

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3804

Appeal MA18-00883

City of Toronto

July 15, 2019

Summary: The City of Toronto (the city) received two access requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to all contracts awarded to a specified company with respect to a specified request for quotation, and a specified appendix (a price form) to that company's request for quotation. The responsive record was the contract between the company (the appellant) and the city; the appendix that was the subject of one of the requests is incorporated into the contract. Before issuing its decision, the city asked the appellant for its views about disclosure in response to each request. The appellant opposed disclosure in each case on the basis of the third party information exemption (section 10(1) of the *Act*). The city issued one access decision in response to both requests, granting full access of the record to the requester. The appellant appealed that decision to this office. The adjudicator finds that section 10(1) does not apply to the record, and upholds the city's access 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: Orders PO-2435, PO-3290, and MO-3577.

OVERVIEW:

[1] The City of Toronto (the city) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

All contracts issued from the City of Toronto, Water Division to [the named company] with respect to Request for Quotation #[a specified number].

Appendix C- Price Form, submitted by [the named company] for Request for Quotation #[the same specified number, above].

[2] The city identified a contract and the specified appendix in response to the requests (which is incorporated into the contract).¹ Pursuant to section 21 of the *Act*, the city notified a third party to obtain its views regarding disclosure of the responsive record.

[3] The third party provided the city with submissions. After considering these representations, the city issued one decision for both requests granting full access to the record.

[4] The third party (now the appellant) appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] Mediation did not resolve the dispute, so the file was referred to adjudication.

[6] As the adjudicator, I began an inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the appellant. I sought and received written representations from the appellant in response. In reviewing the appellant's representations, I noted their reliance on a case involving a different type of record (a winning bid, not a contract), and I invited them to consider whether they wished to provide supplemental representations regarding the type of record relevant to this case. They advised this office that they would not be providing further information. Based on my review of the appellant's representations, I concluded that it would not be necessary to seek submissions from the other parties.

[7] For the reasons that follow, I uphold the city's access decision that the mandatory third party exemption at section 10(1) does not apply to the record, and dismiss this appeal.

RECORD:

[8] The record at issue is a 6-page contract, and a 12-page appendix to the contract ("Appendix C – Price Form").

¹ As confirmed in writing by this office during the inquiry, in contact with the city. The appellant does not dispute this.

DISCUSSION:

Does the mandatory third party information exemption at section 10(1) apply to the record?

[9] The only issue in this appeal is whether the mandatory third party exemption at section 10(1) of the *Act* applies to the record. For the reasons discussed below, I find that the exemption does not apply, and uphold the city's decision to disclose it in full.

[10] Since the contract incorporates Appendix C by reference, I will refer to these documents together as "the record" or "the contract".

[11] The relevant portions of section 10(1) say:

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; [or]

...

(b) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[12] 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

[13] 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 *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.

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) or (c) of section 10(1) will occur.

Part 1: type of information

[14] The appellant did not provide representations specifically on this point, however based on my review of the record itself, I find that it contains two types of information listed under section 10(1): commercial and financial information.

[15] These types of information have been defined by the IPC as follows:

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

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.⁶

[16] Therefore, having commercial and financial information, I find that the record meets Part 1 of the test.

Part 2: supplied in confidence

[17] Part 2 of the three-part test itself has two parts: the record 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.

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order PO-2010.

"Supplied"

[18] 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

[19] 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.⁸

[20] 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 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.⁹

[21] The appellant submits that I should apply the rationale in Order PO-3790, a case where a schedule of pricing and product information was found exempt under section 10(1), but that order has no application to this appeal, given the different nature of the records involved. The request in Order PO-3290 was for the winning bid, which included a schedule of pricing. The record at issue in this appeal is not the winning bid but, rather, the resulting contract. Therefore, Order PO-3290 has no application to this appeal, and I will apply the approach this office has taken to requests for contracts, described above, to the record at issue.

[22] Because the appellant's representations address pricing information, it is worth noting that the city was free to accept or reject the prices put forward by the appellant in its bid. The contract, including the requested Appendix C, contains pricing information for specified products. Pricing information is the type of information that is negotiable between contracting parties, as many IPC orders have held.¹⁰ The appellant does not establish that this was not the case here. Since the appellant was the winning bidder, its pricing information found in the resulting contract is considered negotiated, not "supplied."

Does one of the two exceptions apply to this contract?

[23] There are two exceptions to the general principle that contracts are not

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ 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*).

¹⁰ See, for example, Orders PO-2435 and MO-3577.

"supplied:" the "inferred disclosure" and "immutability" exceptions. Here, the appellant does not argue that either exception applies, although invited to make representations on these exceptions.

[24] 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.¹¹

[25] 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

[26] During the inquiry, I highlighted the difference in the types of records as between Order PO-3790 and this appeal to the appellant and sought any additional representations in light of that difference (given the IPC's approach to contracts, as noted in the Notice of Inquiry). The appellant declined to provide further representations in support of their position resisting disclosure. Without representations from the appellant demonstrating that either exception applies, I find that neither exception applies. Based on my review of the contract, I would be engaging in speculation to find that it contains information that would fall under either exception.

[27] Having found that neither exception to the general principle that contracts are not "supplied" has been established, I find that the record at issue was not "supplied" to the city. It is, therefore, unnecessary for me to examine whether it meets the "in confidence" element of Part 2 of the test, or the harms requirement in Part 3.

[28] Since all three parts of the test must be met for the record to be exempt under section 10(1) and Part 2 is not met, I find that section 10(1) does not apply to the record and I uphold the city's decision to fully disclose it to the requester.

ORDER:

1. I uphold the city's decision to disclose the record at issue in its entirety.
2. I order the city to disclose the record to the requester by **August 20, 2019** but not before **August 15, 2019**.

¹¹ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

¹² *Miller Transit*, above at para. 34.

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: _____

Marian Sami
Adjudicator

July 15, 2019 _____