

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3317

Appeal MA14-321

County of Frontenac

May 30, 2016

Summary: The County of Frontenac (the county) received an access request under the Municipal Freedom of Information and Protection of Privacy Act (*MFIPPA*) for the Request for Proposal (RFP) response and presentation slide deck from an identified company. In this order, the adjudicator finds that the information at issue in the records is exempt under the mandatory third party information exemption in sections 10(1)(a) and (c).

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

Orders and Investigation Reports Considered: Order MO-3058-F.

OVERVIEW:

[1] The County of Frontenac (the county) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for the Request for Proposal (RFP) response from an identified company.

[2] Prior to making its decision, the county identified two records responsive to the request, and subsequently notified the affected party of this request in accordance with section 21(1) of the *Act*, seeking its views regarding disclosure of the responsive records that affect its interests. The affected party responded, objecting to the disclosure of the records. The county subsequently issued a decision to the requester advising of its decision to deny access to the two records in their entirety, pursuant to

the mandatory third party information exemption at section 10(1) of the *Act*.

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

[4] During mediation, the mediator contacted the affected party to see if it would consent to any part of the records being disclosed to the appellant. The affected party did not provide consent.

[5] As mediation did not resolve the issues in this appeal the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the county and the affected party seeking their representations initially.

[6] The county did not provide representations in response to the Notice of Inquiry, but did provide a copy of the publicly available RFP.

[7] In response, the affected party consented to disclosure of further information from the RFP response, which was then sent to the appellant by the county. I also received representations from the affected party in support of its position that section 10(1) applies. I provided the appellant with the non-confidential representations of the affected party, along with a copy of the RFP, and sought the appellant's representations in response. The appellant provided representations in response, however in its representations it simply indicates that it relies on the principles set out in Order MO-3058-F.

[8] In this order, I find that the information at issue in the records is exempt under sections 10(1)(a) and (c).

RECORDS:

[9] There are two records at issue in this appeal. One has been withheld in full and is a 22-page presentation slide deck. The other record has been withheld in part and is a 184-page RFP response.

DISCUSSION:

Does the mandatory third party information exemption at sections 10(1)(a) and/or (c) apply to the records?

[10] In its representations, the affected party relies on sections 10(1)(a) and 10(1)(c). These sections read:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[11] 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

[12] 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

[13] The affected party states that the RFP response contains a summary of every aspect of its business for the purpose of providing potential customers (such as the county) with the reassurance that its fundamental processes/procedures and methodologies are sound and provide the kind of support and partnership they are looking for in a service provider. It states that this is the definition of “commercial information” because the way in which each proponent structures the description of their service is intended to give them a competitive advantage. It states:

In this case, all proponents of the RFP were bidding to provide physiotherapy services (i.e. hours of service provided by a physiotherapist), however the agency support structure, protocols,

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.

programs, pricing (number of hours) and "value adds" outlined in addition to the staffing of physiotherapist time varies greatly across proponents.

[14] The affected party provided detailed representations on the sections of the RFP which contain commercial information, describing its unique approach to providing services. The affected party also submits that these sections of the RFP response contain financial information, including pricing, billing, costing and funding information.

Analysis/Findings

[15] The types of information listed in the affected party's representations in section 10(1) have been discussed 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.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

[16] At issue is the information severed from a RFP response presentation slide deck and a 184-page RFP response to provide physiotherapy services (the services) to a long term care home in the county. I agree with the affected party that the records contain commercial information related to the selling of services to the county by the affected party. The records also contain financial information related to the pricing practices of these services.

[17] Therefore, part 1 of the test under section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[18] 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

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order PO-2010.

⁶ Order MO-1706.

[19] 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

In confidence

[20] 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.⁸

[21] 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
- prepared for a purpose that would not entail disclosure⁹

[22] The affected party states that the RFP response was supplied to the county in the course of a confidential procurement process and refers specifically to section 8 of the RFP, which provides that proposals are received in confidence subject to the disclosure requirements of *MFIPPA*. It submits that:

This clear statement, as well as the nature and context of this procurement process, obliges the county to treat the RFP response as confidential. [We] had a reasonable expectation that the information in the RFP response and related communications would be treated as confidential by the county as part of that process. [We] participated in the procurement on the basis that it was confidential, and would not have done so had its RFP response not been received and retained in confidence.

⁷ Orders PO-2020 and PO-2043.

⁸ Order PO-2020.

⁹ 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.

Analysis/Findings

[23] At issue in this appeal are certain portions of the successful RFP response and the entire presentation slide deck. The slide deck contains information obtained from the RFP response. Section 8 of the RFP provides that the county will treat all proposals as confidential. Based on my review of the records and the affected party's representations, I find that they were supplied in confidence.

