

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3799

Appeal MA17-335

Toronto Community Housing Corporation

July 9, 2019

Summary: The Toronto Community Housing Corporation (the TCHC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the winning submission responding to a specific Request for Proposal. It decided to grant access to portions of it. The third party who made the submission appealed the TCHC's decision to disclose portions of the RFP submission to the requester. The third party appellant argues that the mandatory exemption for third party information at section 10(1) applies. In this order, the adjudicator finds that section 10(1) does not apply to the portions of the RFP submission the TCHC decided to disclose. She upholds the TCHC's decision to grant access to the RFP submission at issue and orders it to disclose the relevant portions to the requester, in accordance with its original 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: Order MO-3058-F.

OVERVIEW:

[1] The Toronto Community Housing Corporation (the TCHC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a complete copy of the winning submission along with copies of the score cards, evaluation and interview notes, meeting minutes and audio pertaining to all submissions received in relation to a specific Request for Proposal [RFP].

[2] The TCHC located the responsive records and, pursuant to section 21(1) of the

Act, notified a number of third parties who might be affected by the disclosure of the records in order to obtain their views.

[3] Subsequently, the TCHC issued a decision, granting partial access to the records. Access to portions of the records was denied pursuant to sections 10(1) (third party information), 11(c) and (d) (economic and other interests) and 14(1) (personal privacy) of the *Act*.

[4] One of the third parties, now the appellant, appealed the TCHC's decision to grant access to portions of its winning RFP submission to the requester. The appellant did not object to the TCHC's disclosure of any of the other information that relates to it.

[5] The original requester did not appeal the TCHC's decision to withhold portions of the requested records.

[6] During mediation, the appellant stated that it continues to object to the disclosure of the portions of its winning RFP submission that the TCHC decided to disclose. This is the only information that remains at issue in this appeal.

[7] As the parties did not reach a mediated resolution, the file was transferred to the adjudication stage of the appeal process. I began my inquiry into this appeal by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the appellant, initially. The appellant provided representations in response.

[8] I then sent a copy of the Notice of Inquiry, together with the appellant's representations, to the TCHC and the requester. The TCHC provided representations in response. The requester chose not to provide representations.

[9] In this order, I find that the mandatory exemption for third party information at section 10(1) of the *Act* does not apply to the portions of the RFP submission that are at issue. I order the TCHC to disclose the winning RFP submission to the requester, in part, in accordance with its original decision.

RECORDS:

[10] The relevant record in this appeal is the appellant's 40-page winning RFP submission. The TCHC has withheld portions of the submission. The portions that the TCHC is prepared to disclose are the only portions that are at issue.

DISCUSSION:

[11] The sole issue to be determined in this appeal is whether the mandatory exemption for third party information at section 10(1) applies to the portions of the winning RFP submission that the TCHC is prepared to disclose.

[12] The appellant submits that the mandatory exemption at section 10(1)(a) of the *Act* applies to the portions of the RFP submission that have not been disclosed.

[13] Section 10(1)(a) 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;

[14] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. 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.

[15] For section 10(1) to apply, the third party 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

[16] To satisfy the first part of the section 10(1) test, the party resisting disclosure (in this case, the appellant) must show that the records reveal information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

[17] In its representations, the appellant does not specifically comment on whether the information at issue qualifies as any of the types set out in section 10(1). However, considering the definitions taken from previous orders and the content of the record, I accept that the RFP submission contains information that qualifies as commercial and financial information as those terms have previously been defined by this office:

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.¹ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.²

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.³

[18] As I find the RFP submission contains commercial and financial information, part 1 of the section 10(1) test has been met.

Part 2: supplied in confidence

[19] 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.⁴ 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.⁵

[20] In order to satisfy the “in confidence” component of the second part of the test, 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.⁶

[21] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case 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

¹ Order PO-2010.

² Order P-1621.

³ Order PO-2010.

⁴ Order MO-1706.

⁵ Orders PO-2020 and PO-2043.

