

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3233

Appeal MA14-90

County of Norfolk

August 21, 2015

Summary: The appellant sought information relating to an identified Request for Proposal. The county denied access in part, or in full, to the responsive records, relying on the exemptions in sections 7(1) (advice or recommendations), 10(1)(a) and (b) (third party commercial information) and 11(c) and (d) (economic and other interests) to deny access to the portion it withheld. The appellant also alleged that the county did not conduct a reasonable search for responsive records. Neither the county, a company whose interests might be affected by disclosure or the appellant made submissions in the appeal. In this order, the adjudicator finds that there is insufficient evidence to conclude that sections 7(1), 10(1)(a) and (b) and 11(c) and (d) apply. Accordingly, the information is not exempt from disclosure. The county is also required to conduct a further search for responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 7(1), 11(c), 11(d), 10(1)(a), 10(1)(b), 17 and 42.

Order Considered: Order PO-1791.

OVERVIEW:

[1] The County of Norfolk (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act or MFIPPA) for access to the following information:

All internal and external documents related to [an identified Request for Proposal] including, but not limited to, the following: submitted bid responses; technical evaluation scores complete with notes per line item; all pricing information; recommendation report forwarded to council for approval; purchase order to successful bidder, etc.

[2] The county identified responsive records and, relying on an identified purchasing by-law, denied access to them in full.

[3] The requester (now the appellant) appealed the county's decision.

[4] During mediation, the county issued a revised access decision identifying the exemptions at section 10(1) (third party commercial information) and 11 (economic and other interests), generally, as the basis for denying access to the responsive records. The county then issued a further access decision disclosing certain information to the appellant. The decision letter was accompanied by an index of records indicating which responsive records were to be disclosed to the appellant and the exemptions that the county claimed were applicable to the records it withheld in part or in full. The index indicated that the county would also be claiming the application of section 7(1) (advice or recommendations) of the *Act* with respect to certain records and particularized that it would be withholding other information pursuant to sections 10(1)(a) and (b), and 11(c) and (d) of the *Act*.

[5] After the appellant received the information the county agreed to disclose and reviewed the index of records, it narrowed its request to be for access to Records 20 to 26, 28, 30 and 31 in the Index of Records which the county had withheld in part, or in full. Accordingly, all other records are no longer at issue in this appeal. Also at mediation, the appellant advised that it is seeking access to a record that the county did not identify in its index of records, namely a purchase order that relates to the Request for Proposal. This raised the reasonableness of the county's search for responsive records, which was then added as an issue in the appeal.

[6] Shortly after the mediator issued her initial Mediator's Report, the county disclosed Record 28 to the appellant. In addition, the appellant further advised the mediator that additional records should exist that relate to the debrief he received on the Request for Proposal process.

[7] As mediation did not fully resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the county and a company whose interests may be affected by the disclosure of certain information remaining at issue (the affected party). Neither the county nor the affected party provided responding representations.

[9] I then sent the appellant a Notice of Inquiry setting out the facts and issues in the appeal. The appellant also provided no representations.

RECORDS:

[10] The withheld portions of Records 20 to 25 and all of Records 26, 30 and 31 as described in the county's Index of Records are at issue in the appeal.

PRELIMINARY MATTER

[11] In the Notice of Inquiry, I set out the following:

Please note that under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

[12] Section 42 of the *Act* reads as follows:

If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

[13] The institution provided no representations or evidence on why the information at issue is exempt under sections 7(1) or 11(c) and/or 11(d) of the *Act*. From my review of the records, I can see no reason why these exemptions might apply to the information in the records for which they were claimed. Accordingly, I find that the exemptions at sections 7(1), 11(c) and/or 11(d) of the *Act* do not apply to the information at issue in the responsive records.

REASONABLE SEARCH

[14] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.¹ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[15] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence

¹ Orders P-85, P-221 and PO-1954-I.

to show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[16] A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request, expends a reasonable effort to locate records which are reasonably related to the request.⁴

[17] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[18] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶

[19] Based on the failure of the institution to provide any representations or any evidence on this issue I am not satisfied that it has conducted a reasonable search for responsive records. Accordingly, I will order the institution to conduct a search for responsive records and to provide the appellant with a decision letter setting out the steps it took in conducting its search. If further records are found in the course of its search, I order the institution to issue an access decision to the appellant.

THIRD PARTY INFORMATION

[20] Affected parties who rely on the exemption provided by section 10(1) of the *Act* to resist disclosure share with the institution the onus of proving that this exemption applies.⁷

[21] The relevant portions of section 10(1) of the *Act* 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, where 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;

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

⁷ Order P-228.

(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;

[22] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁸ 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.⁹

[23] For section 10(1) to apply, the institution and/or the affected 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) and/or (b) of section 10(1) will occur.

[24] In this case all the parties declined to submit representations.

[25] Assuming, without deciding, that the first two parts of the test have been established, I will address part three of the three-part test.

[26] To meet the third part of the test, the county or the affected party must provide “detailed and convincing” evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁰ 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 the surrounding circumstances. However, parties should not assume

⁸ *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.*).

⁹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

¹⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹¹

[27] In applying section 10(1) to government contracts, 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).¹²

[28] In Order PO-1791¹³, this office discussed the impact on an appeal of this nature, of the failure by an affected party to submit representations:

... As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.

In the circumstances, I am unable to find that the submissions of MBS provide the “detailed and convincing evidence” which is required to support the application of section 17(1)(a) to this case.

[29] These comments have even more relevance to this appeal, where none of the parties provided representations. In the absence of any representations, I am similarly left without any evidence on the issue of reasonable expectation of harm from disclosure with respect to the information at issue. I have also reviewed the information the county claims is exempt under sections 10(1)(a) and/or (b) and find nothing in it that would allow me to infer a reasonable expectation of harm from disclosure. As a result, I am unable to conclude that the harms described in section 10(1)(a) or (b) could reasonably be expected to result from disclosure of the information at issue. As all parts of the three-part test for exemption under section 10(1) must be satisfied, I find that this exemption does not apply.

[30] As I have found that none of the information at issue qualifies for exemption under sections 7(1), 10(1)(a) and (b), 11(c) and 11(d) of the *Act*, I will order that it be disclosed to the appellant.

¹¹ Order PO-2435.

¹² Order PO-2435.

¹³ Dealing with the equivalent provision in the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended.

ORDER:

1. I order the county to disclose to the appellant the withheld portions of Records 20 to 25 and Records 26, 30 and 31, in full, by sending them to him by **September 28, 2015**, but not before **September 23, 2015**.
2. I order the county to conduct a further search for responsive records and to provide a decision letter to the appellant by **September 25, 2015**. If any further responsive records are found, the decision letter should set out the county's position regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*.
3. In order to ensure compliance with paragraphs 1 and 2 of this order, I reserve the right to require the county to provide me with a copy of its decision letter and a copy of the records as disclosed to the appellant.

Original signed by: _____
Steven Faughnan
Adjudicator

_____ August 21, 2015