Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3638

Appeal MA17-712

City of Toronto

July 26, 2018

Summary: The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a particular winning bid by a specified company to do specified work for the city. The responsive record was the contract between the company (the appellant) and the city. Before issuing its decision, the city asked the appellant for its views about disclosure. The appellant opposed disclosure on the basis of the third party information exemption (section 10(1) of the *Act*). This order upholds the city's decision.

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

Orders Considered: PO-2020, PO-2043

OVERVIEW:

[1] The City of Toronto (the city) received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to certain records pertaining to the Award of Request for a specified quotation to a named company. The requester then specified that it was seeking:

1. All records in the possession of the City of Toronto ("City") pertaining to the Award including but not limited to, the bid documents submitted by [the specified company], correspondence between the City and [the specified

company] regarding the Award and [the specified company's] bid for the same; and

2. All records in the City's possession relating to [the specified company's] performance under the contract awarded in connection with the Award including but not limited to correspondence, memorandums, notes, or other documents.

3. The production of all above-noted records from [a specified date] to date.

4. Continuous access to any new records that would be encompassed by the above-noted categories for the two years following the date of receipt of this correspondence.

[2] The city located a contract, including the winning bid.

[3] Before issuing its access decision, pursuant to section 21 of the *Act*, the city asked the company it had entered into the contract with for its views about disclosure of a portion of the record. The company/third party objected to disclosure. The city then issued its decision, granting full access to the contract (which included the winning bid).

[4] The company (now the appellant) appealed the city's decision to this office, relying on the mandatory exemption of section 10(1) (third party information) of the *Act*. Mediation could not resolve the dispute, and the appeal moved to adjudication.

[5] As the adjudicator, I sought and received representations from the appellant. After considering its representations, I decided not to seek representations from the city or the requester.

[6] For the reasons that follow, I find that the mandatory third party information exemption at section 10(1) does not apply to the record in this appeal, and I uphold the city's decision to disclose it to the requester.

RECORDS:

[7] The record consists of a bid and the contract between the city and the appellant.

DISCUSSION:

[8] The only issue in this appeal is whether the record at issue is exempt under section 10(1) of the *Act*.

[9] The city decided that the mandatory exemption at section 10(1) does not apply to the bid and the contract, and for the reasons discussed below, I agree with that decision. Further, since I find that the appellant's winning bid was incorporated by reference into the contract, I will refer to these documents together as "the record" or

"the contract".

[10] The relevant portions of section 10(1) state that:

> 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;
>
> . . .

[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 appellant must prove that each part of the following three-part test applies:

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; <u>and</u>
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] The contract meets the first part of the test because it contains two of the types of information listed under section 10(1): commercial and financial information. The

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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.

appellant made a bid to do specified work for the city. It won the bid, and entered into a contract with the city to do that work. Since the contract relates to the provision of services and the payment for those services, it contains commercial and financial information. This finding is consistent with the IPC's definitions of those types of information:

> *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 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]

[14] In light of my finding, I do not need to also decide whether the record contains "trade secrets" as argued by the appellant.

[15] Therefore, I find that part one of the test is met because the record is a contract that contains financial and commercial information.

Part 2: Supplied in confidence

[16] Part two of the three-part test itself has two parts: the information at issue must have been "supplied" to the city by the appellant, and the appellant must have done so "in confidence", implicitly or explicitly. If the information was not supplied, section 10(1) does not apply, and there is no need to decide the "in confidence" element of part two (or part three) of the test. For the reasons that follow, that is the case here.

[17] 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.[6]

[18] 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]

[19] 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

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[3] Order PO-2010.
[4] Order P-1621.
[5] Order PO-2010.
[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.

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]

[20] The appellant relied on Orders PO-2020 and PO-2043 to argue that "all" of the information that the requester asked for was "directly supplied by [the appellant] to [a named city school board]", and that it therefore qualifies as "supplied", but I cannot agree. The appellant could not have been the source of "all" the information within the documents because the responsive record appears to consist of city-generated information, too. In fact, the bid portion of the record actually sets out how a bidder could even make changes to terms.[9] But beyond that, the circumstances of this case are quite different from the ones in Order PO-2020, and Order PO-2043 does not support the appellant's position either.

