Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3264

Appeal MA14-330

County of Norfolks

November 19, 2015

Summary: The appellant made a request to the County of Norfolk (Norfolk) for access to the evaluation records of eight proponents who responded to an RFP Norfolk had issued for health care services. Norfolk identified responsive records and denied access to them in full, claiming the application of the mandatory exemption in section 10(1) (third party information) and the discretionary exemption in section 11 (economic and other interests). In this order, the adjudicator upholds Norfolk's decision, in part, and finds that portions of the records are exempt under section 10(1)(a). The exemption in section 11 is not upheld. Norfolk is ordered to disclose the non-exempt portions of the records to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1)(a), 10(1)(b) and 11.

Orders and Investigation Reports Considered: MO-2283.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the County of Norfolk (Norfolk) in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the evaluation records of eight proponents who responded to a Request for Proposal (RFP) Norfolk had issued for health care services.

[2] Norfolk issued a decision to the requester denying access to the proponents'

evaluation records[1] in their entirety, relying on the mandatory exemption in section 10(1)(a) and (b) (third party information) and the discretionary exemption in section 11 (economic and other interests) of the *Act*.

[3] The requester (now the appellant) appealed Norfolk's decision to this office. It was not possible to achieve a mediated resolution of the appeal. Consequently, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry.

[4] The adjudicator originally assigned to the appeal sought representations from Norfolk, which subsequently notified this office that it was not going to submit representations. The appeal was then transferred to me to continue the inquiry. I then sought representations from eight proponents (the affected parties) and the appellant. I subsequently received representations from three affected parties[2] and the appellant, which were shared in accordance with this office's *Practice Direction 7*. For the reasons that follow, I uphold Norfolk's decision, in part. I find that the majority of the records are not exempt under section 10(1) or 11 and I order Norfolk to disclose the non-exempt portions of the records to the appellant.

RECORDS:

[5] The records at issue are the consensus evaluations for eight proponents relating to a specified RFP issued by Norfolk.

ISSUES:

A. Does the mandatory exemption at section 10(1) apply to the records?

B. Does the discretionary exemption at section 11 apply to the records?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1) apply to the records?

[6] In its decision letter, Norfolk claimed the application of the mandatory exemption in sections 10(1)(a) and (b), which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

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[1] Norfolk did not notify the eight proponents of the request.
[2] I shall refer to the affected parties as affected party A, B and C.

> 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;
> >
> > (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;

[7] 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]

[8] 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

[9] The relevant types of information 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.[5] The fact that a record

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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.) (*Boeing Co.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[5] Order PO-2010.

> might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]
>
> *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.[7]

[10] Affected party A submits that the records contain trade secrets, as well as commercial and labour relations information. Affected party B states that it submitted a technical proposal containing personal information, and a financial proposal containing cost information to Norfolk. Affected party C submits that the records contain commercial information because they contain information directly related to the proposed selling of its services to Norfolk. In addition, affected party C argues that the records contain financial information because the records contain its pricing practice.

[11] The appellant argues that the records do not contain any of the types of information protected in section 10(1), and that the only financial information revealed in the records is the total price bid.

[12] I am satisfied that the information at issue contains "commercial information" for the purposes of section 10(1). The affected parties' information about the type and scope of their services, the company profiles, the provider teams, emergency planning and the total price bid is commercial information that relates solely to the buying or selling of services. Past orders of this office have found that the total price quoted by proponents in response to an RFP constitutes commercial information as it represents the total price for the selling of services to an institution.[8]

[13] Consequently, I am satisfied that the withheld information contains commercial information and I find that the first part of the test in section 10(1) has been met. It is, therefore, not necessary for me to determine whether the records contain financial or labour relations information, or trade secrets.