⁶ Order PO-2020.

- prepared for a purpose that would not entail disclosure.⁷

Representations

[22] The appellant submits that it supplied the information contained in the RFP submission to the TCHC in confidence. It submits that the RFP, to which it responded with its submission, contained the following section addressing the confidentiality of the information to be submitted:

4.5.2. Confidential Information of Proponent

...Proponents are advised that TCHC is governed by the *Municipal Freedom of Information and Protection of Privacy Act*, and this may be required to disclose the name and price of the winning proponent through a Freedom of Information request. Furthermore, Proponents are advised that their proposals will, as necessary, be disclosed on a confidential basis to TCHC advisers retained for the purpose of evaluating or participating in the evaluation of the proposal.

[23] The appellant submits that, as supported by this excerpt from the RFP, it clearly submitted its proposal to the TCHC with the expectation that the information contained therein would not be disclosed to anyone other than TCHC evaluators.

Findings

[24] Based on my review of the records, I am satisfied that the information contained in the appellant's winning RFP submission was supplied, in confidence, by the appellant to the TCHC. All of the information contained in the submission originated with the appellant who provided the information to the TCHC for the purpose of securing the contract for the work sought through the RFP.

[25] The IPC has previously considered the application of section 10(1), or its provincial equivalent,⁸ to winning RFP proposals. Although this office has found, in some circumstances, where a successful proposal becomes the contract between an institution and a third party, it is considered to have been "mutually generated" rather than supplied,⁹ more recent orders have considered and rejected similar arguments when dealing with winning RFP proposals.¹⁰

⁷ Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (SCDC).

⁸ Section 17(1) of the *Freedom of Information and Protection of Privacy Act*.

⁹ See, for example, Order MO-2053.

¹⁰ See, for example, Orders MO-3058-F, MO-3080-I, MO-3282, and MO-3705.

[26] In particular, in Order MO-3058-F, Assistant Commissioner Sherry Liang discussed the IPC's consideration of winning proposals when considering records similar to those at issue in this appeal. In that order, the Assistant Commissioner acknowledged that in past orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied" when the terms of the proposal were incorporated into the contract between a third party and an institution. However, discussing the specific winning proposal that was before her, she determined that the circumstances could be distinguished. She stated that although some of the terms proposed by the winning bidder might have been included in the resulting contract, the "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."

[27] I agree with the reasoning expressed by the Assistant Commissioner in Order MO-3058-F and adopt it for the purposes of this appeal to find that the proposal was supplied to the TCHC within the meaning of part 2 of the section 10(1) test. As was the case in Order MO-3058-F, the record at issue in this appeal is also a winning proposal and I have no evidence before me that it formed part of the contract between the appellant and the TCHC.

[28] With respect to the "in confidence" component of part 2 of the test, I note that the section 4.5.2. of the RFP, an excerpt of which was provided to me by the appellant in its representations,¹¹ is misleading to third parties as it can be read to imply that under the *Act*, the only information that the TCHC may be required to disclose is the name and price of the winning proponent. This is inaccurate as under the *Act*, any information that is in the custody or control of an institution is subject to disclosure unless it falls under an exemption or an exclusion set out in the *Act*. Nevertheless, based on the appellant's representations, I accept that the appellant had an implicit expectation of confidentiality based on reasonable grounds with respect to the information that it provided in its RFP submission. I accept that it communicated the information to the TCHC on the basis that it was confidential and was to be kept confidential. I also accept that the information was treated by the appellant in a manner that indicates a concern for its confidentiality.

[29] Therefore, I find that part 2 of the test has been met; the RFP submission was supplied, in confidence, to the TCHC by the appellant.

