

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-3789

Appeal MA17-626

Loyalist Township

June 21, 2019

**Summary:** The requester made a request under the *Municipal Freedom of Information and Protection of Privacy Act* to the Corporation of Loyalist Township (the township) for a copy of the winning bid for a fire truck. The township denied access, citing the mandatory third party information exemption at section 10(1). This order finds that the information at issue, the executive summary and a brochure about the truck, is not exempt and orders it disclosed.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, RSO 1990, c M56, as amended, section 10(1).

**Orders Considered:** Orders MO-1706 and MO-3058-F.

### OVERVIEW:

[1] The requester made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) to the Corporation of Loyalist Township (the township) for the:

...aerial apparatus [fire truck] specifications of the awarded bid for request for proposal [RFP number and date].

[2] Pursuant to section 21 of the *Act*, the township notified the winning bidder (the

affected party) to seek its views on disclosure. Following receipt of the affected party's response, the township issued a decision denying access in full, citing section 10(1) of the *Act*.<sup>1</sup>

[3] The requester (now the appellant) appealed the decision of the township to this office.

[4] During the course of mediation, the township clarified that it initially identified only certain pages of the requested bid<sup>2</sup> as being responsive to the request.

[5] The mediator notified the affected party, but did not obtain consent to disclose their information.

[6] Subsequently, further discussions took place and the appellant clarified that it was looking for all detailed specifications of a specific truck described in the bid. After further discussions with the township, clarifying the type of information that the appellant was seeking, the township determined that additional pages were responsive to the request. Specifically, pages 3 to 9, and 206 to 248 of the proposal (as numbered by the township) were identified as responsive to the request.

[7] As mediation did not resolve this appeal, the appellant requested that the appeal proceed to adjudication, where an adjudicator conducts an inquiry.

[8] During the inquiry, representations were exchanged between the township, the affected party and the appellant in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[9] In this order, I find that the information at issue is not exempt under section 10(1) and I order it disclosed.

## **RECORD:**

[10] The records that are at issue form part of the successful bid by the affected party made in response to an RFP issued by the township. The pages of the bid at issue are pages 3 to 9, which is the Executive Summary, and pages 206 to 248, which is the part of the bid under the tab Drawings.<sup>3</sup>

---

<sup>1</sup> The township actually initially cited section 17(1), the equivalent to section 10(1) in the provincial *Act*, the *Freedom of Information and Protection of Privacy Act*.

<sup>2</sup> The affected party's bid is also referred to as its proposal in this order.

<sup>3</sup> As described below, these pages appear to me to be a Sales Brochure.

## **DISCUSSION:**

### **Does the mandatory third party information 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,

(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.<sup>4</sup> 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.<sup>5</sup>

[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

---

<sup>4</sup> *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.*).

<sup>5</sup> 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.

***Part 1: type of information***

[14] The township states that the information at issue consists of detailed specifications for the fire truck that describe its construction, operation or maintenance of the equipment.

[15] The affected party states that the record contains technical information, as well as "precise engineering data."

[16] The appellant did not address part 1 of the test under section 10(1) in its representations.

*Analysis/Findings re: part 1*

[17] As noted above, only pages 3 to 9, and 206 to 248 of the record are at issue. Pages 3 to 9 contains the affected party's Executive Summary and pages 206 to 248 consist of the drawings, photographs and specifications about the fire truck.

[18] I agree with the township and the affected party that the Executive Summary and Drawings contain technical information, as the information is about the construction and operation of the fire truck being described in the bid. Although the affected party states that the information at issue contains "precise engineering data," it has not explained what this data is or where it is found in the record.

[19] Technical information, as listed in section 10(1), has been discussed in prior orders, as follows:

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.<sup>6</sup>

---

<sup>6</sup> Order PO-2010.

[20] Therefore, as the information at issue in the record contains technical information, I find that part 1 of the test under section 10(1) has been met.

***Part 2: supplied in confidence***

*Representations*

[21] The township states that the fire truck specification information was supplied in confidence for analysis by its RFP committee. It further states that the results of the RFP process were presented in open session of the township's council as part of a report.

[22] The affected party states that the record contains confidential technical information that should remain between it and the purchaser, the township's Emergency Services department. It states that this document holds precise engineering data it would never want to see a competitor access.

[23] The appellant states that the RFP provides that all proposals submitted to the township become the property of the municipality and as such, the one at issue here is subject to *MFIPPA*. It submits that this is applicable unless the bid submitted clearly notes the proprietary information, and states that the technical information shall remain with the bidder.

[24] The appellant provided a complete copy of the confidentiality provisions of the RFP, from which it quoted an excerpt. The complete provision reads:

11.4.1

All Proposals submitted to the Township become the property of the Township and as such, are subject to the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.56, as amended (the "MFIPPA").