Part 2: supplied in confidence

[14] 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.[9] 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

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[6] Order P-1621.
[7] Order PO-2010.
[8] For example, see MO-3183.
[9] Order MO-1706.

inferences with respect to information supplied by a third party.[10]

[15] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[11]

[16] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, 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 by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[12]

[17] Affected party A submits that the information in its proposal was supplied to Norfolk, it is not available to the public, and it was their understanding that the information would be treated as confidential. Affected party B submits that it supplied its technical and financial proposals to Norfolk in confidence. Affected party C submits that while it did not directly provide the consensus evaluation (the records at issue) to Norfolk, the record was created based solely on the proposal it submitted in confidence to Norfolk. Affected party C argues that this information was supplied with a reasonable expectation of confidentiality because of section 6.8(a) of the RFP, which it advises states:

> The information submitted in response to this Request will be treated in accordance with the relevant provisions of the *Municipal Freedom of Information and Protection of Privacy Act*. The information collected will be used solely for the purposes stated in this Request. Any information submitted by a proponent that is to be considered confidential must be clearly marked as such.

[18] Affected party C states that as a result of the confidentiality clause in the RFP, it

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[10] Orders PO-2020 and PO-2043.
[11] Order PO-2020.
[12] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

marked each page of its proposal as confidential.

[19] The appellant reiterates that it is not seeking access to the actual bids or proposals submitted by any of the proponents to Norfolk, but rather the consensus evaluations. On the issue of confidentiality, the appellant submits that there is no explicit or implicit indication in the RFP that the information provided would be held in confidence. In fact, the appellant argues, the RFP states that the information provided would be treated in accordance with the *Act*.

[20] The appellant also argues that the information it has requested was not supplied by the affected parties to Norfolk. Moreover, the appellant submits that to the extent that any information in the records reveals information that was supplied, it was not done so either implicitly or explicitly in confidence. Lastly, the appellant submits that Affected party C cannot defeat the purpose of the *Act* simply by declaring everything it submitted to be confidential.

Analysis and findings – "supplied"

[21] The consensus evaluations contain columns entitled "Criteria," "Evaluator Comments," "Evaluator Score (2 columns)," and "RFP Score." In addition, the bottom of each page contains the formula used to calculate the price per point. More particular information also includes the total price bid of each proponent, the total points awarded and the total price per point.

[22] I am satisfied that, although the records at issue were created by Norfolk's staff, the content of portions of the consensus evaluations reflect the commercial information that was supplied by the affected parties to Norfolk in their proposals in response to the RFP. Therefore, while the consensus evaluations were not supplied by the affected parties to Norfolk, some of the information in them reveals the non-negotiated information that had been supplied by the affected parties to Norfolk. Consequently, I find that disclosure of some of the withheld portions of these records would reveal information that was "supplied" by the affected parties, or would permit the drawing of accurate inferences with respect to that information, for the purposes of section 10(1). In particular I find the following information to be supplied:

- the name of the proponent;
- the content of the column entitled "Evaluator Comments;"
- the total price bid for each proponent; and
- the total price per point, because in combination with the scoring information, one could ascertain the total bid price.

[23] However, I find that other information in the consensus evaluations was not "supplied" by the affected parties to Norfolk for the purposes of section 10(1). In

particular, I find that:

- the reference number of the RFP and the date of the evaluation would not reveal any information supplied to Norfolk by the affected parties;

- the first column of each record entitled "Criteria" sets out the criteria used by Norfolk to evaluate the respective proposals of the affected parties. This listed criteria is identical in each consensus evaluation and, in my view, reveals the criteria that Norfolk devised for this RFP, but does not reveal any information supplied to it by the affected parties;

- the final column of each record entitled "RFP Score" sets out the maximum score that a proponent can achieve for each of the criteria listed in the criteria column. These maximum scores were set by Norfolk and do not reveal information that was supplied to it by the affected parties;

- the formula for calculating the total price per point is a generic formula that was created by Norfolk. This formula is identical on each record and does not reveal information that was supplied to it by the affected parties;

- the total price bid and total price per point in the consensus evaluation for affected party A is blank and, therefore, does not contain any information it supplied to Norfolk; and

- the two columns entitled "Evaluator Score" simply reflect Norfolk's score of the affected parties' proposals for each of the criteria it set. The scores were not supplied by the affected parties to Norfolk. Conversely, it is Norfolk which evaluated the affected parties' proposals. The information in these columns reflects the numerical scoring and does not reveal underlying non-negotiated information the affected parties supplied to Norfolk. This applies equally to the total points awarded set out on the bottom of each page of the consensus evaluation.

