-3197.
[28] The region cites Order P-984 in support of its position.

[110] The affected party also provided representations on the possible application of the public interest override, submitting that there is no compelling public interest in the disclosure of the records at issue and states:

> We fail to see how our client's proposal in relation to supplying the Region with high-speed blower equipment could, in any way, meet the test for section 16. Firstly, there is no compelling public interest in disclosure and the appellant has shown no compelling public interest. Secondly, even presuming that there is a compelling public interest, we fail to see how that interest could clearly outweigh the purpose of the exemption (s. 10(1)). Put simply, this is not a case where the public interest override would reasonably apply. . .

[111] The affected party relies on Order PO-2618, in which Adjudicator DeVries found that an appellant's reference to the public interest in tenders submitted to governments was general in nature and that there was no suggestion that the public had a specific interest in the records at issue.

[112] In order for me to find that section 16 of the *Act* applies to override the exemption of the records I have found qualify under section 10(1), I must be satisfied that there is a compelling public interest in the disclosure of those particular records that clearly outweighs the purpose of the third party information or personal privacy exemptions.

[113] I acknowledge the importance of institutional accountability for RFP processes, and I agree that a public interest exists in the disclosure of information related to them to ensure that they are conducted in a fair and unbiased manner. However, I do not accept the appellant's position that a public interest that is compelling in nature exists in this case. Specifically, I accept the position taken by the region and the affected party that insufficient evidence has been provided to establish that there was a general or public interest in this particular RFP that would lead to the request in this appeal transcending the realm of private interest. The appellant has simply not provided sufficient evidence to support its position that a public interest in this RFP exists.

[114] Further, I find that disclosure of the records for which I have upheld the third party information exemption would not shed light on the region's actions or decisions with respect to the appellant's stated interest. I agree with the board and affected party that disclosure of the information that I have found to be exempt would not serve to inform the public about the activities of the region with respect to its tendering process. Therefore, I find that the exempt information would not add "to the information the public has to make effective use of the means of expressing public opinion or to make political choices."[29]

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[29] Order P-984.

[115] In the circumstances, I find that there is no compelling public interest in the disclosure of the exempt portions of the affected party's proposal, emails and scoring sheets. Therefore, the "public interest override" provision in section 16 does not apply in the circumstances of this appeal.

ORDER:

1. I order the region to issue an access decision to the appellant in relation to pages 31-34, 37, 51, 82, 97-116, 129-143, 146-147, 188-190, 196-198 and 208-210, treating the date of this order as the date of the request.

2. I order the region to disclose pages 5, 22, 24, 38, 39, 42, 49, 50, 52, 53, 54, 81, 83, 87, 88, 127, 148, 149, 154, 155, 157, 158, 172, 173, 225, 229, 230, 231, 238, 239 and 240, in full to the appellant by **January 6, 2014** but not before **December 30, 2013**.

3. I order the region to disclose portions of the proposal to the appellant by **January 6, 2014** but not before **December 30, 2013**. As the proposal was not consistently numbered, I have enclosed copies of the pages to be disclosed to the appellant.

4. I order the region to disclose pages 23, 90, 91, 92, 93 and 94, in part to the appellant by **January 6, 2014** but not before **December 30, 2013**. I have enclosed copies of these pages and have highlighted the areas that **are** to be disclosed to the appellant.

5. In order to verify compliance with order provisions 2, 3 and 4, I reserve the right to require that the region provide me with a copy of the records sent to the appellant.

Original Signed By: November 27, 2013
Cathy Hamilton
Adjudicator