Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3258

Appeal MA14-397

City of Greater Sudbury

October 30, 2015

Summary: The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) to the quantity and unit price of the goods and services sold to the City of Greater Sudbury (the city) by the affected party as set out in invoices and in the Addendums to two contracts between it and the city. The city denied access, citing the mandatory third party information exemption in section 10(1). This order does not uphold the city's decision, finding that the information was not supplied by the affected party to the city.

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] The City of Greater Sudbury (the city) received a four-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to information relating to water and wastewater emergency repair services. Specifically, the request was for the following information:

1. Reasons for outsourcing Water and Wastewater Emergency repairs. This may include any/all of the following:

    - report submitted by an authorized person,

- approval from council.

2. Contract details of the Water and Wastewater Emergency repairs, from 2005 to July 2014. This may include:

   - unit prices/cost.

3. Details of extending contract beyond 2008.

4. Details of individual emergency repair carried out by the contractor and associated costs from 2005 to July 2014. This information may include:

   - Date, Location, total cost and details of cost stating unit price/cost.

   - Invoices submitted by the contractor for each emergency repair and amount paid.

[2] With respect to the invoices responsive to parts 2 and 4 of the request, the requester subsequently agreed to narrow the scope of the request to the time period from 2007 to 2014.

[3] The city issued a fee estimate and interim access decision in response to part 4 of the request. Specifically, the city advised that the estimated cost to process the request was $1950. The city also advised that, based on a preliminary review, partial access would likely be granted to most of the records and sections 14(1) (personal privacy), 10(1) (third party information) and 11 (economic and other interests) of the *Act* would likely apply to other parts of the records.

[4] The city also issued a decision relating to parts 1, 2 and 3 of the request. The city granted partial access to the requested information. Access to two records was denied pursuant to section 15 (information soon to be published) of the *Act.* Access to two other records was denied, in part, pursuant to section 11 of the *Act.* The city indicated that there are no responsive records relating to part 3 of the request.

[5] The requester (now the appellant) appealed the decision of the city. In his letter of appeal, the appellant noted that he is not appealing the city's decision relating to parts 1 and 3 of the request. The appellant also noted that he had paid $975 in relation to the fee estimate relating to part 4 of the request. The appellant noted that he will determine if he will appeal the decision relating to part 4 of the request once he receives a final decision from the city relating to those records.

[6] The city issued a revised decision relating to Parts 1, 2 and 3 of the request. In that decision, the city identified five additional records. Access to some of the records was denied pursuant to section 15 of the *Act.* Access to the remaining records was denied, in part, pursuant to sections 10(1), 11(c), and 11(d) of the *Act.* The city once again indicated that there are no responsive records relating to part 3 of the request.

[7] In correspondence dated September 15, 2014, the city notified an affected third party in relation to records which could affect their interest pursuant to section 21 of the *Act.*

[8] During mediation, the appellant advised the mediator that he feels that there is a public interest in the disclosure of the records at issue. As a result, section 16 of the *Act* has been added as an issue in this appeal.

[9] The city issued a further revised decision granting partial access to the records relating to parts 1, 2, and 3 of the request.

[10] Following receipt of that decision, the appellant advised the mediator that he is only seeking the quantity amounts and the unit pricing set out in the records relating to parts 2 and 4 of the request.

[11] The city subsequently advised the mediator that it is no longer relying upon the application of section 11 of the *Act* in relation to the records relating to part 2 of the request.

[12] In correspondence dated December 15, 2014, the city issued a final decision relating to part 4 of the request. The city granted partial access to the requested records. The city advised that access to unit pricing information was severed pursuant to section 10(1) of the *Act*. The affected party appealed this and appeal file MA15-10 was opened to address that appeal. This third party appeal was then resolved at mediation and appeal MA15-10 was closed.

[13] As the affected party did not consent to the disclosure of the information remaining at issue, further mediation was not possible and the appellant advised the mediator that he would like this matter to proceed to adjudication where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[14] In this order, I do not uphold the city's decision and order disclosure of the information at issue in the records.

RECORDS:

[15] With respect to part 2 of the request, the appellant is seeking the quantity amounts and unit pricing contained on the following pages:

Record 3 pages 1 and 2

Record 4 pages 3, 4, 5

Record 8 pages 38, 39, 52, 53

Record 9 pages 119, 120, 121, 131, 132, 133, 176, 177, 178

[16] With respect to part 4 of the request, the appellant is seeking the quantity amounts and unit pricing contained on the invoices. The city advises that there are approximately 8950 pages of invoices and provided this office with a sample of these invoices.

DISCUSSION:

Does the mandatory third party information exemption at section 10 apply to the records?

[17] Section 10(1) states in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[18] 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]

[19] 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

---

[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.

