

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3572

Appeal MA16-741

City of Ottawa

March 5, 2018

Summary: The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to specialized towing services. After notifying third parties, the city decided to disclose the records. This order deals with the appeal of one of the third parties. In this order, the adjudicator finds that the records at issue are not exempt under section 10(1) as the third part of the test has not been met. As a result, she upholds the city's decision to disclose the records.

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

BACKGROUND:

[1] The City of Ottawa (the city) received a request, pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to a copy of the following records:

...all documents relating to the Request for Standing Offer Towing Services for Bylaw Services, [a particular RFSO number], including but not limited to:

- All internal city communication, memoranda and policies relating to preparation of the Tender/Standing Offer, and/or evaluation of bids/proposals/offers;

- Electronic communications between members of the Evaluation Committee; and
- All proposals submitted in response to the Tender/Standing Offer.

[2] The city identified records responsive to the request and issued a decision to the requester granting partial access. The city claimed sections 10(1) (third party information), 11 (economic and other interests), and 14(1) (personal privacy) of the *Act* to withhold portions of the records from disclosure. The requester appealed and MA16-318 was opened to deal with this matter.

[3] During mediation, the requester advised the mediator that he was not interested in pursuing access to any records that were being withheld under section 14(1) of the *Act*. The city also advised the mediator that it was no longer relying on section 11 of the *Act*. Prior to issuing a revised decision, the city notified three affected parties of the request pursuant to section 21(1) of the *Act*.

[4] The city received representations from two of the affected parties resisting disclosure of the information relating to them. A third affected party informed the city that it has no issue with the city disclosing the information relating to it.

[5] Subsequently, the city issued a revised decision in which it indicated that its decision was to disclose the records (which resulted in MA16-318 being closed). Both affected parties, now the third party appellants, appealed the city's decision to this office. Consequently, appeals MA16-685 and MA16-741¹ were opened to deal with their appeals. The records of the two affected parties resisting disclosure were not released. However, the city released a copy of the record to the requester relating to the third affected party who did not object to the disclosure.

[6] As mediation did not resolve the appeal, it was moved to the next stage, where an adjudicator conducts an inquiry under the *Act*. I invited the third party appellant to submit representations but I did not receive any from him. The city and the original requester provided representations, which were shared with the third party appellant.

[7] In this order, I uphold the city's decision that the records are not exempt under section 10(1) and I order that they be disclosed.

RECORDS:

[8] The records at issue are pricing schedules for towing services.

¹ Please note that appeal MA16-685 is heard separately from appeal MA16-741.

DISCUSSION:

[9] The only issue in this appeal is whether the mandatory exemption for third party information at section 10(1) of the *Act* applies to the records 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.² 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.³

[12] 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

² *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.*).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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] Past orders of this office have defined financial and commercial information as follows:

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.⁴

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.⁵ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁶

[14] Adopting these definitions, from my review of the records, I find that the records contain information that qualifies as financial and commercial information for the purposes of section 10(1) of the *Act*. I note that the third party appellant did not provide any representations on the type of information contained in the records at issue. I also note that the city submits that the records constitute both commercial and financial information as it consists of pricing information. Based on my review, I accept that the records contain both financial and commercial information, and thus the first part of the test for the application of section 10(1) has been met.

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.⁷

[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

⁴ Order PO-2010.

⁵ Order PO-2010.

⁶ Order P-1621.

⁷ Order MO-1706.

inferences with respect to information supplied by a third party.⁸

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.⁹

[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 disclosure¹⁰

[19] The third party appellant has not submitted any representations.

[20] It appears that the information was provided to the city in response to the Request for Standing Offer (RFSO) Towing Services for By-Law Services. Previous orders from this office has found that the terms proposed by a third party which ultimately forms part of a contract is normally considered mutually generated or negotiated, not supplied.¹¹ In this case, the third party appellant was ultimately unsuccessful in the procurement process and, therefore, its proposed terms did not form part of a contract for services with the city. Accordingly, I find that the information was supplied to the city.

[21] Although it is unclear whether the information was supplied with a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided, I find that the disclosure of the information fails to establish the harm set out in the third part of the test.

[22] In order to satisfy the third part of the test, the party resisting disclosure must

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

¹⁰Orders 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.

¹¹ See Order MO-3175.

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.¹²

[23] 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*.¹³

[24] I find that, on the basis of the records themselves, there is no basis for a finding that disclosure would result in any of the harms listed under sections 10(1)(a) to (d). As noted above, the third party appellant did not provide any representations to substantiate the harm in disclosure of the records. I also note that the city takes the position that it would not be reasonable to expect that disclosure of the information would harm the economic/commercial interests of the third party appellant. The city relies on Order MO-2833 for the principle that although a tender process may become more competitive in the future due to disclosure of pricing information, it does not significantly prejudice prospective proponents. Accordingly, I find there is no evidence to establish any of the harms that may occur due to disclosure, and will order the records disclosed.

ORDER:

I uphold the city's decision to disclose the records at issue to the requester and order the city to send a copy of the records to him. This disclosure is to take place by **April 16, 2018** but not before **April 9, 2018**

Original Signed by: _____

Lan An
Adjudicator

March 5, 2018 _____

¹² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

¹³ Order PO-2435.