Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4005

Appeal MA19-00686

Region of Peel

February 1, 2021

Summary: The Region of Peel (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the unit pricing of a specified winning bid. The region identified the schedule of prices of the winning bid as the responsive record. The winning bidder, a third party, appealed the region's decision to grant full access to the pricing information on the basis that it is exempt under the mandatory exemption at section 10(1) (third party information) of the *Act*. In this order, the adjudicator finds that the information is not exempt under section 10(1). She upholds the region's access decision and dismisses the appeal.

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-3347, MO-2093, MO-3062, MO-3530, MO-3577 and MO-3829.

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 the unit price for each awarded medical supply product from a specified tender document for Peel Regional Paramedic Services.

[2] The region identified the responsive record relating to the request, and notified third parties to obtain their views regarding disclosure of the records. The region later issued a

decision that granted access to the record in full.[1] The region advised the third parties that they had the opportunity to appeal the region's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[3] One of the affected third parties, now the appellant, appealed the region's decision to the IPC.

[4] Mediation was attempted but could not resolve the dispute,[2] so the file was moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry.

[5] As the adjudicator of this appeal, I began my 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 in response. The appellant agreed to share their representations with the region and the original requester. I then sought and received written representations from the region and the original requester.

[6] For the reasons that follow, I uphold the region's decision and dismiss the appeal.

RECORDS:

[7] The information at issue is found in a 13-page document that sets out the unit price for each awarded medical supply product relating to a specified tender document.

DISCUSSION:

[8] The only issue to be decided in this appeal is whether the mandatory exemption at section 10(1) apply to the record. As I will explain below, I find that the information at issue is not exempt under section 10(1), and I will order it disclosed to the original requester.

[9] The appellant submits that the records are exempt under sections 10(1)(a), (b), and (c) of the *Act*.

[10] Sections 10(1)(a), (b), and (c) say:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

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[1] In addition, the region provided an index of records that noted that a portion of the record was deemed non-responsive to the request.

[2] The original requester confirmed that they were not seeking the non-responsive 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) 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[.]

[11] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

[12] 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

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.

[13] In this appeal, the appellant has the burden of proof to show that section 10(1) applies to the information at issue because it is the appellant that opposes disclosure, not the region.

Part 1: type of information

[14] The types of information listed in section 10(1) ("a trade secret or scientific, technical, commercial, financial or labour relations information") have been discussed in

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[3] *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.*).

[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

prior orders. In this appeal, the record meets part one of the test because it contains commercial and financial information, as I will explain below.

[15] The appellant states that the record contains "a trade secret of the commercial type" because "it is product detail listing between [b]uyer and [s]eller."

[16] The IPC has defined the term "trade secret" as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[5]

[17] In support of its position that the information at issue is a "trade secret," the appellant essentially re-states this test and asserts that each part of the test applies. However, re-stating the test for "trade secret" does not sufficiently establish that the record contains a trade secret.

[18] From the appellant's characterization of the information as "trade secret of the commercial type" as a "product detail listing between [b]uyer and [s]eller," it appears that the appellant acknowledges that there is commercial information in the record.

[19] The IPC has defined "commercial information" 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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]

[20] Based on the wording of the request (clearly referring an awarded tender and the pricing relating to that), the region's identification of the record as a responsive record,

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[5] Order PO-2010.

[6] Order PO-2010.

[7] Order P-1621.

and my review of the contents of the record itself, I find that the record is the schedule of prices of the appellant's winning bid to sell medical supply products to the region. As this information concerns buying and selling as between the region and the appellant, it qualifies as "commercial information" under section 10(1).

[21] Furthermore, since the record includes pricing information, I find that it also contains "financial information," as that term has been described by the IPC:

> *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.[8]

[22] Since the record contains at least one type of information listed under section 10(1), it meets part one of the test for section 10(1).

Part 2: supplied in confidence

[23] Part two of the three-part test itself has two parts: the record at issue must have been "supplied" to the region 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.

Supplied

[24] 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.[9]

[25] 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.[10]

[26] 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.[11]

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[8] Order PO-2010.

[9] Order MO-1706.

[10] Orders PO-2020 and PO-2043.

[11] 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*).

[27] In this appeal, the parties do not agree about whether the information at issue appears in a contract. Both the region and the requester point to the contractual relationship between the appellant and the region, and the IPC's past treatment of similar information. The appellant asserts that the information is not part of "a contract document" and points to the fact that its staff entered the information into the region's website "in response to a request for the same" as evidence that the information was supplied. By "request for the same," the appellant appears to be referring to is the tendering process, which involved bidders inputting the price for each medical supply product. On my review of the record and the representations of the parties, I find that, while the pricing information in the record was "input" into the region's website, this input was conducted as a response to a bidding process, which the appellant won. I see no difference between this method of presenting pricing information in a bid from presenting it in a physical paper bid.

[28] It is not disputed that the appellant won the tendering process in question, or that there is no separate contract reflecting the agreement between the region and the appellant. The appellant did not specifically address the region's representations relying on past IPC orders that have held that where there is no separate contract between the parties, but instead repeated the position it had stated earlier in the inquiry. As the region submits, past IPC orders have held that when there is no separate contract between the parties, the accepted bid becomes the contract, and the information within it, including pricing information, is treated as negotiated information because its presence in the contract signifies the institution's acceptance of those terms and pricing.[12] I find that this approach applies here.

[29] In addition, previous orders of this office have recognized, in a bidding process, the institution is free to accept or reject the prices put forward by the parties.[13] The appellant fails to establish that this is not the case here. In fact, on this point, the appellant describes the pricing information as "agreed prices,"[14] as between the appellant and the region. Accordingly, I accept the region's submission, and I find, that when it accepted the appellant's bid, the pricing formed the basis for the agreement between the region and the appellant, and that this pricing information is considered negotiated, not "supplied."

Does one of the two exceptions apply?

[30] There are two exceptions to the general principle that contracts are not "supplied:" the "inferred disclosure" and "immutability" exceptions.

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[12] Orders PO-3347, MO-2093, MO-3062, MO-3530, and MO-3829.

[13] See, for example, Orders PO-2435 and MO-3577.

[14] This description of the pricing information is found in the appellant's arguments under part three of the three-part test.

[31] 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.[15]

[32] 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.[16]

[33] The appellant did not address whether either exception applies. Under part two, its representations were limited to an assertion that the record is not part of "a contract document" and explaining that its staff manually entered the prices into the region's website.

[34] Without representations from the appellant demonstrating that either exception applies, I find that neither exception applies. Based on my review of the record, I would be engaging in speculation to find that the pricing information at issue that would fall under either exception.

[35] Since neither exception to the general principle that contracts are not "supplied" has been established, I find that the information at issue was not "supplied" to the region. As a result, it is unnecessary for me to examine whether it meets the "in confidence" element of part two of the test, or the harms requirement in part three.

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

ORDER:

1. I uphold the region's access decision and dismiss the appeal. I order the region to disclose the records to the appellant, in full, no later than **March 8, 2021**, but no earlier than **March 3, 2021**.

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

3. The timeline noted in order provision 1 may be extended if the region is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting time extension request.

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

[16] *Miller Transit*, above at para. 34.

Original Signed by: February 1, 2021

Marian Sami
Adjudicator