[24] Consequently, the information described above that I have found was not "supplied" to Norfolk by the affected parties has not met the second part of the test in section 10(1) and is not exempt from disclosure under this exemption. However, Norfolk has also claimed the application of the discretionary exemption in section 11 to this information which I will also consider.

Analysis and findings – "in confidence"

[25] Based on my review of the information which I have found to be "supplied" and the representations of the affected parties, I am satisfied that this information was supplied with a reasonably-held expectation that it would be treated in a confidential manner by Norfolk. The 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 parties, describing aspects of its services, and the proposed price for the services they would be providing under the terms of its proposed contract with Norfolk. In my view, the parties intended this information be kept confidential once it was supplied to Norfolk.

[26] 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 parties, provided that the other parts of the test in section 10(1) are met.

[27] Having found that the the name of the proponent; the content of the column entitled "Evaluator Comments;" the total price bid for each proponent; and the total price per point was "supplied in confidence," the second part of the test in section 10(1) has been met with respect to this information. I will go on to determine whether the third part of the test has been met.

Part 3: harms

[28] The party resisting disclosure 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.[13]

[29] 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 that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[14]

[30] 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).[15]

[31] Affected party A submits that sharing information about where it did well and where it did not do well in its proposal would prejudice its competitive position, as it could give a competitor an "edge" for future proposals with Norfolk or other organizations. In this industry, affected party A argues, there are only a select number of companies that tend to compete for the same contracts and, therefore, the competition is "fierce."

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[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[14] Order PO-2435.
[15] *Ibid*.

[32] Affected party B submits that disclosure of the records would negatively impact its competitive ability in the market because competitors could access its budgeting strategies. Affected party B goes on to argue that information, if disclosed, would harm it and "expose" it to competition in the marketplace.

[33] Affected party C submits that disclosure of the records relating to it, along with the records of the other seven proponents, could permit a competitor to create a profile of the typical competitor bidding on services in the long-term care market. This information would provide a competitor with a significant advantage in future procurement processes, as it would be able to position itself against the strengths and weaknesses of its competitors. Affected party C goes on to argue that if the requester is a potential purchaser of its services, disclosure of the record could impact its perception of Affected party C and its capabilities, thereby impacting contract negotiations. Affected party C also takes the position that should the record be disclosed, it might choose not to submit proposals in response to future RFP's issued by Norfolk in order to lessen the risk of its commercial and financial information being shared with competitors. It argues that this could result in fewer bids and fewer options for Norfolk to choose from.

[34] The appellant submits that disclosure of the records would not give rise to any of the harms articulated in section 10(1). In particular, the appellant argues that the disclosure of the evaluation comments in no way would give a company a competitive edge. Further, the appellant states that the affected parties must provide detailed and convincing evidence of harm, but that they have merely repeated the description of the harms set out in the *Act*.

Analysis and findings

[35] As previously stated, the party resisting disclosure 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. I will now determine whether the harm in sections 10(1)(a) and (b) have been made out as regards the information that I have found was supplied in confidence to Norfolk by the affected parties.

<u>The proponents' names</u>

[36] I have not been provided with sufficient evidence that the disclosure of the names of the affected parties, all of which are service providers, could reasonably be expected to cause the harms contemplated in section 10(1)(a) or (b). Consequently, I find that the proponents' names are not exempt from disclosure under section 10(1).

<u>The total bid price and total price per point</u>

[37] In respect of the harm in section 10(1)(a), I must determine whether disclosure of the information at issue could reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations

of a person, group of persons or organization.

[38] I accept that the disclosure of the total bid prices and the total price per point could provide future proponents with commercial information that might lead to them putting in lower bids in response to future RFPs. However, the fact that a proponent may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position as contemplated by section 10(1)(a).[16] I make this finding because, in my view, it is highly unlikely that an institution would enter into a contract with a proponent based solely on accepting the lowest total price bid; there would be further discussion and negotiations regarding the details of the proposal between an institution and a proponent prior to the acceptance of the proposal.

[39] The information at issue sets out only the total price of each affected party (and the total price per point, which could reveal the total price bid). I find that this information does not provide insight into the commercial methodology of each affected party or the possible unique design of their proposals, such that disclosure of the information could significantly prejudice their competitive position. I also find that, contrary to affected party C's argument, disclosure of the total price of the bid would not reveal enough information to allow another proponent to create a "profile" of that competitor, or impact a purchaser's perception of the proponent's capabilities.

