Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-3180

Appeal MA12-422

City of Toronto

April 2, 2015

**Summary:** A trade union seeks access to the price schedules attached to a contract the City of Toronto awarded to a cleaning company. The City of Toronto granted the requester full access to the pricing schedules. The cleaning company appealed the City of Toronto's decision to this office. The cleaning company takes the position that the price schedules qualify for exemption under the mandatory third party information exemption under section 10(1). This order finds that the records do not qualify for exemption and dismisses the appeal.

**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:** Orders MO-1706, MO-3175, PO-1791, PO-2018, PO-2435, PO-2485 and PO-3450

**Cases Considered:** *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII); *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.).

## OVERVIEW:

[1] A trade union submitted two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Toronto (the city) for

copies of records relating to a specified cleaning services contract to clean police stations in Toronto.

[2] The city located responsive records and notified the cleaning services company (the third party) pursuant to the notification provisions under section 21(1). The third party objected to the release of any information relating to it.

[3] The city issued a decision letter granting the requester partial access to responsive records, including records the third party claims qualify for exemption under section 10(1).

[4] The requester appealed the city's decision to withhold certain records to this office and appeal file MA12-488 was opened. However, that appeal was subsequently closed as the requester no longer sought access to the records at issue in that appeal.

[5] The third party (now the appellant) also appealed the city's decision to disclose records to the requester and a mediator from this office was assigned to this appeal. The sole issue in this appeal is whether the city's decision to disclose the records at issue to the requester should be upheld.

[6] Mediation did not resolve this appeal and the issues remaining in dispute were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act.*

[7] During the inquiry stage the appellant confirmed that it no longer seeks to appeal the city's decision to disclose the records identified as Schedule B, C and D on the index of records provided with the city's access decision. Accordingly, those records are no longer at issue in this appeal. Also during the inquiry stage, the city, appellant and original requester provided written representations to this office.

[8] This appeal file was subsequently transferred to me to issue a decision.

[9] In this order, I dismiss the appeal.

## RECORDS:

[10] The only records remaining at issue are the price schedules described in the chart below:

| **Page #** | **Record Description** | **# of Pages** |
|---|---|---|
| 95 – 104 (duplicate pages 165 -175) | Part A, Price Schedule A1, A2, A3, A4 | 10 |
| 107 -116 (duplicate pages at 247 – 257) | Schedule A | 11 |

## DISCUUSION:

[11] The appellant claims that the price schedules qualify for exemption under section 10(1)(a), (b) or (c). These sections 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,
>
> (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;

[12] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[2]

[13] 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

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[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.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

**Part 1: type of information**

[14] The appellant submits that the price schedules contain commercial and financial information. The city advises that the information contained in the price schedules "pertains to a proposed commercial relationship between the City and the [appellant] regarding the supply of custodial services to the City. Some of the information contains financial information, including unit costs for the proposed service".

[15] The requester submits that it reviewed the city's representations and notes that the city concedes that the records contain commercial and/or financial information.

[16] Commercial and financial information have 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.[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]
>
> *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.[5]

[17] Having regard to the city's and appellant's representations, along with the records themselves, I am satisfied that the records contain "commercial information" and/or "financial information" within the meaning of these terms defined by this office. Accordingly, I find that the first part of the three-part test has been met.

[3] Order PO-2010.
[4] Order P-1621.
[5] Order PO-2010.

## Part 2: supplied in confidence

### *Supplied*

[18] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[6]

[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.[7]

[20] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach has been upheld by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* and a number of other decisions.[8] Most recently, it was once again upheld by the Divisional Court in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*.[9]

[21] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[10] The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[11]

[22] In support of its position that the pricing information contained in the schedules was supplied to the city, the appellant submits that:

- it supplied the pricing information at issue directly to the city;

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[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8] *Supra,* note 1. See also, Orders PO-2018, and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 (Div. Ct.) (*Grant Forest Products Inc.*) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct) (*CMPA*). See also *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (Can LII) and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[9] 2015 ONSC 1392 (CanLII) (*Aecon Construction*), upholding PO-3311.
[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[11] *Miller Transit*, above at para. 34.

- the pricing information at issue represents its responses to information requested by the city as part of the Request for Proposal (RFP) process; and
- the city did not add or vary any of the items contained in the price schedules.

[23] The city submits that the unit pricing information at issue is contained both in the contract for Janitorial Services awarded to the appellant and the Custodial Services Agreement, signed by the city and the appellant. The city takes the position that the information at issue was not "supplied" as it forms part of its contract/agreement with the appellant. The city also submits that the "inferred disclosure" or "immutability" exceptions do not apply in the circumstances of this appeal.

