

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3223

Appeal MA14-207

Town of Whitchurch-Stouffville

July 16, 2015

**Summary:** The requester seeks access to records describing the amounts the town paid a waste collection company over a specified time period. The town granted the requester full access to the records and the company appealed the town's decision to this office. The company takes the position that the records qualify for exemption under the third party information exemption under section 10(1). This order finds that the information was not "supplied" to the town for the purposes of section 10(1). Accordingly, the records do not qualify for exemption and the appeal is dismissed.

**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:** Order PO-2806

### OVERVIEW:

[1] A requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the town of Whitchurch-Stouffville (the town) for records relating to a particular solid waste company (the third party). The requester subsequently narrowed its request to include only a summary of invoices for a specified time period.

[2] The town located the responsive records and notified the third party pursuant to the notification provisions in section 21(1). The town considered the third party's objections, but decided to grant the requester with access to the responsive records.

[3] The third party (now the appellant) appealed the town's decision to this office and a mediator was assigned to the appeal.

[4] During mediation, the mediator explored settlement with the parties. However, settlement was not possible as the appellant maintains that the records contain third party information and that they qualify for exemption under sections 10(1)(a) and (c).

[5] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry stage, the original requester and appellant provided representations in support of their positions. The town did not make any additional submissions beyond what it already stated in its decision letter to the appellant granting access to the records.

[6] In this order, I find that the records do not qualify for exemption under section 10(1) and dismiss the appeal.

## **RECORDS:**

[7] The records at issue in this appeal are three sets of computer print outs describing the amounts the town paid to the appellant over a specified time period, totalling 11 pages.

## **DISCUSSION:**

[8] The sole issue in this appeal is whether the third party information exemption at section 10(1) applies to the records. In its decision letter to the appellant, the town stated:

Based on our review of past orders from the Information and Privacy Commissioner, the mandatory exemption requirements under subsections 10(1)(a) and (c) of the *Act* do not apply to the records that the Town intends to release.

The invoices were related to services acquired through the solicitation of competitive offers and approved through a resolution of Council. Therefore, the amounts on the contract/award would be on the contract/award amounts, could also be made known to the public.

[9] However, the appellant takes the position that the records qualify for exemption under section 10(1)(a) and (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; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

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

[11] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

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

[12] The appellant submits that the records “reveal commercial or financial information in the form of a summary of invoices issued by the Third Party to the Town

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<sup>1</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

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

and the total amount paid under the contract” for a specified period of time. The requester’s representations did not specifically address this issue.

[13] Commercial and financial information have been defined 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.<sup>3</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>4</sup>

*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.<sup>5</sup>

[14] Having regard to the appellant’s submissions, along with the records themselves, I am satisfied that the records contain “commercial information” and/or “financial information” within the meaning of these terms as defined by this office. In making my decision, I took note that the computer printouts at issue contain invoice numbers, cheque numbers, transaction dates and the amount the town paid for each transaction. Each of the three printouts also report the total amount the town paid the appellant for the specified time period.

[15] Having regard to the above, I find that the first part of the three-part test has been met.

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

### ***Supplied***

[16] 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.<sup>6</sup>

[17] 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.<sup>7</sup>

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<sup>3</sup> Order PO-2010.

<sup>4</sup> Order P-1621.

<sup>5</sup> Order PO-2010.

<sup>6</sup> Order MO-1706.

<sup>7</sup> Orders PO-2020 and PO-2043.

[18] 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.<sup>8</sup>

[19] 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.<sup>9</sup> 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.<sup>10</sup>

#### *Representations of the parties*

[20] The requester’s and the town’s submissions do not specifically address the issue of whether the information at issue was supplied by the appellant to the town. The appellant’s representations state:

The requested records were created by the Town from invoices directly supplied to the Town by the Third Party. Disclosure of the summary would reveal the amounts of those invoices.

The Third Party had a reasonable implicit expectation that its invoices would be confidential. The invoices contain sensitive commercial information about the value of services provided, which would be of significant interest to competitors. Only the Third Party and the Town had access to the information, and the information is not available from sources to which the public has access.

#### *Decision and analysis*

[21] There is no dispute that the computer printouts at issue were prepared by the town. Accordingly, for the records to meet the “supplied” test in section 10(1), there

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<sup>8</sup>This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*),.

<sup>9</sup> Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

<sup>10</sup> *Miller Transit*, above at para. 34.

must be evidence that the "inferred disclosure" or "immutability" exceptions apply in the circumstances of this appeal.

[22] For the "immutability" exception to apply there must be evidence that the information at issue is immutable or is not subject to change. The examples provided above include financial statements, underlying fixed costs and product samples or designs. The appellant's representations do not claim that the records contain this type of information and I am satisfied that they do not.

[23] However, the appellant submits that the computer printouts prepared by the town contain the same information it included in the invoices it sent to the town for payment. Accordingly, the appellant appears to take the position that the "inferred disclosure" exception applies as the records contain "non-negotiated confidential information" it supplied to the town. In support of its position, the appellant submits that information regarding the amounts the town is to pay it for its services is not available to the public and would be of significant interest to competitors.

[24] The town submits that the appellant was awarded its contract after a process of soliciting competitive offers and being vetted by its council. The town submits that that its contract with the appellant "would be publicly available" and thus "it is reasonable to expect that any invoice amounts" flowing from the contract would be treated in the same manner.

[25] Having regard to the representations of the parties, along with the records, I find that the records merely contain information regarding the mutually-agreed upon price the town agreed to pay the appellant for its services. Accordingly, I am satisfied that disclosure of information regarding the amount the town paid the appellant pursuant to the terms of their contract would not reveal non-negotiated confidential information. In my view, the circumstances in this appeal are similar in those in Order PO-2806 in which Adjudicator Daphne Loukidelis found that annual payments the Ontario Power Generation made to a company which could be "readily traced back" to the negotiated arrangement could not meet the "supplied" test in section 10(1).

[26] In this appeal, the appellant was awarded a contract to provide waste collection services to the town and issued invoices to collect its agreed-upon fee. The requester does not seek access to the actual invoices, but rather the computer printouts which track the town's receipt and payment of the invoices. I agree and adopt the reasoning in Order PO-2806 and find that the amounts of monies the town paid the appellant can be traced back to the contract between the parties. Though the appellant submits that the terms of the contract are confidential, I find that the appellant failed to adduce sufficient evidence to support this position. For example, the appellant did not present objective evidence demonstrating that there was an expectation to keep the amounts of monies the town paid it from the public. In fact, the town's evidence suggest that the

appellant's expectation of confidentiality is not reasonable taking into consideration the fact that the payments to the appellant involve the expenditure of public funds.

[27] Having regard to the above, I find that the information at issue was not "supplied" to the town 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.

[28] I find that section 10(1) does not apply and dismiss the appeal.

**ORDER:**

1. I uphold the town's decision to disclose the records.
2. I order the town to disclose the record to the requester by **August 21, 2015** but not before **August 14, 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 town to the requester to be provided to me.

Original signed by: \_\_\_\_\_  
Jennifer James  
Adjudicator

\_\_\_\_\_ July 16, 2015