Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3375

Appeal MA16-108

Regional Municipality of York

November 8, 2016

Summary: The requester sought access to a memorandum of understanding entered into between a named company (the appellant) and the region. The region's decision was to grant full access to the record and the appellant appealed that decision to this office. The appellant claims that the record qualifies for exemption under the mandatory third party information exemption in section 10(1). The adjudicator finds that the information in the record does not qualify as third party information under section 10(1) as it was not supplied to the region by the appellant. Accordingly, the appeal is dismissed.

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

Orders and Investigation Reports Considered: MO-1706.

Cases Considered: *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139.

OVERVIEW:

[1] The requester made a request to the Regional Municipality of York (the region) pursuant to *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for a copy of the Memorandum of Understanding for [a named company] regarding the South East Collectors Sanitary Sewer Project.

[2] The region located the responsive record and initially denied the requester

access to it. The region claimed the mandatory third party exemption and notice was given to the third party (the named company).

[3] The original requester appealed the region's decision to this office. During mediation of that appeal, the region issued a revised decision granting full access to the requested record.

[4] Once the region issued its new decision, the third party, now the appellant, appealed that decision resulting in this appeal.

[5] During mediation, the mediator spoke with the appellant, the region and the original requester. The requester continued to seek access to the entire record and the appellant continued to object to the release of the record.

[6] As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process. During the inquiry, I sought representations from the region, the appellant and the original requester. I received representations from the appellant which were shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Note 7. The region and the original requester did not provide representations in this appeal.

[7] For the reasons that follow, I find that the section 10(1) third party exemption does not apply and uphold the region's decision to release the record.

RECORD:

[8] The record remaining at issue is a Memorandum of Understanding (MOU) entered into by the region and the third party.

DISCUSSION:

THE SOLE ISSUE IN THIS APPEAL IS WHETHER THE RECORD IS EXEMPT UNDER SECTION 10(1).

[9] 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,
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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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[10] 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]

[11] For section 10(1) to apply, the appellant must satisfy each part of the following three-part test:

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

PART 1: TYPE OF INFORMATION

[12] The types of information listed in section 10(1) have been discussed in prior orders. The two that are relevant in this appeal are:

> *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

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[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.

[3] Order PO-2010.

> 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]

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

[14] In its representations, the appellant states that the record contains both commercial and financial information concerning its project with the region. It states that given the nature of the information in the record, disclosure of the record has the potential to impact negotiations with the region and may impact its subcontractors on subsequent, similar and associated issues on the project. The appellant states that the record contains "without prejudice" information that was provided by it in order to arrive at an interim resolution of an issue that if not resolved could have impacted the progress on the project and cost the parties significant time and legal costs.

[15] The region took the position at mediation that the entire record would be released.

ANALYSIS AND FINDING:

[16] On my review of the record, I am satisfied that the information constitutes commercial information, since it pertains to an interim resolution of disputes arising at a midway stage of the project and agreed upon terms of a commercial relationship between the appellant and the region.

[17] In addition, I am satisfied that some portions of the record contain financial information, including pricing information, projected calculations of revenues, commissions and bonuses and adjustment amounts.

PART 2: SUPPLIED IN CONFIDENCE

SUPPLIED

[18] The requirement that the information was "supplied" to the institution reflects

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[4] Order P-1621.

[5] Order PO-2010.

the purpose in section 10(1) of protecting the informational assets of third parties.[6]

[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]

[20] 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]

[21] 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]

[22] The appellant offers the following representation on the "supplied" issue in regard to the MOU:

> The information within the records were provided in a "without prejudice" manner to reach a settlement and at all times had an implied confidentiality associated with it . . . [the appellant] would not provide this information in a non-confidential environment as it risks exposure to claims from Subcontractors misusing such information which they are not usually privy to and to avoid competitors from determining [the appellant's] business strategies. There (sic) records entail confidentiality

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[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.

privileges for settlement or otherwise be covered by exclusions similar to settlement privileges.

ANALYSIS AND FINDING:

[23] A number of previous orders have addressed the question of whether information contained in a contract entered into between an institution and an affected party is "supplied" within the meaning of section 10(1). Because the information in an MOU is typically the product of a negotiation process between the two parties, the contents of an MOU will not normally qualify as having been supplied. Further in MO-1706, adjudicator Bernard Morrow found that even if a contract is preceded by little negotiation, or if it substantially reflects terms proposed by a third party, it does not lead to the conclusion that the information in the contract was "supplied" within the meaning of section 10(1).

[24] Having examined the record, I find that the MOU comprises the essential terms of an agreement between the region and the appellant and therefore cannot be considered to meet the "supplied" test in section 10(1).

[25] Of the exceptions to the general rule, mentioned above, I find that neither of the two exceptions apply. Firstly, as articulated by the Divisional Court in *Miller Transit* it is for the parties "to provide the evidence to bring the disputed contents within the two exceptions to the general presumption of mutual generation." In this instance, the region did not provide representations and in fact made the decision to release the entire record. The appellant did not refer to either of the "inferred disclosure" or "immutability" exceptions as applying in this instance. The appellant did state in its representations that the record contained information which is part of its business strategy and not directly related to the dispute or project.

[26] The Court in *Miller Transit* referred to the inferred disclosure exception as arising "where information actually supplied does not appear on the face of a contract but may be inferred from its disclosure." The Court stated that this exception applies "where contractual information gives rise to an inference, not that the very same information may be found in materials provided by a third party, but that other, confidential, information belonging to the third party may be gleaned by reference to contractual information."

[27] Also, the immutability exception is referred to in *Miller Transit* as arising "in relation to information actually supplied by a third party which appears within a contract but which is not susceptible to change in the give and take of the negotiation process such as financial statements, underlying fixed costs and product samples or designs."

[28] I reviewed the record to assess if either of these exceptions could apply. In my review of the MOU, I do not see that either of these exceptions is relevant. The appellant has indicated that part of the record contains information about its business

strategy that is not directly related to the dispute or project. However, in my review of the record, it is clear that the information the appellant refers to has been tied to the project by the MOU. In addition, I find that the information in this part of the record does not meet either of the two exceptions to the general rule.

[29] I find that the two exceptions to this general rule do not apply. Therefore, part two of the three-part test has not been met in regard to this record.

[30] In the circumstances, I have decided it is not necessary to consider the "in confidence" element of part two of the three-part test, given my finding that the record was not "supplied" by the appellant. In addition, since all three parts of the test must be met, it is not necessary to determine whether part three applies as all three parts of the test must be met in order for section 10(1) to apply.

ORDER:

1. I uphold the decision of the region to disclose the record to the requester, and order it to do so by **December 14, 2016** but not before **December 9, 2016**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the region to provide me with a copy of the record disclosed to the requester.

Original Signed by: November 8, 2016

Alec Fadel
Adjudicator