

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3282

Appeal MA14-89

Toronto Police Services Board

January 27, 2016

Summary: The appellant sought access to the winning proposal and corresponding scoring and evaluation materials from a specified request for proposal. The police denied access to the responsive records, relying on the mandatory third party information exemption in section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed the decision, and subsequently removed names and other information (excluding education information) from the scope of his appeal. The police's decision to deny access to the remaining information is not upheld.

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

Orders and Investigation Reports Considered: Orders MO-3058-F and MO-3080-I.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the complete proposals submitted by two companies in response to a specified request for proposal (RFP) for handyman services. The police located two records responsive to the request. In accordance with section 21 of the *Act*, the police notified a third party whose interests could be affected by disclosure of the records and sought its position on disclosure. The third party objected to disclosure of its proposal. The police then issued a decision denying the requester access to the proposal of the third party, but

granting him access to the second proposal. The police also denied access in full to records containing the evaluation results for both proposals. The police relied on the mandatory exemption in sections 10(1)(a) and (c) (third party information) of the *Act* to deny access to the third party's proposal, and on the discretionary exemption in section 7(1) (advice and recommendations) to deny access to the evaluation records.

[2] The requester, now the appellant, appealed the police's decision to this office. Mediation was attempted but did not resolve the issues in the appeal. Accordingly, the appeal was moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[3] During the inquiry stage, the police reconsidered their decision in this appeal based on an interim order I issued at that time, Interim Order MO-3080-I. Like the present appeal, Interim Order MO-3080-I involved the winning submission and corresponding evaluation records relating to a request for proposal issued by the police. Based on their review of Interim Order MO-3080-I, the police issued a revised decision granting the appellant partial access to the evaluation records of the third party's proposal at pages 32 to 35 of the records and complete access to the evaluation records of the second proposal, and to six pages of records relating to the proposal that were previously not included in the appeal. The police also indicated in their revised decision letter that they no longer relied on the exemptions in sections 7(1) and 10(1)(c) of the *Act*, and relied only on the exemption in section 10(1)(a). Because the third party did not raise section 10(1)(c) in its submissions to the police at the time of the request or in its submissions to this office during the mediation stage of the appeal, this exemption ceased being an issue in the appeal when the police decided not to rely on it.

[4] After receiving the police's revised decision, the appellant continued to seek access to the withheld information. Accordingly, the appeal proceeded and I sought and received representations from the police, the appellant and the third party on the possible application of section 10(1)(a) to the withheld information. In the Notice of Inquiry I sent to the appellant, I asked him to address the application of the exemption with reference to Interim Order MO-3080-I which dealt with the same issues and similar records held by the police, and which the police relied on in issuing their revised decision in this appeal. I shared the parties' representations in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[5] At the end of my inquiry, the appellant advised that he was not interested in pursuing access to the names and personal information of individuals identified in the records at issue, with the exception of any information on these individuals' educational background. As a result of the appellant's decision to narrow the scope of the appeal, page 20 of the records – which is a resume of an individual that contains no education information – is no longer at issue. As well, the names of individuals in pages 3, 11, 13 and 21, and the names and contact information of two individuals at pages 24 and 25, are similarly no longer at issue in this appeal.

[6] In this order, I do not uphold the police's decision to deny access to the remaining information and I order the police to disclose this information to the appellant.

RECORDS:

[7] The records at issue consist of the third party's proposal (pages 1 – 31, excluding page 20 and the names and contact information of individuals in pages 3, 11, 13, 21, 24 and 25) and the withheld portions of two pages of evaluation materials (pages 32 and 33).

DISCUSSION:

[8] The sole issue for me to determine in this appeal is whether the mandatory exemption at section 10(1)(a) applies to the withheld information in the records. This section states:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization[.]

[9] 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

[10] For section 10(1)(a) 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

¹ *Boeing Co. v Ontario (Ministry of Economic Development and Trade)*, [2005] OJ No 2851 (Div Ct)], leave to appeal dismissed, Doc M32858 (CA)].

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

[11] The 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.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

[12] I adopt these definitions for the purpose of this appeal.

[13] In their representations, the police do not directly address this part of the test. Instead, they repeat the third party's position that the records contain financial and labour relations information. In his representations, the appellant asserts that the records do not contain any of the types of information protected by the section 10(1)(a) exemption. The appellant also states his belief that the records would not include accounting methods, profit and loss data, overhead and operating costs.

[14] Having reviewed the records, I am satisfied that they contain the type of information protected by part one of the test. The proposal is an offer for the sale of handyman services to the police, and the scoring and evaluation materials document the police's assessment of the proposal. All of the records were created for the purpose of entering into a commercial arrangement, and on this basis, I find that they all contain commercial information. I also find that some of the records contain information that qualifies as financial information as well. The first part of the section 10(1) test is therefore satisfied.

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order PO-2010.

Part 2: supplied in confidence

[15] The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 10(1)(a) of protecting the informational assets of third parties.⁶ 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

[16] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁸ In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.⁹

Representations

[17] Neither the police nor the third party directly addresses this issue in their representations. However, the third party objects to disclosure of any of the information at issue.