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

[20] The city states that the records contain commercial and/or financial information, as the information appearing in the contracts reflects pricing practices and the use or distribution of money in relation to the services provided by the affected party. It also states that the unit prices and quantity relate to the selling of goods and services for a profit-making enterprise, thereby making it commercial information.

[21] The affected party states that the records relate to its quantities and unit prices and is commercial information.

[22] The appellant agrees that the records contain commercial and financial information.

Analysis/Findings

[23] The types of information raised by the city and the affected party as listed in section 10(1) have been discussed in prior orders:

> *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]

[24] At issue in this appeal are the prices per unit and the quantity amounts of the affected party's goods and services. I agree that this information is commercial information as it relates to the selling of the affected party's goods and services. I also agree that this information is financial information as it relates to the affected party's

---

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

pricing practices.

[25] Therefore, part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

[26] 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]

[27] 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]

[28] 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.[8]

[29] 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.[9] 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.[10]

[30] The city states that the unit prices and quantity information in the records relates to two contracts. It states that these contracts were awarded by a tender process, which is a competitive approach, as opposed to the negotiated approach to procurement in a request for proposals (RFPs). It describes the tender process where the lowest price tender is awarded the contract and submits that negotiations typically do not play a part in the tender process. It states:

---

[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8] 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*).
[9] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[10] *Miller Transit*, above at para. 34.

> Once the city ensured that the bids were compliant, the unit prices in relation to the estimated volume of the contracts ended up being the factor which determined the lowest bid. Keeping in mind that the city's intention was always to select the lowest compliant bid without negotiation, interpreting a lowest price tendering contract to be a negotiated contract is inconsistent with how businesses and institutions conduct competitive processes for lowest price bid contracts. As such, the city suggests that binding lowest price tenders contain unit prices which are supplied and that this information is not negotiated.
>
> The city and any other competitor in the industry could easily infer the markup attached to the goods and services because the unit prices themselves are so detailed that the underlying cost would be apparent. Because the underlying nonnegotiable information may be inferred from the information, this information qualifies as "supplied".

[31] The city also provided an affidavit from its chief purchasing officer. She states that during the evaluation of tenders, after determining that the bids were valid, the only factor used to determine which bid won was which bid contained the lowest estimated total contract price. According to her, this price was based on the total of the unit prices associated with the estimated volume of work. She also states that the city reserved the right to reject any and all tenders and told bidders that the lowest of any tender will not necessarily be accepted. She further states that in this case, the affected party's bid was the lowest bid and, as the city required the affected party's services, the affected party's bid was selected.

[32] The affected party states that these were no negotiations between it and the city at the time the contract was made. It states that it tendered the contract and was advised it was the lowest bidder, therefore, there was nothing mutually generated.

[33] The appellant states that the records in questions, unit price and quantity, do not qualify as having been supplied for the purposes of the second part of the test under section 10(1). He points out that the terms of a tender are determined by the owner, in this case the city. He refers to the Request for Tenders (RFT) document which lists the city's general conditions of the contract to be imposed by the city on the bidders.[11] He states that these terms included pre-qualification, performance guarantee, confidentiality, and government taxes, however, the unit cost and quantity are not the terms of tender documents. The appellant further states that the *Act* does not distinguish between documents related to tenders, request for proposals, or contracts.

[34] The appellant notes that the city's procurement policies and procedures for the

---

[11] The city provided the terms of the tender for both contracts at Exhibits A and D to the affidavit of the city's Chief Purchasing Officer.

two contracts were governed by two specific by-laws,[12] which lists the purposes, goals and objectives of the city's procurement process, as follows:

a. To encourage competition among suppliers

b. To maximize savings for taxpayers.

c. To ensure service and product delivery, quality, efficiency and effectiveness;

d. To ensure fairness among bidders;

e. To ensure openness, accountability and transparency while protecting the financial best interests of the City of Greater Sudbury;

f. To have regard to the accessibility for persons with disabilities to the Goods. Services and Construction purchased by the City of Greater Sudbury;

g. To attempt to reduce the amount of solid waste requiring disposal through the purchase of environmentally responsible Goods and Services. [Emphasis added by appellant]

[35] The appellant submits that the contracts were awarded according to governing procedures and these two by-laws to ensure competitive bidding and that the unit price and quantities are part of a competitive process and do not qualify as having been supplied.

Analysis/Findings

[36] I will now review the details of the records at issue.

[37] With respect to part 2 of the request, the appellant is seeking the quantity amounts and unit pricing contained in two documents entitled "Addendum No. 2 [date], Schedule of Unit Prices Contract No. [#] …" for:

Record 3 pages 1 and 2

Record 4 pages 3, 4, 5

Record 8 pages 38, 39, 52, 53

Record 9 pages 119, 120, 121, 131, 132, 133,[13] 176, 177, 178

---

[12] The city provided the purchasing by-laws for both contracts at Exhibits H and I to the affidavit of the city's Chief Purchasing Officer.