[21] In contrast to this case, the contract in Order PO-2020 was between an affected party and a non-institution; it did not directly involve the institution with access-to-information disclosure duties. That is why the adjudicator found that IPC orders stating that contracts are negotiated (and not "supplied") were not applicable in *those* circumstances.[10] In the present appeal, the contract is clearly between the city, which is an institution subject to the *MFIPPA* disclosure requirements, and the appellant. Therefore, Order PO-2020 is not relevant in the circumstances of this appeal.

[22] Similarly, Order PO-2043 is not helpful to the appellant, as in that decision, the adjudicator applied the general rule that contracts are not "supplied". The adjudicator in that order discusses the intent of the third party exemption to protect the "informational assets" of a company doing business with the government. However, from my review of the record at issue in the present appeal, including the pricing information, I do not find that the record contains such assets. There are multiple terms in the bid (again, now part of the contract) directing the appellant to include *all* of its costs in its pricing – making it impossible to discern any unique non-negotiable costs of the appellant from such all-inclusive pricing.

[23] In my view, the contract as a whole reflects the agreed-upon terms that were the result of negotiation between the parties. Once the city accepted the bid, including the pricing, the information became negotiated, rather than supplied.[11]

[24] Since the orders cited by the appellant do not help the appellant establish that the contract was "supplied", I turn to the question of exceptions to the general rule that contracts are negotiated, not "supplied".

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[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] Pages 5 and 15 of 52 of the bid.

[10] Ibid.

[11] Order PO-2384.

Does one of the two exceptions apply to this contract?

[25] There are two exceptions to the general principle that contracts are not "supplied": the "inferred disclosure" and "immutability" exceptions. Here, the appellant argues that the immutability exception applies.

[26] 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.[12]

[27] The appellant claims that the immutability exception applies "because [the contract] contain[s] underlying fixed costs and specific product information", but I do not find that to be the case. As discussed, the appellant's pricing was to be all-inclusive. The appellant did not explain how inclusively listed costs could reveal its fixed costs. It is, therefore, unreasonable to find that the appellant's "fixed costs" could be determined from figures that are to be inclusive of *all* costs. As for "specific product information", the appellant did not state what "specific product information" belonged to it in the record. Certainly, the plain reading of the description of the contract indicates that any specific products at issue belonged to the city, not the appellant.

[28] In addition, the city was free to accept or deny the prices put forward by the appellant in the bid (and now found in the contract). This type of information is precisely the type of information that is negotiable between contracting parties, as many IPC orders have held.[13] The appellant does not establish that this was not the case here. In fact, the language of the bid, which was incorporated into the contract, explicitly allows the city to accept or reject any part of a bid without specifying any exceptions to that right, so I conclude that the city could have rejected or accepted the pricing information provided by the bidder. Since the appellant was the winning bidder, its pricing information was considered negotiated, not "supplied".

[29] I find, therefore, that the "immutability exception" does not apply. Accordingly, part two of the test has not been met, and the section 10(1) exemption does not apply to the contract. It is, therefore, unnecessary for me to examine whether the contract meets the "in confidence" element of part two of the test, or the harms requirement in part three.

[30] Accordingly, I find that section 10(1) does not apply and I uphold the city's decision to disclose the record.

ORDER:

1. I uphold the city's decision to disclose the record at issue in its entirety.

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[12] *Miller Transit*, above at para. 34.
[13] See, for example, Orders PO-2435 and MO-3577.

2. I order the city to disclose the record to the requester by **August 30, 2018** but not before **August 24, 2018**.

3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the record sent to the requester, pursuant to paragraph 2 of this order.

Original Signed By: July 26, 2018

Marian Sami
Adjudicator