11.4.2

If any part of the Proponent's Proposal contains a trade secret or scientific, technical, commercial, financial, or other information that, if disclosed to the public, could reasonably be expected to prejudice significantly the competitive position of the Proponent or result in undue loss to the Proponent, such information should be specifically and clearly identified by marking those pages "Confidential" and be accompanied by a brief explanation as to why the Proponent requires such information not be disclosed to the public. Subject to the MFIPPA which governs the disclosure of confidential information contained in Proposals, the Township will endeavour to maintain the confidentiality of such marked pages, but reserves the right to reject the Proponent's Proposal if the

Township, in its absolute discretion, determines that all or some part of the information should be disclosed to the public and the Proponent, having received a request in writing from the Township, refuses to consent to the disclosure of the information contained in the request.

#### 11.4.3

Privacy and Freedom of Information. All submissions and attached materials received in response to this RFP are deemed to be the property of The Corporation of Loyalist Township as of the date of their submission except to the extent they are protected as third party material under applicable privacy law. The Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act) applies to all RFPs, quotations and proposals submitted to The Corporation of Loyalist Township (the Township). RFPs, quotations and proposals will be received in confidence and are subject to the disclosure requirements of the Act. Pursuant to orders made by the Information and Privacy Commissioner/Ontario, the Township shall not withhold the following information from RFPs, quotations or proposals, if requested through the MFIPPA process by any person or business:

- 11.4.3.1 the cover letter to the RFP, quotation, or proposal;
- 11.4.3.2 the table of contents;
- 11.4.3.3 lists of figures, tables, and appendices; and
- 11.4.3.4 any information regarding the form and structure of a RFP, quotation or a proposal (i.e. information which may disclose the manner in which the document is constructed).

#### 11.4.4

Respondents should identify any portions of their RFP/quotation/proposal which contain a trade secret, scientific, technical, financial, commercial or labour relations information supplied in confidence and which will cause harm [if] disclosed. The Township cannot ensure that any given portion of any materials received in response will not be ordered released under MFIPPA.

*Analysis/Findings re: part 2*

Supplied

[25] The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>7</sup>

[26] 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.<sup>8</sup>

[27] It is clear that the record for which section 10(1) is claimed was provided to the township as part of the appellant’s winning submission in response to the RFP. Accordingly, I am satisfied that the record was “supplied” by the affected party to the township.

[28] This conclusion is consistent with many previous orders of this office that have considered the application of section 10(1) or its provincial equivalent to RFP proposals. For example, in Order MO-1706, Adjudicator Bernard Morrow stated as follows on this point:

...it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board’s solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution...<sup>9</sup>

[29] Even though the information at issue in this appeal is part of the successful bid, it is clear that the RFP submission is not a contract. For this reason, the principle that, in general, the contents of a negotiated contract do not meet the “supplied” requirement does not apply here. As Assistant Commissioner Sherry Liang stated in Order MO-3058-F:

I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been “mutually generated” rather than “supplied”, where the terms of the proposal were incorporated into the

---

<sup>7</sup> Order MO-1706.

<sup>8</sup> Orders PO-2020 and PO-2043.

<sup>9</sup> See also Orders PO-3058-F, PO-3316 and PO-3420.

contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.

[30] I agree with this interpretation, which was applied in circumstances similar to those that are present in this case. Therefore, I find that the information at issue in the record was "supplied" to the township within the meaning of section 10(1).

In confidence

[31] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>10</sup>

[32] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.<sup>11</sup>

[33] The affected party did not provide specific representations that addressed the information at issue in this appeal, namely the Executive Summary and the Drawings; nor did it provide representations in response to the Notice of Inquiry, which set out these four points and asked it:

---

<sup>10</sup> Order PO-2020.

<sup>11</sup> Orders PO-2043 and PO-2371, and Order PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).



Did the third party [the affected party] supply the information with a reasonable expectation of confidentiality? Was the expectation explicit or implicit? Please explain.

[34] As noted above, in its representations, the affected party does not expressly address the basis for its claim that the information at issue in the proposal was confidential. As well, none of the pages of the affected party's bid in response to the RFP are marked as "confidential".

[35] Nevertheless, based on the confidentiality expectations of the affected party set out above, and the affected party's and the township's representations in their entirety, I am satisfied that the affected party had an expectation of confidentiality for the contents of its bid.

[36] However, considering the particular information at issue, I find that this expectation of confidentiality does not have an objective basis as it concerns the pages 206 to 248. These pages, although under the tab "Drawings" in the bid, appear to consist of a sales brochure for the fire truck that is available from sources to which the public has access. As such, it appears to have been prepared for a purpose that would entail disclosure. Therefore, I find that part 2 of the test under section 10(1) does not apply to pages 206 to 248, as these pages were not supplied to the township in confidence. Nevertheless, for the sake of completeness, I will consider whether part 3 of the test under section 10(1) is met for the Sales Brochure at pages 206 to 248 of the record.