[40] Turning to section 10(1)(b), I am not persuaded that disclosure of the total bid prices (and total price per point) of the affected parties could reasonably be expected to result in similar information no longer being supplied to Norfolk in the future, as contemplated in section 10(1)(b). Companies and service providers seeking to do business with public institutions such as Norfolk must understand that certain information regarding how the institution meets its financial obligations will be made public.[17]

[41] Further, in Order MO-2283, Assistant Commissioner Brian Beamish addressed the possible application of section 10(1)(b) to information submitted by third parties in response to an RFP issued by the City of Oshawa (the city) for the construction of a sports and entertainment facility. The city and one affected party in that case took the position that disclosure of the information at issue would result in the information no longer being supplied as contemplated by section 10(1)(b). In that order Assistant Commissioner Beamish stated:

> In effect, the City is taking the position that companies will no longer provide the type of information that is necessary in order for the City to evaluate expressions of interest and proposals. In other words, companies will consciously submit incomplete or inadequate bids if they believe that

[16] See for example, Order PO-2435.
[17] For example, see Order MO-2274.

> certain information in these bids could become public. In my view, this is an exaggerated and entirely hypothetical proposition. Given the scope of projects put up for public bid, and the value of those projects, detailed and convincing evidence is required that companies will withdraw from the bidding process. That has not been provided.

[42] I agree with the reasoning outlined by Assistant Commissioner Beamish and adopt it for the purposes of this appeal.

[43] In my view, a contract to provide health related services is potentially profitable and, in keeping with the reasoning in Order MO-2283, requires sufficient evidence to demonstrate that future proponents could reasonably be expected to either withdraw from, or not participate in, the bidding process for such contracts. The affected parties in this case provide little evidence to support that position.

[44] Consequently, I find that the total bid price and total price per point are not exempt from disclosure under either section 10(1)(a) or (b).

Evaluator Comments Column

[45] Based on my review of the parties' representations and the records themselves, I am satisfied that the Evaluator Comments columns contain sufficient commercial information which, if disclosed, could reasonably be expected to prejudice significantly the competitive position of the affected parties. The columns provide detailed information about the affected parties' services which could be exploited by competitors in the marketplace. Accordingly, I am satisfied that the information contained in the Evaluator Comments columns qualifies for exemption under section 10(1)(a).

[46] Having found that the evaluator comments columns are exempt under section 10(1)(a), it is not necessary for me to consider the application of section 10(1)(b) to them.

[47] As previously stated, I also find that the proponents' names, total bid price and total price per point are not exempt from disclosure under either section 10(1)(a) or (b). Norfolk has also claimed the application of the exemption in section 11, which I will consider below.

Issue B: Does the discretionary exemption at section 11 apply to the records?

[48] Norfolk also denied access to the records, claiming the application of the discretionary exemption in sections 11(c) and 11(d), which state:

> A head may refuse to disclose a record that contains,

> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[49] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[18]

[50] For sections 11(c) or (d) to apply, the institution must provide sufficient 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.[19]

[51] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[20]

[52] As previously stated, Norfolk did not provide representations in this appeal. With respect to this exemption, not only has Norfolk not provided sufficient evidence that disclosure of these records may reasonably be expected to harm its economic interests, it has not provided any evidence at all.

[53] 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. I find that Norfolk has not met the burden of proof with respect to its decision to deny access to the evaluation records on the basis of section 11. Therefore, I do not uphold this exemption.

[54] In sum, I find that portions of the records are exempt under section 10(1), but also that the records are not exempt from disclosure under section 11. Consequently, I order Norfolk to disclose the non-exempt portions of the records to the appellant.

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[18] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[19] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[20] Order MO-2363.

ORDER:

1. I order Norfolk to disclose portions of the records to the appellant by **December 24, 2015** but not before **December 17, 2015**. Norfolk is to withhold only the content of the column entitled "Evaluator Comments." The remaining portions of the records are to be disclosed to the appellant.

2. I reserve the right to require Norfolk to provide me with a copy of the records it discloses to the appellant as a result of this order.

Original Signed by:

Cathy Hamilton
Adjudicator

November 19, 2015