Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3825

Appeal MA18-163

Region of Peel

August 30, 2019

Summary: The appellant, a third party, appealed a decision by the Region of Peel to disclose information relating to a contract with the third party for the provision of paratransit taxi services within the region. The appellant claims that the records are exempt under section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the exemption does not apply and orders disclosure of the records with personal information severed.

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 MO-3317, MO-3530, PO-2453, PO-2618 and PO-3347.

OVERVIEW:

[1] This appeal arises from a request made to the Region of Peel (the region) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about paratransit service providers under contract with the region. The requester sought access to the following information relating to specified service providers for the years 2015, 2016 and 2017:

> Total costs broken down by company and year for each of the last three years (2015-2017).
>
> Total complaints segmented by company for each of the least three years.

> Any missed training or citations from municipal licensing on the companies for missed training, fleet issues or other infractions.
>
> Any liquidated damages enforced by the Region on any contract for transhelp in the last three years.
>
> Available spreadsheets on costing data by company for each of the last three years.
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> Any and all tender documents for all contracts that have been put to call in the last three years for disabled transportation.

[2] The region searched for and located multiple responsive records. In accordance with section 21(1) of the *Act*, before issuing an access decision, the region notified third parties whose interests might be affected by disclosure and gave them the opportunity to make representations.

[3] A third party submitted representations to the region explaining that the records should not be disclosed because the mandatory exemption at section 10(1) of the *Act* (third party information) applied to them.

[4] The region did not accept this position and issued a decision to disclose the responsive records in part. The region wrote in its decision that the third party had not satisfied all three parts of the test in section 10(1) of the *Act* and that it would release records relating to the third party's submissions made during the procurement process for paratransit service providers. The region decided to withhold information that it determined was personal information. The requester did not take issue with the region's decision to withhold this information from the records and did not appeal the region's decision to withhold this information. The information the region withheld is therefore not at issue in this appeal.

[5] The third party, now the appellant, appealed the region's decision to disclose the records, claiming that section 10(1) applies to the records in their entirety. The appeal proceeded to mediation.

[6] During mediation, the requester confirmed that he is not seeking personal information that might be contained in the records. The requester did not appeal the region's decision to withhold personal information from the records, such as individuals' names and email addresses. Only the application of the mandatory third party information exemption at section 10(1) is at issue in this appeal.

[7] When mediation could not resolve the appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. As part of my inquiry, I received representations from the appellant and the region which I shared with each.

[8] For the reasons that follow, I uphold the region's decision to disclose the records and I dismiss the appellant's appeal.

RECORDS:

[9] There are two records at issue in this appeal. The first is a 42-page submission (the proposal) in response to the region's RFP. The second is a two-page unit pricing sheet (the unit pricing sheet) that contains a summary of fees and the contract price by type of service.

DISCUSSION:

[10] As noted above, the only issue in this appeal is whether the mandatory exemption at section 10(1) of the *Act* applies to the records.

[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,
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> 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...1

[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

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[1] Section 10(1)(d), which is not relevant and therefore not addressed in this order, is intended to protect "information supplied to or the report of a conciliation officer, mediator, labour relations office or other person appointed to resolve a labour relations dispute."

[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.*).

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. 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 parties agree that the records meet the first part of the test because they contain two types of information contemplated by section 10(1): commercial and financial information.

[15] "Commercial information" has been discussed in prior orders as relating 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] "Financial information" has been defined as information relating to money and its use or distribution and must contain or refer to specific data.[5]

[16] The proposal sets out the appellant's commercial, financial, operating and contractual relationship with the region as it relates to transportation services. The pricing sheet sets out the appellant's financial and operating details in relation to the performance of the appellant's agreement with the region.

[17] Because the records relate to the provision of specified commercial services to the region and the payment for those services, I find that they contain commercial and financial information.

[18] I must therefore consider whether the next two parts of the above-noted three-part test are also met.

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[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] Order PO-2010.
[5] Order PO-2010.

Part 2: supplied in confidence

[19] Part two of the three-part test itself has two parts: the appellant must have "supplied" the information to the region, and must have done so "in confidence", either implicitly or explicitly. If information was not supplied to the region by the appellant, section 10(1) does not apply, and there would be no need for me to decide whether the "in confidence" element of part two of the test is met.