[24] I find that the information at issue in the records was communicated to the county on the basis that it was confidential and was to be kept confidential, was treated consistently by the affected 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.

[25] Therefore, part 2 of the test under section 10(1) has been met.

Part 3: harms

[26] 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

[27] 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

[28] 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

[29] The affected party provided both confidential and non-confidential representations on part 3 of the test under sections 10(1)(a) and (b).

[30] With respect to section 10(1)(a), the affected party submits that the RFP response is intended to be a confidential proposal between the prospective customer and proponent whereby the latter uses every means possible to convince the former to select them. It states that:

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 Order PO-2435.

In order to accomplish this, the customer must be reassured that all aspects of the proponents' processes and procedures are sound and will result in a successful partnership for quality service provision. This requires the proponent to be completely transparent and divulge all aspects of its operations in writing to give the customer enough information to be able to make this important decision. It is not only the content of the RFP but the format and style (the way in which it is written) that is confidential, because as a whole it contributes to providing proof to the customer that the proponent will provide the services as proposed. The physiotherapy industry (particularly in Long Term Care) is very competitive and is dominated by 4 large providers. The only way that we can maintain our market share is by continually developing proprietary programs and value added services that give us a competitive advantage (however small) in these RFP processes. The harm caused by releasing this information would be significant, and will undoubtedly cause us to lose out on future opportunities.

[31] With respect to section 10(1)(c), the affected party submits that it operates in a competitive industry and that disclosure would provide its competitors with an important piece of financial and commercial intelligence that they could then exploit in future procurement processes. It submits that competitors would be able to use this information to their advantage in order to better compete with the affected party in future procurements and would result in undue loss to it and undue gain to its competitors.

[32] The affected party further submits that disclosure would provide its current, future, and prospective clients with information that they could exploit for more favourable pricing, value-added incentives and other concessions from it and this could result in undue loss to it. In particular, it states that its ability to provide flexible bids based on the nature of the opportunity and the prospective client would be diminished.

[33] The appellant relies on Order MO-3058-F, where both sections 10(1)(a) and (c) were at issue, as is the case in this order.

Analysis/Findings

[34] In Order MO-3058-F, the senior adjudicator determined that a detailed fee proposal for the project in that appeal and another project in an RFP response met part 3 of the test as it was unique to that affected party, was developed for the purpose of the particular project (based on its experience and expertise) and was not publicly known. The detailed fee proposal included a description of the services and timeframe for the project and another project, charge out rates, wages, details of overhead costs and costing of bonding and insurance, which could be used to extrapolate its operating costs.

[35] The senior adjudicator in also found that part 3 of the test was met for the information that reveals the affected party's approach to some elements of the construction budget, and that its construction management fees would reveal one of the company's most significant competitive strategies.

[36] The senior adjudicator in Order MO-3058-F did not accept that part 3 of the test was met for information that revealed the size and value of previous projects performed by the affected party as this information consisted of, at most, of the total square footage and overall financial value of the project. She found that given the range of costs that are taken into account in arriving at the total values, and the normal market fluctuations in those costs, disclosure of this information was unlikely to allow for an accurate extrapolation of the affected party's sensitive financial and commercial information.¹³

[37] The senior adjudicator also found that part 3 of the test was not met for the information that revealed the approximate number of the affected party's employees and other general information about the company (such as annual business volume, prior work, company history, membership in an industry organization, the roles that certain employees of the affected party would fulfill on the project).

[38] I adopt the findings in Order MO-3058-F and apply them in this order. I find that the information at issue in the RFP response and the slide deck is information that meets part 3 of the test as it reveals detailed fees, costs and services. The portions of the records at issue do not contain the type of information that the Senior Adjudicator found in Order MO-3058-F did not meet part 3 of the test, namely, the size and value of previous projects performed by the affected party, the approximate number of the affected party's employees and other general information about the company (such as annual business volume, prior work, company history, membership in an industry organization, the roles that certain employees of the affected party will fulfill on the project).

[39] Based on my review of the information remaining at issue in the RFP response and slide deck presentation, along with the very detailed confidential and non-confidential representations of the affected party as to the specific information at issue, I find that the information remaining at issue meets part 3 of the test under sections 10(1)(a) and (c). In particular, disclosure of the records could significantly prejudice the competitive position of the affected party under section 10(1)(a) and/or could result in undue loss to it under section 10(1)(c).

[40] As all three parts of the test under section 10(1) have been met, the information at issue in the records is exempt under section 10(1).

¹³ See Order MO-2774, at para. 25.

ORDER:

I find that the information at issue in the records is exempt under section 10(1).

Original Signed by: _____

Diane Smith
Adjudicator

_____ May 30, 2016