

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3473

Appeal MA16-570

Regional Municipality of York

July 20, 2017

Summary: An affected third party appealed a Regional Municipality of York (York region) decision to disclose information in the third party's RFP submission that became part of a contract for interpretation services. Section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* does not apply to the information so York region's decision to disclose the information is upheld.

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

OVERVIEW:

[1] The Regional Municipality of York (York region) received a request under the *Act* for:

- all proposals submitted in response to an identified RFP for face to face interpretation services for the Community and Health Services Department, including the one submitted by the successful proponent
- pricing information included in all proposals
- a copy of the scoring sheets (including scores obtained in each section) used to evaluate all proposals

- a copy of the contract signed between York region and the successful proponent

[2] After considering the representations of an affected third party, York region issued a decision granting the requester partial access to the responsive records, denying access to some information under sections 10 (third party information) and 14 (personal privacy) of the *Act*.

[3] In its decision letter to the requester, York region explained that there is no separate contract document responsive to the request because its purchase order and the third party's proposal for face to face interpretation services for York region's Community and Health Services Department (RFP submission) comprise the contract.

[4] The requester appealed York region's decision, but later decided not to pursue access to the information withheld by York region, so that information is not at issue in this appeal.

[5] The third party appealed York region's decision to disclose portions of the RFP submission. Mediation did not resolve the outstanding issues, so the file proceeded to adjudication, where an inquiry is conducted.

[6] The inquiry began by inviting representations from the third party appellant and York region on the issues set out in the Notice of Inquiry. Neither party provided representations.

[7] This order upholds York region's decision to disclose to the requester the portions of the RFP submission at issue in this appeal. Section 10(1) does not apply to the information in the RFP proposal York region decided to disclose.

RECORDS:

[8] The information at issue in this appeal is the information in the RFP submission York region decided to disclose to the requester. The information at pages 36-38, 57-59 and 64-71, and some information on pages 29, 30, 35, 41, 45, 46, 53, 55, 56 60, and 76-110 of the RFP submission was withheld by York region and is not at issue.

DISCUSSION:

[9] The sole issue in this appeal is whether the mandatory exemption at section 10(1) of the *Act* for third party information applies to the portions of the RFP submission at issue.

[10] Section 10(1) 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,

- (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
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[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 third party appellant, as the party resisting disclosure, 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.

[13] As noted above, neither the appellant nor York region provided representations in this inquiry. The appellant has therefore not provided evidence to establish that section 10(1) applies to the information at issue. However, section 10(1) is a mandatory

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.

exemption, so if I consider from my review of the information at issue and considering previous decisions that section 10(1) applies to the information at issue, it must be withheld.

Part 1: type of information

[14] Prior orders have described “commercial information” as relating 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

[15] The information at issue relates to a commercial arrangement between the third party appellant and York region for the provision of face to face interpretation services. I therefore find that the information at issue is commercial information.

Part 2: supplied in confidence

[16] The requirement that the information was “supplied” to the institution reflects the purpose of section 10(1) to protect the informational assets of third parties.⁴

[17] 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.⁵

[18] 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.⁶

[19] There are two exceptions to this general rule, known 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.⁷ The immutability exception arises 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

³ Order PO-2010.

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

⁶ This approach was approved by the Divisional Court in *Boeing Co.*, cited above, in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*), and most recently in *Toronto-Dominion Bank v. Ryerson University*, 2017 ONSC 1507.

⁷ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

samples or designs.⁸

Analysis

[20] While the information at issue appears in an RFP submission, York region made clear that the RFP submission, in combination with its purchase order, form the contract between it and the appellant that falls within the scope of the request for information.

[21] As outlined above, the general rule is that contracts are not “supplied” for the purposes of section 10(1), but are negotiated between the parties, even though, as in this appeal, the contract may have been preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.

[22] From my review of the information at issue, there is no evidence to support a conclusion that the “inferred disclosure” exception or the “immutability” exception applies to any of the information at issue. Accordingly, the general rule remains and the information at issue does not qualify as supplied for the purpose of section 10(1). The requirements of Part 2 of the section 10(1) test are not met.

[23] As I have found that the information at issue was not supplied to York region, I do not need to consider Part 3 of the test, namely whether disclosure of the information at issue could reasonably be expected to result in any of the harms set out in section 10(1). I note however that there is no evidence before me or apparent from my review of the information at issue that disclosure of the information would give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

[24] I am satisfied that section 10(1) does not apply to the information at issue and I order it disclosed to the requester.

ORDER:

1. I uphold York region’s decision to disclose the information at issue in the RFP submission.
2. I order York region to disclose the information at issue to the requester by **August 25, 2017** but not before **August 21, 2017**.

Original Signed by: _____
Hamish Flanagan
Adjudicator

July 20, 2017 _____

⁸ *Miller Transit*, above at para. 34.