[20] 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]

[21] 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]

[22] 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" for the purpose of section 10(1). Past IPC orders have, in general, treated the provisions of a contract 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[8]

[23] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. 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 that the affected party supplied to the institution. The "immutability" exception applies to information that is immutable or is not susceptible to change.[9]

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

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[6] Order PO-2010.
[7] Orders PO-2020 and PO-2043.
[8] [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed. Doc. M32858 (C.A.) (*Boeing Co.*).
[9] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis*.
[10] Order PO-2020.

[25] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case must be 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 disclosure.[11]

Representations

The appellant's representations

[26] The appellant submits that it provided its bid to the region as part of the RFP process in explicit confidence and not for public circulation. The appellant says that the information in the records was communicated to the region on the basis that it was confidential and was to be kept confidential. The appellant inserted a disclaimer into the records which states that the records contain what the appellant says are its valuable properties and trade secrets, as well as confidential information disclosed on a confidential basis to permit the region to evaluate the appellant's proposal as part of its procurement process. The appellant also submits that the proposal itself was explicitly marked as "Confidential" at the bottom of each page, indicating that it was not intended for public circulation.

[27] The appellant says that the confidential nature of the records is not altered because the appellant was successful on the RFP.

The region's representations

[28] The region disputes that the records meet part two of the section 10(1) test.

[29] The region submits that the proposal forms part of the mutually generated agreement between the parties. Specifically, the region says that, when it accepted the appellant's proposal, the proposal became part of the parties' overarching agreement and is therefore considered to have turned into negotiated information.

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[11] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[30] The region also says that the appellant submitted the proposal with the understanding that with a request under the *Act*, all documents it provided to the region "may be required by law to be made available to a requesting member of the public."

[31] The region says that the pricing sheet was not generated by the appellant but by the region and includes the total contract price as well as information regarding the number of complaints made to the region against each taxi vendor awarded a contract through the RFP. Because the region created the pricing sheet, the region says it was not "supplied" to it by the appellant.

[32] The region submits that disclosure of the pricing sheet would neither reveal nor permit the drawing of accurate inferences with respect to information supplied by a third party because pricing information cannot be considered to have been "supplied" by the appellant where that information was mutually generated. Since it was not "supplied," the region says that there is no basis for considering whether it was supplied "in confidence."

Analysis and Findings

[33] For the reasons that follow, I find that the appellant has not established that it supplied the information in the records to the region in confidence, and has therefore failed to satisfy part two of the three-part test.

[34] It is well established that 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). Previous orders of this office have generally treated the provisions of a contract as mutually generated rather than supplied, even if preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[12] Agreed-upon essential terms of a contract or agreement are generally considered to be the product of a negotiation process and not "supplied," even if the negotiation amounts to acceptance of the terms proposed by the third party.[13]

[35] Previous orders have also considered circumstances where the parties did not create a separate formal contract after the institution's acceptance of the proposal or tender from a third party but instead deemed the winning bid to be the contract.[14] In Order PO-3347, the adjudicator, in considering the provincial equivalent of section

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[12] Order MO-3290.
[13] The Divisional Court approved this approach in *Boeing Co. v Ontario (Ministry of Economic Development and Trade)*, cited above. See also Orders MO-1706, MO-3062, PO-2018 and PO-2496, upheld in *Grant Forest Products Inc. v Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v John Doe*, [2008] O.J. No. 3475 (Div. Ct.).
[14] Orders MO-2093, MO-3062, and PO-3347.

10(1), found that a winning submission and numbered purchase order were deemed by the parties to be the contract and were therefore not "supplied" by the affected party to the institution.

[36] This reasoning was applied in Order MO-3530, in which the adjudicator upheld the region's decision to disclose information contained in a pricing summary and found that, when a tender became the contract, it became negotiated information because its presence in the contract signified the region's acceptance. The adjudicator wrote:

> I am bolstered in this regard by the determinations of Commissioner Brian Beamish in Order PO-2435 where he rejected the position taken in that appeal by the Ministry of Health and Long-Term Care that proposals submitted by potential vendors in response to government RFPs…are not negotiated because the government either accepts or rejects the proposal in its entirety.