[37] The remaining information at issue is the Executive Summary, which is found at pages 3 to 9 of the record. Based on my review of these pages, I agree with the affected party that it was supplied in confidence. This information appears to me to have been:

- communicated to the township on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the township
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.

[38] Therefore, I find that pages 3 to 9 of the record was supplied in confidence and part 2 of the test under section 10(1) has been met for this information. I will consider whether this information meets part 3 of the test, below.

***Part 3: harms***

[39] Part 3 of the test concerns whether disclosure of the record gives rise to a

reasonable expectation of one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1).

[40] The township states that the specifications in the record for the fire truck consists of technical information and disclosure would cause prejudice towards the affected party's competitive position on future bids.

[41] The affected party states that disclosure of the information to a competitor, such as the requester, would have a direct impact on its ability to present competitive offers to customers. It submits that in some cases, disclosure would also directly influence the neutrality of some bidding processes because it would allow the competitors to use this kind of information against it.

[42] The affected party states that its approach regarding RFPs is oriented to providing the data the client requested and meeting their needs. The affected party submits that it strongly believes if the customer accepted its proposal, it is because its proposal was complete and met and even exceeded their expectations. It states that the fire truck that is the subject matter of the bid has been delivered to the township. It further states that it followed the RFP process at every single step of its bid and met the township's requests while still offering competitive pricing.

[43] The affected party submits that disclosure of the sensitive technical information contained in the record would cause it prejudice in future competitive bidding situations and ultimately, directly affect its business.

[44] Regarding this part of the test, the appellant states only that there was a significant cost difference between its bid and the affected party's winning bid and, therefore, questions the compliance of the accepted proposal with the terms of the RFP.

*Analysis/Findings re: part 3*

[45] The party resisting disclosure must provide detailed 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.<sup>12</sup>

[46] The failure of a party resisting disclosure to provide detailed 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

---

<sup>12</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

harms in the *Act*.<sup>13</sup>

[47] The affected party appears to be relying on the exemptions in sections 10(1)(a) and (c), namely that disclosure could reasonably be expected to prejudice significantly its competitive position under section 10(1)(a), or result in undue loss to it under section 10(1)(c).

[48] There are two types of documents at issue from the bid, pages 3 to 9, the executive summary, and pages 206 to 248, the part of the bid under the tab "Drawings" that appears to consist of a sales brochure.

[49] The affected party did not provide representations on the specific information at issue in the records. Instead, its representations are general and focus on how well it responded to the RFP.

[50] The only specific information in the affected party's representations about the contents of its bid is that it contains precise engineering data and sensitive technical data.

[51] I note that the record concerns a fire truck sold to the township by the affected party in response to an RFP. This fire truck that has already been delivered to the township and the affected party has indicated that training was being conducted on it.

[52] The executive summary at pages 3 to 9 is a letter from the affected party to the township outlining how it plans to satisfy the bid requirements. It contains general information about the truck and the affected party's business.

[53] I cannot ascertain from my review of this six and a half page summary at pages 3 to 9 of the record, which is a letter to the township, where the precise engineering data or sensitive technical data is located. I find that the executive summary contains general information about the fire truck and the affected party's business.

[54] The other information at issue is at pages 206 to 248 under the tab "Drawings." It contains photographs and specifications about the truck. It does not contain sufficient engineering or technical data to allow the truck to be reproduced by a competitor. Instead, these pages appear to me to be a brochure used as a sales tool for the truck.

[55] In particular, I specifically cannot ascertain how the photographs and drawings of the fire truck at pages 206 to 248, along with the specifications about the truck in this portion of the bid, is information that meets part 3 of the test under section 10(1). The truck is in use by the township and, as such, the appearance and many of the truck's features would be observable.

---

<sup>13</sup> Order PO-2435.

[56] The affected party has not provided submissions as to how the photographs, drawings and specifications of the fire truck at pages 206 to 248 of the record could reasonably be expected to cause the harms set out in section 10(1). I find that the affected party has not provided sufficiently detailed evidence about the potential for harm should this information in the record be disclosed.

[57] Based on my review of the information at issue in the record and the parties' representations, I find that I do not have sufficient evidence to determine that the prospect of disclosure of this information gives 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. Therefore, this information does not meet part 3 of the test under section 10(1).

[58] In conclusion, I have found that the information at issue in the record is not exempt under section 10(1). As no discretionary exemptions have been claimed for this information, and no other mandatory exemptions apply, I will order it disclosed.

**ORDER:**

I order the township to disclose the Executive Summary at pages 3 to 9 and the Sales Brochure at pages 206 to 248 to the appellant by **July 29, 2019** but not before **July 24, 2019**.

Original signed by \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ June 21, 2019