[24] The requester submits that the "pricing information at issue here cannot meet part two of the three-part test: the information was not supplied in confidence but rather forms part of the negotiated contract between the City and [the appellant]".

[25] The appellant does not dispute that the pricing information was included in the contract and agreement. However, it argues that unit price information has been found to been "supplied" by this office in Order PO-1791. In Order PO-1791, the requester sought access to a contract between the Management Board Secretariat (MBS) and a private contractor providing shredding and recycling services. Attached to the contract was an appendix which specified the unit and total prices for each year of the contract and the private contractor objected to the release of this information. In that order, Adjudicator Sherry Liang ultimately ordered the pricing information disclosed, but in her analysis found that this information was "supplied" to the institution.

[26] However, I note that the Notice of Inquiry sent to the appellant specifically referred to recent orders from this office, which were upheld by the Divisional Court, which found that even where the terms of the contract were incorporated without change from the proposal or draft that originate with one party or the other, it is still treated as having been "mutually generated" and not "supplied" for the purposes of section 10(1).[12]

[27] Having regard to the representations submitted to this office, it appears that there is no dispute between the parties that the price schedules were prepared by the appellant and submitted with the appellant's bid. There is also no evidence before me suggesting that the city or the requester dispute the appellant's assertion that the price schedules attached to the contract and agreement between the city and appellant contain the same pricing information the appellant provided the city with its bid.

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[12] Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.)].

[28] Accordingly, the issue I am to determine is whether the fact that the information at issue in this appeal appears to contain the exact same information as the appellant originally provided with its bid can be said to have been "supplied" for the purposes of the second part of the three-part test under section 10(1).

[29] Recently in Order MO-3175, Adjudicator Catherine Corban stated:

> … it is well established that the agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied" even when "negotiation" amounts to acceptance of the terms proposed by the third party [See Orders PO-2384, PO-2497 (upheld in *CMPA)* and PO-3157]. In Order MO-1706, Adjudicator Bernard Morrow stated:
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> > …[T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects the terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.
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> Also … the Divisional Court has affirmed this office's approach with respect to the application of section 10(1) to negotiated agreements and specifically confirmed in *Miller Transit* and *Aecon Construction* that the approach is consistent with the intent of the legislation, which recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds.

[30] For the purposes of this appeal, I adopt this office's approach to section 10(1) which has been repeatedly upheld by the Divisional Court, and find that the price information at issue is a product of the negotiation process between the city and the appellant.

[31] The appellant argues that it supplied the pricing information contained in the price schedules directly to the city However, the price schedules now form part of the contract and agreement between the city and the appellant and recent authorities have consistently treated the provisions of a contract as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no

negotiation or where the final agreement reflects information that originated from a single party.[13]

[32] Accordingly, the fact that the information at issue in this appeal appears to replicate the exact same information as originally provided by the appellant to the city is not determinative of whether the information has been "supplied".

[33] Finally, I considered whether either the "inferred disclosure" and "immutability" exceptions apply to the circumstances of this appeal. The appellant did not provide specific representations on whether the "inferred" disclosure exception applies. Accordingly, there is no evidence before me suggesting that disclosure of the price schedules would reveal, or permit the drawing of accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the city.[14]

[34] The "immutability" exception applies to information that is immutable or is not susceptible of change. Examples are financial statements, underlying fixed costs and product samples or designs.[15] In my view, the pricing information at issue in this appeal does not contain this type of information; nor did the appellant's representations address this issue. In my opinion, the appellant's submissions in support of its position that disclosure of the price information at issue could reasonably be expected to result in financial loss is premised on the assumption that the price information submitted in bids can be changed to undercut other bids.

[35] Having regard to the above, I find that the price information at issue in this appeal does not fit the "inferred disclosure" or "immutability" exceptions.

[36] In summary, I find that the price schedules attached to the contract and agreement reflect the end result of the appellant's and city's negotiations. Accordingly, this information was not "supplied" to the city for the purposes of section 10(1) and does not meet the second part of the three-part test for the third party information exemption under section 10(1). As all three parts of the section 10(1) test must be met, it is not necessary for me to also review the confidentiality requirement of the second part or the harms contemplated in the third part. I find that section 10(1) does not apply and dismiss the appeal.

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[13] Supra, note 1 and 8.
[14] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[15] *Miller Transit*, above at para. 34.

## ORDER:

1. I uphold the city's decision to disclose the price schedules to the requester.

2. I order the city to disclose pages 95-104, 107-116, 165-175 and 247-257 to the requester by **May 8, 2015** but not before **May 1, 2015.**

3. In order to verify compliance with order provision 2, I reserve the right to require a copy of the records disclosed by the city to the requester to be provided to me.

Original signed by: April 2, 2015
Jennifer James
Adjudicator