

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3829

Appeal MA18-236

Region of Peel

September 11, 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 information at issue.

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-3530 and PO-3347.

OVERVIEW:

[1] The Region of Peel (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to the provision of paratransit taxi services within the region for the years 2015, 2016 and 2017. Specifically, the request was for:

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 last 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.

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 its decision to release 367 pages of responsive records in full and another 45 pages 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 submissions made by the third party 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 they are exempt from disclosure under section 10(1). The appeal proceeded to mediation.

[6] Shortly thereafter, the region located an additional responsive record regarding pricing. The region sought the appellant's representations regarding disclosure of the additional record. The region advised the appellant that it would disclose this additional record and that, in the absence of a response from the appellant, it would assume that the appellant's position regarding disclosure of the additional record remained the same as with the initial records, namely, that the appellant was not consenting to its release. The appellant did not make any representations to the region regarding this additional record.

[7] During mediation, the requester confirmed that he is not seeking access to the information that the region withheld on the basis that it was personal information. Only

the mandatory third party information exemption at section 10(1) is at issue in this appeal.

[8] When a mediated resolution could not be reached, the appeal 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 that I shared with each.

[9] For the reasons that follow, I find that the records are not exempt under section 10(1) of the *Act*. I uphold the region's decision and dismiss the appeal.

RECORDS:

[10] There are two records at issue in this appeal. The first is a 31-page submission (the proposal) in response to the region's RFP. The second is a two-page unit pricing sheet (the pricing sheet) that contains a summary of fees and the contract price by type of service. The information at issue is the information that the region is prepared to disclose. The information the region decided to withhold on the basis that it is personal information is not at issue.

DISCUSSION:

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

[12] Section 10(1) states 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...¹

[13] Section 10(1) is designed to protect the confidential “informational assets” of business 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

[14] 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;
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 paragraphs (a) through (d) of section 10(1) will occur.

Part 1: type of information

[15] The parties agree that the records contain commercial information. The region submits that the records also contain financial information, which the appellant did not dispute. I agree that the records contain both commercial and financial information.

[16] “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

[17] There is no dispute that the records describe the provision of specified services

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.*).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

⁴ Order PO-2010.

⁵ Order PO-2010.

by the appellant to the region in exchange for fees. The proposal sets out the appellant's operating and contractual relationship with the region for taxi services and the pricing sheet sets out the appellant's financial and operating details in relation to the performance of those services.

[18] Because they set out business services and related charges, I find that the records contain commercial and financial information, which satisfies part one of the test for exemption under section 10(1).

[19] Since the records contain commercial and financial information, I must consider whether the next two parts of the above-noted three-part test are met: that the information was supplied to the region in confidence, and, if so, that there was a reasonable expectation that the specified harms will result from disclosure.

Part 2: supplied in confidence

[20] 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. Where information was not supplied to the region by the appellant, section 10(1) does not apply, and there is no need for me to decide whether the "in confidence" element of part two of the test is met.

[21] 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

[22] 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

[23] 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

[24] There are two exceptions to this general rule which are described as the

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.*).

“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

[25] 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

[26] 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

Appellant’s representations

[27] The appellant submits that information in the records was provided to it by its suppliers on a confidential basis and that it has no authority to “authorize publication” of this information. It also submits that the records contain information about its drivers and shareholders who have not authorized disclosure to third parties through an access-to-information request.

Region’s representations

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

⁹ Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis*.

¹⁰ Order PO-2020.

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.

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

[30] The region also says that the appellant submitted the proposal with the understanding that, in the event of a request under the *Act*, all documents it provided to the region "may be required 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 such as the number of complaints made to the region against each taxi vendor awarded 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 says 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 submits 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 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

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 Loukidelis*, cited above.

[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 or tender to be the contract.¹⁴ In Order PO-3347, the adjudicator, in considering the provincial equivalent of section 10(1), found that a winning submission and numbered purchase order were deemed by the parties to be the contract and was 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, the information became "negotiated" information. Although given the opportunity to reply to the region's representations, the appellant did not respond or dispute that its bid became part of the

¹⁴ Orders MO-2093, MO-3062, and PO-3347.

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

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.

[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 itself, 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. The appellant has also given no evidence to support that this information was supplied in confidence.

[40] The appellant also submits that third party suppliers provided underlying information to the appellant on a confidential basis. I have reviewed the records and note that the proposal contains information such as the appellant's organizational structure and includes a history of its previous services. However, the appellant has not provided any particulars as to specific confidential information that might be inferred from disclosure of the records. Therefore, there is no basis upon which I could make a finding that the inferred disclosure exception to the "supplied" rule applies.

[41] Finally, the region says that the appellant did not have a reasonable expectation of confidentiality because it 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 protected by a specific exemption under the *Act*. The appellant was given the opportunity to make further representations in response, but did not do so.

[42] Given the lack of detailed support for the appellant's opposition to disclosure, there is no reasonable basis upon which to find that it supplied the information in the records to the region, or that such information was supplied "in confidence." I also have insufficient evidence before me to find that the inferred disclosure exception applies to any information in the records. I have also considered whether the "immutability" exception would apply and find no basis for it. As a result, I find that part two of the test for exemption under section 10(1) has not been satisfied.

[43] I note that the appellant states in its representations that its competitive position can reasonably be expected to be prejudiced if the size and composition of its fleet and information about the composition and value of its trade relationships are published.

[44] However, section 10 does not exempt from disclosure all information that could reasonably be expected to result in 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.

[45] Accordingly, I find that the second part of the three-part test is not met and that the records do not qualify for exemption under section 10(1) of the *Act*. I uphold the region's decision to disclose the information at issue in the records.

ORDER:

1. I order the region to disclose the records in accordance with its access decision to the requester by October 16, 2019 but not before October 11, 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 record which is disclosed to the requester.

Original Signed By: _____

Jessica Kowalski
Adjudicator

September 11, 2019 _____