Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3499

Appeal MA16-233

Dufferin-Peel Catholic District School Board

September 27, 2017

Summary: A request was made to the Dufferin-Peel Catholic School Board for information regarding a successful tender bid, specifically, the identity of the winning proponent along with the awarded price. The board located a responsive record and notified the appellant of the request. The appellant opposed disclosure of the record, citing section 10(1) (third party information). In this order the adjudicator upholds the board's decision to disclose the record, and ordered the record disclosed.

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

Orders and Investigation Reports Considered: MO-1706, PO-2435, PO-2453, PO-3311.

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

BACKGROUND:

[1] The requester made a request to the Dufferin-Peel Catholic District School Board (the board) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to a tender. Specifically, the request was for the following:

> Re: Tender [identified #] – We would like to receive the following information on all items highlighted in yellow on attach[ed] sheet:
>
> 1. Who was awarded?
>
> 2. What was the awarded price?

[2] The board located a responsive record and following third party notification, the board decided to grant full access to the record.

[3] A third party (now the appellant) appealed the board's decision resulting in this appeal.

[4] During mediation, the mediator communicated with the original requester, the board and the appellant. The requester continues to seek access to the entire record and the appellant continues to object to the release of the record.

[5] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry under the *Act*. I commenced the inquiry by seeking the representations of the parties. Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and *Practice Direction 7*.

[6] In this appeal, it is important to note that the request is for the finalized contract (the awarded bid) not the original tender submitted by the appellant. When examining the record at issue, it is apparent that this was not the original tender submitted by the appellant as the word "Award" appears in the title.

[7] In this order, I find that the appellant did not supply the record to the board and therefore section 10(1) does not apply. The decision of the board is upheld and the appeal is dismissed.

RECORDS:

[8] A one-page chart titled "[identified #] – [identified product] – [identified location] - AWARD".

DISCUSSION:

Does the mandatory exemption at section 10(1) apply to the record?

[9] Section 10(1)(b) 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,
>
> > 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.

[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 a record to qualify for exemption under section 10(1), 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:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
>
> > (i) is, or may be used in a trade or business,
> >
> > (ii) is not generally known in that trade or business,
> >
> > (iii) has economic value from not being generally known, and

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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.

> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[3]
>
> *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.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *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.[6]

Finding:

[13] The appellant submits that the record contains trade secrets by way of strategies used that are comprised of formulas confidential to their business. In examining the record, I find that as a stand-alone document, I am not satisfied that the information that the appellant says amounts to a trade secret, meets the definition of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism," or otherwise meets the definition of "trade secret" as contemplated by section 10(1).

[14] However, in examining the record, I find that it contains commercial information. The record relates to the buying of merchandise and identifies individual items along with the final awarded price. The record also contains financial information since it contains pricing information.

[15] Because I have concluded that the record at issue qualifies as both "commercial" and "financial" information, I find that the requirements of Part 1 of the section 10(1) test have been met.

Part 2: supplied in confidence

Supplied

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

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[3] Order PO-2010.
[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.

the purpose in section 10(1) of protecting the informational assets of third parties.[7]

[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.[8]

[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.[9]

[19] 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.[10] 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.[11]

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.[12]

[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

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[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.
[9] 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*).
[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[11] *Miller Transit*, above at para. 34.
[12] Order PO-2020.

- 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
- prepared for a purpose that would not entail disclosure[13]

Representations:

[22] In its representations, the board indicated that it takes no position on the application of section 10(1). It is clear, however, from its initial decision that it decided to disclose the disputed record.

[23] In its representations, the appellant states that by disclosing their awarded bid pricing it could reveal trade secrets that are strategies used. It stated that the strategies are comprised of formulas that it implements to be successful in the bidding process. The appellant submits that disclosing the record could compromise significantly its ability to be competitive, as well as significantly interfere with other contracts that it participates in with similar institutions.

[24] The appellant submits that, in the past, the board has on every bid award occasion since the advent of the *Privacy Act*[14], denied the release of any bid results to any vendors that have submitted their bids along with a letter of confidentiality. It claims that the board has been honoring the confidentially request according to the *Privacy Act*. The appellant included the "confidentiality statement" that accompanied its bid when it was submitted.

[25] In summary, the appellant feels that their bid submission was submitted in confidence and contains trade secrets that are strategies used, comprised of formulas confidential to their business and if revealed can compromise their ability significantly. These trade secrets are proprietary to their company which are closely held within the upper management and executive of the appellant's company and are protected by confidentiality.

[26] The requester also made representations in this appeal. It noted that the request was made for bid prices of the awarded vendor. The requester submits that it is common practice to reveal awarded vendors and bid prices for transparency reasons and to create fair competition on future bids.

[27] The requester noted that even though the appellant submits that the board has always denied the release of any bid results to any vendors that have submitted their

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[13] 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.
[14] It appears the appellant is referring to the *Municipal Freedom of Information and Protection of Privacy Act*.

bids with a letter of confidentiality, the board in this instance had agreed to release the requested information.

