Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4148

Appeal MA20-00392

City of Toronto

January 14, 2022

Summary: The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about the sale of fluoride to the city. The city identified responsive records and following notification of the fluoride provider, granted full access to the records at issue. The fluoride provider appealed the city's decision, claiming the application of section 10(1) (third party commercial information) of the *Act*. The requester confirmed that the only record sought is the contract for the sale of fluoride to the city. In this order, the adjudicator finds that section 10(1) does not apply to the contract and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, section 10(1).

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> …about the following water treatment plant: R.L. Clark Water Treatment Plant. I would like to obtain the documents in regard to the fluoride additive used, specifically, I would like the records showing what kind of fluoride is used (i.e. Fluor silicic Acid or Sodium Fluoride or other) along with the source of the fluoride, where does this specific plant buy this

> fluoride from (the company). This can be done by providing the record of a contract that would have all the information plus how much was paid for the fluoride. I would like the information to be the most recent, within the last 5 years if possible.

[2] The city identified responsive records, including the contract between the fluoride provider and the city, and following notification of the fluoride provider, the city issued a decision granting the requester full access to the responsive records.

[3] The fluoride provider appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] During mediation, the appellant confirmed that it was appealing the city's decision on the basis that the records at issue should be withheld pursuant to the mandatory third party information exemption in section 10(1) of the *Act*.

[5] The requester clarified that they are pursuing access to the most recent contract between the city and the appellant for the supply of fluoride to the city. The requester confirmed that they are not interested in pursuing access to other responsive records.

[6] The appellant confirmed that they object to the disclosure of the most recent contract and they wished to pursue the appeal at adjudication. Accordingly, the appeal moved to adjudication, where a written inquiry may be conducted.

[7] I initially sought representations from the appellant. The appellant did not provide extensive representations but set out its position in an email to the IPC. The requester also provided their position in an email to an IPC staff member in response to the appellant's statement. The parties' positions were shared in accordance with the IPC's *Code of Procedure*.[1] I did not find it necessary to seek the city's representations regarding its decision to disclose.

[8] For the reasons that follow, I find that the contract is not exempt under section 10(1) of the *Act* and dismiss the appeal.

RECORD:

[9] The record at issue consists of a four-page contract between the appellant and the city (the contract).

DISCUSSION:

[10] The sole issue before me is whether the mandatory exemption at section 10(1)

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[1] *Practice Direction 7*.

of the *Act* applies to the contract.

Representations

[11] The appellant submitted the following in response to the Notice of Inquiry seeking its representations:

> Our stance remains that the release of contract information related to this supply agreement will be detrimental to our business, we are a privately owned firm and our supply contract/agreements remain confidential to the public. We are willing to provide technical and safety information relating to the agreement but not contract details.

[12] The requester was provided with a copy of the appellant's position and a Notice of Inquiry. In response, the requester stated:

> …I do not believe the other party met the requirements and would fail the test outlined in the [Notice of Inquiry]. Sure they may pass some of the parts but overall I believe they have not fulfilled the burden of proof they should, if they want this information to not be disclosed.

Analysis and finding

[13] Section 10(1) of the Act 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;
> >
> > (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; or
> >
> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[14] 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]

[15] For section 10(1) to apply, the appellant, as the party resisting disclosure of the record, 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] The appellant submits that supply contracts and agreements are confidential, but did not provide further representations on the nature of the information in the record. Based on my review of the record, I find that it contains information related to the sale of fluoride to the city, including pricing and contract terms. Commercial information, as it relates to section 10(1) of the *Act*, refers to information that relates solely to the buying, selling or exchange of merchandise or services.[4] Accordingly, I find that the record contains commercial information for the purpose of section 10(1) and thus the appellant has met part one of the test.

Part 2: supplied in confidence

[17] 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.[5]

[18] 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.[6]

[19] 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

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[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 MO-1706.
[6] Orders PO-2020 and PO-2043.

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.[7]

[20] 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 supplied by the third party to the institution.[8] 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.[9]

[21] Based on my review of the record and the parties' submissions, the information in the record was not supplied to the city. The record is a contract between the appellant and the city, and the appellant did not provide any submissions relating to the inferred disclosure or immutability exceptions to the general rule about contracts being negotiated rather than supplied. I find that neither the appellant nor the contents of the record itself establish that disclosure of the information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the city. Additionally, I am unable to find that the information in the record is subject to the immutability exception given that the appellant did not provide representations on this exception. Accordingly, I find that the information in the record was not supplied to the city within the meaning of section 10(1) of the *Act*.

[22] All three parts of the test must be met in order for section 10(1) to apply to the record. As I have found that part two of the test is not made out, I find that section 10(1) does not apply to the record at issue.

ORDER:

I find that section 10(1) does not apply to the record and uphold the city's decision to disclose it to the requester. I dismiss the appeal.

Original Signed by: January 14, 2022

Stephanie Haly
Adjudicator

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[7] 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*),.

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

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