

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4263

Appeal MA21-00143

Township of Bonnechere Valley

October 21, 2022

Summary: The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to a variety of records relating to an operational review of the township's service delivery processes conducted by a consulting management firm (the third party), including the successful bid submission provided in response to a Request for Proposals (RFP) to conduct the review.

The township issued an access decision and denied access to portions of the third party's submission made in response to the RFP and to the interview questions it used in conducting the review under the mandatory third party information exemption in section 10(1) of the *Act*. The requester appealed this decision. In this order, the adjudicator upholds the township's decision under section 10(1) and finds that the information at issue is exempt.

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

Orders and Investigation Reports Considered: MO-2983, MO-1706, MO-2070, PO-3175, and MO-3058-F.

OVERVIEW:

[1] The appellant sought access under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) to a variety of records relating to an operational review of the Township of Bonnechere Valley's (the township) service delivery processes, including the successful bid submission provided by a municipal

management consulting firm (the third party or the consultants) and some of the records created during the review itself.

[2] Originally, the appellant sought access to:

Any documentation relating to the 2020 Operational Review including RFP [Request for Proposal] or RFQ [Request for Quotation], bid submission including supporting material covering experience of [the third party] consultants, Statement of Work scope, contract and payment terms, names of any subcontractors, any interim reports including drafts, minutes of any meetings or any documentation relating to the operational review including such items as handwritten notes, reports, emails, presentation etc. in any media by any town official/employee (sic) attended any meetings or discussion with the consultants conducted between 1 November 2018 and 1 December 2020.

[3] The appellant then narrowed his request to include only the following records dated between November 1, 2018 and December 1, 2020:

- Operational Review RFP
- Operational Review RFP [the submission] – for [the third party] – redacted
- Operational Review [named company]’s Agreement [(the contract)]
- Operational Review handwritten notes from Deputy CAO [Chief Administrative Officer]
- Operational Review handwritten notes from CAO
- Operational Review emails between the CAO and [the third party]
- Operational Review emails between Deputy CAO and [the third party]
- Operational Review emails between Mayor and [the third party]

[4] The township provided the appellant with partial access to these records. It denied access to portions of the records relying on the mandatory third party information exemption in section 10(1) of the *Act*.

[5] Asked by the appellant why certain email attachments containing the consultants’ interview questions used to conduct the operational review were not disclosed to him, the township responded as follows:

The questions are third party [copyright] information and they contain methodologies and proprietary information and we do not have permission to release them...

[6] The appellant appealed the township's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to attempt a resolution of the appeal.

[7] During the course of mediation, the appellant advised the mediator that he is pursuing full access to the consultants' interview questions used to conduct the operational review (the interview questions) and to the withheld information in the RFP submission (the submission).

[8] Subsequently, and following further third party consultation and consent, the township issued a decision to the appellant granting access to further information from the submission.

[9] The appellant then advised the mediator that he wished to move the appeal to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry. The appellant wished to continue to pursue access to the interview questions and to the remaining withheld information from the submission, with the exception of phone numbers.

[10] I decided to conduct an inquiry and I sought the representations of the township, the third party, and the appellant. These representations were exchanged between the parties in accordance with the IPC's *Practice Direction 7*.¹

[11] In this order, I uphold the township's decision under section 10(1) and find that the information at issue in the records is exempt.

RECORDS:

[12] The withheld information at issue is contained in the following two records:

1. A 19-page submission made by the third party in response to a Request for Proposals issued by the township (the submission).² At issue are the following portions of pages 3, 6 -11, and 16-18 of the submission that contains details regarding the third party's:
 - 3- team's skill set;
 - 6 - approach to project communications;
 - 7 - background review of pertinent data, policies and documents;
 - 8-9 - consultations with stakeholders;

¹ Portions of the third party's representations were confidential and not shared with the appellant or referred to in this order, although I have relied on these portions in arriving at my decision in this order.

² Other than the phone numbers in the submission.

- 9-10 - approach to the specifics of the report it will generate
 - 11 - report follow up;
 - 16 - Proposed milestones, cost breakdowns and schedule;
 - 17 - hourly rates; and,
 - 18 - customer (or client) list from similar projects.
2. The entirety of five sets of interview questions (without the answers) totaling 13 pages containing specific templates developed by the third party.