[13] Pages 119, 120, 121, 131, 132, and 133 of Record 9 only have quantities, not unit prices, listed on these pages.

[38] These pages are addendums to, and form part of, the two contracts entered into between the city and the affected party. I find that the information at issue in these pages was not supplied by the affected party to the city. As stated above, the provisions of a contract between an institution and a third party, 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 even where the final agreement reflects information that originated from a single party.

[39] I do not accept the city's and the affected party's submissions that if a contract is awarded as a result of a tender process, as opposed to a RFP process, that it is not mutually generated. I agree with the appellant that the two contracts were awarded according to the city's procurement by-laws[14] to ensure competitive bidding. I find that the unit price and quantities in Addendum No. 2 to each contract are part of a competitive process and do not qualify as having been supplied. I do not agree with the city and the affected party that just because a contract was awarded in response to a RFT, where generally the lowest overall bid is accepted, that this information is supplied by the affected party and not mutually generated.

[40] As noted above by the appellant, the terms of the tenders to be received by the city were set by the city. As well, the city had the right to decide whether or not to accept the tender. The city provided a copy of page 9 of each of the two contracts,[15] which include the following terms:

- The city reserves the right to reject any or all tenders,
- The lowest or any tender not necessarily accepted.

[41] I also find that the inferred disclosure exception does not apply.

[42] From my review of the records, I cannot ascertain how the information in the addendums would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. In particular, I cannot ascertain from my review of the records how the markup attached to the goods and services could be inferred. I do not agree with the city that the unit prices themselves are so detailed that the underlying cost is apparent from the records.

[43] Nor do I find that this information is immutable. As I already indicated, I have found that the unit price and quantity of goods and services to be sold to the city by the affected party was susceptible to negotiation.

[44] With respect to part 4 of the request, the appellant is seeking the quantity

---

[14] Exhibits H and I of the affidavit of the city's Chief Purchasing Officer.
[15] Found at Exhibits J and K of the affidavit of the city's Chief Purchasing Officer.

amounts and unit pricing contained in invoices the city received from the affected party for goods and services rendered. I also find that this information was not supplied by the affected party to the city.

[45] I rely on Order PO-2806, where it was found that the price per ton in an invoice represented the agreed upon unit price and was calculated based on the negotiated commercial agreements. In that order, Adjudicator Daphne Loukidelis stated:

> …the withheld price per metric tonne contained in the second affected party's invoice, I also find that it represents a mutually-agreed upon unit price for the removal of each tonne of that particular by-product from OPG's[16] Lambton facility, which is not "supplied."
>
> In my view, the dollar figures mentioned above simply represent calculations arising from negotiated commercial arrangements between OPG and the affected parties. Past orders have established that where an institution has the option to accept or reject a third party's bid or pricing, it cannot argue that the pricing information was "supplied" to it by the third party. In this appeal, there is no evidence to suggest circumstances where OPG was unable to accept or reject the affected parties' unit prices or the terms of its pricing, more generally, for the provision of the removal services. As previously recognized by this office, the option to do so is itself a "form of negotiation" [Orders PO-2435 and PO-2632]. Accordingly, I find that the remaining payment amounts in the spreadsheets and the unit price given on the invoice are not "supplied" for the purposes of part 2 of section 17(1).[17]

[46] I also find that the information at issue in the invoices, namely the unit prices and quantity of goods or services sold to the city by the affected party, which information is used to calculate the amount owed by the city to the affected party, simply represent calculations arising from negotiated commercial arrangements between the city and the affected party. Therefore, I find that the information at issue in the invoices was not supplied by the affected party to the city.

[47] Accordingly, I find that none of the information at issue in the records was supplied by the affected party to the city and that part 2 of the test under section 10(1) has not been met. Since all three parts of the test under section 10(1) must be met to find the information exempt under that exemption, I will order the information at issue in the records disclosed to the appellant.

[48] Given my findings that the supplied test under part 2 of the test under section

---

[16] Ontario Power Generation, the institution in this order.

[17] Section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the equivalent to section 10(1) of *MFIPPA.*

10(1) has not been met, it is not necessary for me to consider whether the information at issue was supplied in confidence under part 2 of the test nor whether part 3 of the test, the harms test, has been met. As the information at issue in the records is not exempt under section 10(1), it is also not necessary for me to consider whether the public interest override in section 16 applies.

ORDER:

1. I order the city to disclose the information at issue in the records to the appellant by **December 7, 2015** but not before **December 1, 2015**.

2. In order to verify compliance with order provision 1, I reserve the right to require a copy of the records disclosed by the city to the appellant to be provided to me.

Original Signed by: October 30, 2015

Diane Smith
Adjudicator