[18] In his representations, the appellant submits that the third party did not supply the information to the police; rather, he argues that the records at issue were mutually generated. He states that the proposal would have been a response to the RFP requirements which were made public in the RFP tender. He adds that the proposal, which was the successful bid, would form part of the contract entered into between the third party and the police. The appellant asserts that neither the police nor the third party can reasonably expect that the records would be treated confidentially and in support of this, he points to the third party’s agreement to have information regarding

⁶ Order MO-1706.

⁷ Orders PO-2020 and PO-2043.

⁸ Order PO-2020.

⁹ Orders PO-2043, PO-2371 and PO-2497.

the evaluation of its proposal disclosed by the police. He concludes by questioning whether the proposal was marked "confidential" by the third party.

Analysis and finding

[19] I am satisfied that the third party supplied its proposal to the police. All of the information in the proposal originated with the third party which provided the information to the police in response to the police's solicitation of proposals for handyman services. I do not accept the appellant's submission that the tender information was mutually generated. Previous orders of this office have considered and rejected similar arguments when dealing with winning RFP proposals. In particular, I note Order MO-3058-F which considered records similar to those at issue in this appeal.

[20] In Order MO-3058-F, the adjudicator dismissed the argument that contents of a winning proposal had been "mutually generated" rather than "supplied" where the terms of the proposal were incorporated into the contract between a third party and an institution. In dismissing this argument, the adjudicator held that the subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the institution into a "mutually generated" contract, noting that the record at issue before her was the winning proposal. The record at issue in this appeal is also the winning proposal and I have no evidence before me that it formed part of the contract between the police and the third party. I adopt the approach taken in Order MO-3058-F and reject the appellant's submission that the proposal was not supplied because some of its terms may form part of the contract. I also reject the appellant's submission that the proposal was mutually generated because it responds to the requirements of the RFP which were made public. This argument disregards both this office's interpretation of "supplied" under part two of the test and the purpose of the mandatory third party exemption in section 10(1) of the *Act*.

[21] As for the evaluation materials at pages 32 to 35, I note that some pricing information has been taken directly from the third party's proposal and is reproduced in page 32. Beyond this specific information however, I agree with the appellant that the remaining information contained in the evaluation materials in pages 32 and 33 was not supplied by the third party but rather, was generated by the police's RFP evaluation committee. I find that this information was not supplied and cannot therefore qualify for exemption under section 10(1) of the *Act*, and I will order it disclosed.

[22] Turning to the confidentiality of the information I have found to have been supplied by the third party, I disagree with the appellant's assertion that the third party had no reasonable expectation of confidentiality in the proposal. Based on the nature of the record and the information contained therein, I am satisfied that the third party supplied its information in the proposal with the implicit expectation that it would remain confidential. Moreover, the presence or absence of a "confidential" marking on a record is not determinative when considering the second part of the section 10(1) test.

Looking at all of the circumstances, including the third party's expectation of confidentiality, the police's treatment of the information in a confidential manner, and the absence of any evidence that the information is publicly available or that it has been treated in a way that is not confidential, I am satisfied that the proposal was provided by the third party to the police in confidence in satisfaction of the second part of the test.

Part 3: harms

[23] 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.¹⁰

[24] 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*.¹¹

[25] 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

Representations and finding

[26] The police and the third party assert that disclosure of the information at issue "could prejudice [the third party's] competitive position in the marketplace." Neither party provides any further representations on the harms part of the test. The appellant provides representations on this last part of the test. However, due to my finding below, there is no need for me to set them out in this order.

[27] I have no evidence before me from the third party and the police that disclosure of the records at issue could reasonably be expected to significantly prejudice the third party's competitive position. The absence of any evidence from the third party and the police about the potential for harm amounts to a failure to demonstrate that the risk of prejudice to the third party's competitive position is well beyond the merely possible or speculative. Moreover, there is nothing in the records themselves, or in the circumstances surrounding this appeal and the RFP underlying it, that would lead me to

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

¹¹ Order PO-2435.

¹² *Ibid.*

infer that the harms contemplated by section 10(1)(a) could reasonably be expected to occur. As a result, I find that the third part of the test is not satisfied and the information at issue is not exempt under section 10(1)(a). Accordingly, I will order the information at issue disclosed.

ORDER:

1. I do not uphold the police's decision to withhold the portions of the proposal and evaluation records remaining at issue.
2. I order the police to disclose to the appellant by **March 3, 2016**, but not before **February 26, 2016**:
 - the third party's proposal (pages 1 – 31, excluding page 20 and the names and contact information of individuals in pages 3, 11, 13, 21, 24 and 25) and
 - the withheld portions of pages 32 and 33 of the evaluation materials.
3. For greater certainty, I am providing the police with a copy of the pages listed in provision 2 above which are to be disclosed in part, highlighting the information that is **not** to be disclosed.
4. To verify compliance with this order, I reserve the right to require the police to provide me with a copy of the records disclosed to the appellant in accordance with provision 2 above.

Original Signed by: _____
Stella Ball
Adjudicator

_____ January 27, 2016