[28] The original requester also submits that this is not a case of trade secret infringement.

Analysis and finding:

Part 2: supplied in confidence

Supplied

[29] As stated, the requirement that it be shown that the information was "supplied" to the board reflects the purpose in section 10(1) of protecting the informational assets of the third party.

[30] As stated, the request in this appeal, is a request for the finalized contract (the awarded bid) not the original tender submitted by the appellant. This office has consistently treated the terms of a contract as mutually generated, rather than "supplied" by a third party, even where the contract is preceded by little or no negotiation.[15]

[31] For example, in Order MO-1706, Adjudicator Bernard Morrow stated:

> the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was supplied within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

[32] In Order PO-2435, Commissioner Brian Beamish rejected the position taken by an institution that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Commissioner Beamish observed that the exercise of the government's option in accepting or rejecting a consultant's bid is a "form of negotiation." He wrote:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per

[15] PO-3761.

> diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or SSHA, to claim that the per diem amount was simply submitted and was not subject to negotiation.

[33] Similarly, in Order PO-2453, Adjudicator Catherine Corban addressed the application of "supplied" to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other items, the record at issue in that appeal contained the successful bidder's pricing for various components of the service to be delivered, as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were not "supplied" pursuant to part 2 of the test under section 17(1) of *FIPPA* (the provincial *Act* equivalent to section 10(1)), Adjudicator Corban stated:

> Following the approach taken by Assistant Commissioner Beamish [as he was then] in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

[34] Several decisions of the Divisional Court have affirmed this office's approach to section 10(1).[16] In particular, these decisions confirm that one of the central purposes of freedom of information legislation is to make institutions more accountable to the public.[17] In *Miller Transit*, the court not only upheld Adjudicator Donald Hale's decision ordering the disclosure of portions of bus services contracts as they were not "supplied" to the region, the Court observed that:

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[16] See for example, *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.) at para. 18; *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 at paras. 46 and 56; *Corporation of the City of Kitchener v. Information and Privacy Commissioner of Ontario,* 2012 ONSC 3496 at para. 10; *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 at para. 27 and *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario* 2015 ONSC 1392 at para 13.

[17] This office has also published a paper in September 2015 on the issue entitled Open Contracting: Proactive Disclosure of Procurement Records.

> The IPC adjudicator's decision was also consistent with the intent of the legislation which recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds: see *Vaughan (City) v. Ontario (Information and Privacy Commission)*, 2011 ONSC 7082 (CanLII), 2011 ONSC 7082, 109 O.R. (3d) 149 (Div. Ct.), at para. 49.

[35] I adopt the approach outlined in the authorities above, in the case before me. As stated, in this appeal, I am not dealing with a request for a copy of the appellant's tender as initially submitted, rather I am dealing with a request for the finalized agreement (the awarded bid). When examining the record at issue, it is apparent that this was not the original tender submitted by the appellant as the word "Award" appears in the title. It may be that the board accepted the prices indicated on the original tender from the appellant or that it negotiated different prices but, as the above case law suggests, either is viewed as a negotiated contract between the parties.

[36] Even if the board simply accepted the appellant's suggested pricing, I find that the information in the record, including pricing information became "negotiated" information since by accepting the bid and including it in a contract for services the board has agreed to it. The terms of the bid quotation submitted by the appellant effectively became the essential terms of a negotiated contract. In that regard, either the awarded terms were negotiated through the process of offer and acceptance or accepting the information at issue, including the pricing component in the bid which were then incorporated into the contract (the award), was a form of negotiation.

[37] I further find that the appellant has not established the application of the "inferred disclosure" or "immutability" exceptions.

[38] As set out above, the inferred disclosure exception arises where information actually supplied does not appear on the face of a contract but may be inferred from its disclosure. At issue in this appeal is information that appears on the face of the Award. Hence, the "inferred disclosure" exception does not apply. I am also not satisfied that the immutability exception applies. The appellant's representations do not address this issue and therefore there is no evidence that explains how disclosing the withheld information would reveal the appellant's actual underlying non-negotiable information.

[39] Accordingly, I find that the appellant has not provided sufficient evidence to establish that the information in the record was supplied for the purposes of Part 2 of the three-part section 10 test.

[40] As a result, it is not necessary for me to address the "in confidence" portion of the Part 2 test.

[41] Further, as all three parts of the test under section 10(1) must be met in order for the exemption to apply, I find that section 10(1) has no application to the awarded

bid. As a result, it is unnecessary to consider Part 3 of the test.

ORDER:

I uphold the decision of the board and order the board to disclose the record to the requester by **November 2, 2017** but not before **October 30, 2017**.

Original Signed by: September 27, 2017

Alec Fadel
Adjudicator