Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3544

Appeals MA16-635 and MA17-175

Region of Peel

December 20, 2017

Summary: This order deals with a third party's appeal of the region's decision to disclose, in full, records relating to its current contracts and/or agreements with a named organization in regards to the operation of homeless shelters in the Region of Peel. The region initially relied on the mandatory third party exemption at section 10(1) of the *Act* to withhold some records but during the inquiry stage changed its decision. In this order, the adjudicator upholds the region's decision, in full, and orders that the records be disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1) and 16.

Orders and Investigation Reports Considered: Orders MO-2435 and MO-2786.

BACKGROUND:

[1] The Region of Peel (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for:

> The current contract and or agreement between the Region of Peel and [named organization] in regards to the operation of the homeless shelters in Peel Region.

[2] Pursuant to section 21 of the *Act,* the region notified a third party and sought its views regarding disclosure. After considering the third party's representations, the

region issued an access decision granting partial access to the requested records and citing the exemption for third party information at section 10(1) of the *Act* to deny access to the remainder of the information.

[3] The third party (now the third party appellant) appealed the region's decision to disclose and, as a result, MA16-635 was opened. The original requester also appealed the region's decision. A separate file (MA17-175) was opened to address that appeal.

[4] During mediation, the third party appellant advised the mediator that it does not consent to the disclosure of any of the information that the region had decided to grant access to. The requester advised that he is pursuing access to all of the information which was denied by the region pursuant to section 10(1). He is also relying on the public interest override provision at section 16 of the *Act*.

[5] As no further mediation was possible, the appeal was moved to the next stage, where an adjudicator conducts an inquiry under the *Act*. I have decided to consider both appeals together.

[6] I sought and received representations from all the parties. Pursuant to this office's *Code of Procedure* and *Practice Direction Number 7*, non-confidential copies of their representations were shared with the other parties.

[7] During the inquiry stage, the region issued a supplemental decision granting access to the records, in full, as it no longer relied on section 10(1).

[8] In this order, I uphold the region's decision, in full, to disclose the records at issue.

RECORDS:

[9] The original requester has confirmed that he is seeking only the service agreement(s) between the region and the third party appellant, and subsequent amendments to them. He is not seeking the third party appellant's response to the Request for Proposal (which was also included in the records provided by the region), and that record is not at issue in this appeal.

[10] The records at issue are comprised of the service agreement between the region and the third party appellant, including attached schedules, appendices, and amendments, as listed in the region's index.

ISSUES:

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

B. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 10(1) exemption?

DISCUSSION:

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

[11] 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,
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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
> >
> > (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.

[12] 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]

[13] 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

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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.

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.

[14] I will first consider the second part of the test.

Part 2: supplied in confidence

Supplied

[15] 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.[3]

[16] 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.[4]

In confidence

[17] 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.[5]

[18] 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 disclosure[6]

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[3] Order MO-1706.
[4] Orders PO-2020 and PO-2043.
[5] Order PO-2020.
[6] 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.

Parties' representations

[19] In its representations, the third party appellant submits that the "supplied" requirement of part two of the test has been met. It points out that the information necessary to support its Rapid Re-Housing Triage and Intervention System (the Programme) was authored by it and its consultants. It also submits that neither the region nor any other public body subject to the *Act* had a hand in the creation of the documents in the record which are integral to the Programme. It further explains that the part of the records describing the Programme was supplied by it to the region.

[20] The third party appellant also submits that the "in confidence" requirement of part two of the test has been met. It submits that the record is not otherwise disclosed or available from sources to which the public has access. It also argues that the part of the record containing documents describing the Programme or documents necessary to implement the Programme was prepared for a purpose that would not entail disclosure.

[21] It further submits:

> As it happens, the Programme documents were disclosed by [the affected party] to the Region in the course of replying to the RFP Document. But the bulk of the Programme documents are not appended to nor does it form a part of that otherwise publicly assessable agreement with the Region and for good reason; the Programme documents were not prepared for a purpose that would entail disclosure and the Region implicitly acknowledged this because it does not require these documents to be appended to the Service Agreement.
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> …
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> Finally, the [affected party]'s reasonable expectations were supported by its familiarity with the law regarding exemption provisions contained in request for proposal documents. In the case at hand, the RFP Document states the Region is subject to MFIPPA with respect to the collection, use, disclosure, retention and protection of confidential and sensitive information under the Agency's custody or control.

[22] The original requester submits that the information was not supplied in confidence. He points out that the RFP contained a clause stating that the information provided to the region is subject to the *Act*. As such, by responding to the RFP, the third party appellant agreed to this clause. He also points out that at no time during the RFP process did the third party appellant object.

Analysis and findings

[23] As can be seen by the parties' representations above, their arguments are mainly with respect to the third party appellant's response to the RFP. However, as noted

earlier, the original requester is not seeking access to the third party appellant's response to the RFP. He is seeking access to the service agreement and its subsequent amendments. As such, I will only address whether the service agreement and its subsequent amendments meet the second part of the test

[24] However, before I begin, for clarification purposes, I note that the Programme is referenced mainly in the response to the RFP and its appendices (which are not at issue in this appeal) while the service agreement contains one reference to the Programme.[7]

[25] In Order PO-3670, Adjudicator Stella Ball states the following:

> The IPC has repeatedly found that the contents of a contract between an institution and a third party will not qualify as having been "supplied" for the purpose of section 17(1) [the provincial equivalent of section 10(1)] because contracts are presumed to be mutually generated, while proposals submitted by third parties to institutions are presumed to be "supplied."[8] The IPC has applied this general rule even in situations where the contracts are preceded by little or no negotiation. The Divisional Court has repeatedly upheld the IPC's general rule that contracts are mutually generated.[9] While there are two exemptions to this general rule – the "inferred disclosure" and "immutability" exceptions – the third party does not argue that these exceptions apply in this appeal.

[26] I adopt the reasoning in the above-noted order for this appeal. Applying the reasoning in the above-noted order, I find that the records consist of a service agreement and its amendments. I also find that they are not "supplied" for the purpose of the *Act*.

[27] The two exceptions to the general rule described above 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]

[28] As stated above, the third party appellant did not provide submissions on

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[7] The one reference in the service agreement contains four documents.
[8] See Order MO-3058-F for discussion of this general rule.
[9] See *Miller Transit* paras 26 and on, and more recently, *Accenture Inc. v Ontario (IPC)* 2016 ONSC 1616 at paras 40-42 and 50.
[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[11] *Miller Transit*, above at para. 34.

whether either exception applies to the information relating to the Programme contained in the services agreement. The third party appellant did not argue that the information about the Programme in the services agreement was information that it supplied to the region that was not susceptible to negotiation. Further, I note that the information relating to the Programme in the services agreement includes four documents (pages 271 – 277 of the records). Based on my review of these documents, and in the absence of specific representations on this issue, I do not find that I have sufficient evidence to satisfy me that disclosure of the information would permit the accurate inference of underlying non-negotiated confidential information supplied by the appellant.

[29] As all parts of the three-part test must be met for section 10(1) to apply, it is unnecessary to consider whether the first part and the third part of the test is satisfied.

B: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 10(1) exemption?

[30] Due to my findings above, it is unnecessary for me to discuss whether there is a compelling public interest in disclosure of the records at issue.

ORDER:

1. I uphold the region's decision to disclose the records at issue, in full.

2. I order the region to disclose the records to the appellant by **January 31, 2018** but not before **January 26, 2018**.

Original Signed by: December 20, 2017

Lan An
Adjudicator