[37] Order PO-2453 also addressed the application of the "supplied" component of part two of the test to bid information prepared by a successful bidder in response to a Request for Quotation issued by an institution. Among other things, the record contained the successful bidder's pricing for various components of the service to be delivered, as well as the total price of its bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were therefore not "supplied" pursuant to part two of the test,[15] the adjudicator wrote:

> Following the approach taken by [Commissioner] Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information…contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

[38] I adopt this approach in this appeal. Once the region accepted the appellant's proposal, including pricing information contained within it, and because the proposal became part of the contract, the information became "negotiated" information. Although given the opportunity to reply to the region's representations, the appellant did not respond to dispute that its bid became part of the parties' overarching contract. By accepting the proposal and making it the contract for services between itself and the appellant, the region agreed to it and the records were incorporated into the parties' contract.

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[15] Under the provincial equivalent of section 10(1).

[39] I have also reviewed the two pages of the pricing sheet at issue. They contain a summary of fees charged by the appellant and the total contract price broken down by type of service. I accept the region's submission that it, and not the appellant, generated this record. On its face, it contains a header that identifies it as a form originating in the region's purchasing division and contains instructions to prospective bidders regarding its completion and submission. Although the region may have generated the form, I find that it contains pricing information that the appellant supplied. However, for the reasons described above, once the region accepted the appellant's pricing for services, the information became negotiated information that formed part of the service contract.

[40] The appellant relies on Order PO-2618 to argue that the fact that the appellant was successful on the RFP does not alter the confidential nature of the proposal. In Order PO-2618, the adjudicator considered a successful bid proposal that led to a final agreement between the bidder and an institution and concluded that the existence of a final agreement and contractual relationship did not mean the third party could not reasonably expect confidentiality in relation to its written proposal. In my view, Order PO-2618 is distinguishable from this appeal.

[41] In Order PO-2618, the records at issue consisted of four tenders submitted to the Ontario Realty Corporation (the ORC) in response to an RFP for consulting services. Of the four tenders, three were unsuccessful. The fourth was submitted by the successful service provider that ultimately won a contract with the ORC. Concerning the unsuccessful proposals, the adjudicator found that, since no agreement was actually reached, those bids could not qualify as negotiated agreements. The adjudicator also upheld the ORC's decision to deny access to the fourth, successful, bid. The adjudicator found that that bid had been supplied in confidence; however, he also found that the ORC had entered into a separate, further agreement with the successful bidder that was not the subject of the access request. That is not the case here.

[42] I also reject in any event the appellant's submission that the records were supplied "in confidence." Section 19 of the RFP's terms and conditions alerted the appellant to the fact that, in the case of a request under the *Act*, all documents the appellant provided to the region pursuant to the procurement process could be disclosed to a requesting member of the public unless they were protected by a specific exemption.

[43] Because neither the "supplied" nor the "in confidence" portions of the part two test have been established, I find that the exemption at section 10(1) does not apply.

[44] However, I would like to briefly address the appellant's representations regarding part three of the test in section 10(1), noting that the majority of its representations focus on harms that it says could reasonably be expected to occur if the records are disclosed.

[45] The appellant relies on Order MO-3317 in support of its position that it will suffer

prejudice to its competitive position and undue loss while its competitors will enjoy undue gain if its commercial and financial information is disclosed. I find that Order MO-3317 is distinguishable for the same reasons as Order PO-2618, above.

[46] In Order MO-3317, the adjudicator considered harms that could reasonably be expected to occur if a bid that she found had been supplied in confidence were disclosed. The County of Frontenac (the county) withheld large portions of a proposal to provide physiotherapy services in response to an RFP. The adjudicator accepted that the proposal was intended to be a confidential proposal between the county and the bidder in which the bidder used every means possible to convince the county to select them. The adjudicator found that disclosure of the records could significantly prejudice the bidder's competitive position in a competitive industry where competitors could use the information to their advantage to better compete in future procurements. There is no indication from my review of Order MO-3317 that, unlike in this appeal, the bid at issue became the final agreement with the county or that it was not distinct from the agreement created after the winning bid was selected.

[47] In any event, section 10 does not exempt from disclosure all information that could reasonably be expected to cause harm if disclosed. To be exempt from disclosure under section 10(1), information must have been supplied to the institution in confidence. Because I have found that the appellant has not satisfied part two of the test, it is not necessary to review whether any of the harms in section 10(1) are established.

[48] For the reasons set out above, I find that the records do not qualify for exemption under section 10(1) of the *Act*. I uphold the region's decision to disclose the records with personal information removed.

ORDER:

1. I order the region to disclose the records in accordance with its access decision to the requester by October 7, 2019 but not before October 1, 2019.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the region to provide me with a copy of the records disclosed to the requester.

August 30, 2019

Jessica Kowalski
Adjudicator