Part 3: harms

[30] The parties resisting disclosure must provide evidence about the potential for

¹¹ Note that I do not have a copy of the RFP itself setting out this provision and am relying on the appellants' submission for its content.

harm. In this case, the affected parties 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

[31] The failure of a party resisting disclosure to provide sufficient evidence demonstrating a reasonable expectation of harms contemplated in section 10(1) will not necessarily defeat the claim for exemption where harm can be inferred by 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

[32] In applying section 10(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for sufficient evidence to support the harms outlined in section 10(1).¹⁴

Representations

[33] The appellant submits that the disclosure of its RFP submission will result in the harm contemplated in section 10(1)(a); that is, disclosure will prejudice significantly the competitive position or interfere significantly with its contractual or other negotiations.

[34] The appellant argues that there is a "very real possibility that the person requesting to see [its] proposal is a competitor" who "submits proposals for the same projects [they] pursue." The appellant submits that it does not use "boilerplate" proposals and each one is the result of "research and a great deal of thought and effort." It submits that its unique approach and method is its intellectual property and its disclosure would significantly prejudice its ability to be competitive in an extremely competitive environment; a competitor could integrate the appellant's approach and method into its future proposals and if they quote a lower fee, the competitor would be awarded the project.

[35] The appellant identifies a number of specific portions of its proposal that it submits should not be disclosed, some of which are portions that the TCHC has already indicated that it will not disclose. The appellant's representations that address the remaining portions focus on the fact that disclosure of the information that they contain would reveal its unique and innovative approach to various different elements of a project.

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.

¹⁴ Order PO-2435.s

Findings

[36] I have reviewed the appellant's representations and the specific portions of information that remain at issue in the winning RFP submission. I do not accept that I have been provided with sufficient evidence to conclude that the disclosure of the specific information that the TCHC is prepared to disclose could reasonably be expected to prejudice significantly the competitive position of interfere significantly with the contractual or other negotiations of the appellant as contemplated by section 10(1)(a).

[37] As indicated above, in its representations, the appellant identified specific portions of its RFP submission that it argues should remain confidential because disclosure could be reasonably expected to result in the harms in section 10(1)(a). I note that many of these portions are not at issue because the TCHC has indicated that it is not prepared to disclose them. On my review of the portions that the TCHC is prepared to disclose, in my view, the appellant's representations fall short of the type of detailed evidence required to establish that the harm in section 10(1)(a) could reasonably be expected to occur.¹⁵ Additionally, I find that harms set out in section 10(1)(a) are not inferable from the content of these portions of the RFP submission or the surrounding circumstances.

[38] I acknowledge that the appellant's argument against disclosure is based on the premise that it would suffer harm because a competitor could use the information to undercut the appellant in a future bid for similar projects. However, I note that this office has previously stated that the possibility that a third party may be subject to a more competitive bidding process for future related projects does not, in and of itself, prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations.¹⁶ I agree with this proposition and find it applicable to these circumstances.

[39] Accordingly, I find that the appellant has failed to establish that disclosure of the portions of information that remain at issue could reasonably be expected to prejudice significantly its competitive position or interfere significantly with the contractual or other negotiations. Part 3 of the section 10(1) test has not been met.

[40] As all parts of the three-part test must be met for section 10(1) to apply, I find that the portions of the appellant's winning RFP submission that are at issue in this appeal are not exempt from disclosure under section 10(1). Therefore, I uphold the TCHC's decision to grant partial access to the RFP submission and will order that the portions at issue be disclosed to the requester, in accordance with the TCHC's original

¹⁵ Previous orders have held that the need for public accountability in the expenditure of public funds dictates the need for "detailed and convincing" evidence. See Order PO-2435.

¹⁶ See Order PO-2435.

decision.

ORDER:

1. I uphold the TCHC's decision to grant access to portions of the RFP submission that it decided to disclose.
2. I order the TCHC to disclose to the requester, the relevant portions of the RFP submission, in accordance with its decision, by **August 13, 2019** but not before **August 8, 2019**.
3. I reserve the right to require the TCHC to provide me with a copy of the records disclosed to the requester in accordance with provision 2.

Original Signed by: _____
Catherine Corban
Adjudicator

July 9, 2019 _____