DISCUSSION:

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

[13] The only issue in this appeal is whether the section 10(1) exemption for third party information applies to the records. The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,³ where specific harms can reasonably be expected to result from its disclosure.⁴

[14] The township relies on section 10(1)(a) to withhold the information at issue and the third party argues that sections 10(1)(a) and 10(1)(c) exempt the information at issue from disclosure.

[15] Section 10(1) states in part:

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;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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.

[16] For section 10(1) to apply, the party arguing against disclosure 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1 of the section 10(1) test: type of information

[17] I will first determine whether the records reveal information that meets part 1 of the test under section 10(1).

Representations

[18] The third party and the township explain that the third party is a consultant that provides municipal management consulting services to municipalities. Its services include conducting operational reviews of municipalities' operations to provide feedback on how to improve its services for optimal output and performance.

[19] The township and the third party state that the records contain commercial and financial information, such as rates for the provision of services, payment for those services, cost breakdowns, and a client list. Therefore, according to the third party, the records contain "information that relates to the provision of services (commercial information) and the payment for those services (financial information)."⁵

[20] As I will describe further below, the third party argues that the interview questions contain proprietary information that it has developed using its expertise.

[21] The appellant did not provide representations on part 1 of the test but does not dispute that the records contain commercial and financial information.

Findings re part 1

[22] The IPC has described commercial and financial information that is protected under section 10(1) as follows:

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to

⁵ The third party relies on Order MO-3791.

commercial or non-profit organizations, large or small.⁶ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁷

Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁸

[23] I agree with the township and the third party that the submission contains commercial information related to the selling of services to the township by the third party. The submission outlines the consulting services that the third party is proposing to sell the municipality and contains commercial information.

[24] As well, the withheld information in the submission contains information about the prices the third party is proposing to offer its services to the township. Therefore, the submission contains financial information.

[25] The interview questions contain a different type of information. The third party has described the interview questions as containing methodologies and proprietary information. Previous orders have found that this type of information qualifies as scientific information.

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.⁹

[26] These IPC orders have found that survey questions or questionnaires created by an expert in the field of social sciences, may qualify as scientific information.¹⁰ These orders accept that the creation of the survey questions or questionnaire would have involved the observation and testing of specific hypotheses or conclusions. In Order MO-2983, Adjudicator Catherine Corban also accepted that "the survey questionnaire itself might reveal a unique method, formula, pattern or compilation of information embodied in a product used by the affected party's business."

[27] I agree with the findings in these prior orders and find that the interview questions that the third party has developed in the delivery of its services to the township, qualify as scientific information. In reaching this conclusion, I have

⁶ Order PO-2010.

⁷ Order P-1621.

⁸ Order PO-2010.

⁹ Order PO-2010.

¹⁰ Orders MO-1379, MO-2983, and MO-3097.

considered that the third party's principals have decades of municipal experience and also have expertise and training in one-on-one facilitation. As well, they are either registered professional planners and/or certified engineers and they all have extensive experience in the field of municipal planning and operations.

[28] In summary, I find that the five sets of interview questions at issue qualify as scientific information as, similar to the appeal at issue in Order MO-2983, they reveal a unique method, formula, pattern or compilation of information embodied in a product used by the third party's business. These interview questions relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field of municipal planning, namely the observation and testing of information needed for the third party to conduct the operational review of the township's operations.

[29] Accordingly, part 1 of the test under section 10(1) has been met as the submission contains commercial information and financial information and the interview questions contain scientific information.

Part 2: supplied in confidence

[30] I will now determine whether the information at issue in the records was supplied in confidence to the township.

Supplied

[31] The requirement that the information have been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.¹¹ 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.¹²

In confidence

[32] The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.¹³

[33] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,

¹¹ Order MO-1706.

¹² Orders PO-2020 and PO-2043.

¹³ Order PO-2020.

- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.¹⁴

Representations

[34] The township and the third party both submit that the records were supplied by the third party in confidence.

[35] The third party states that the submission includes a confidentiality clause, which reads:

CONFIDENTIALITY

Insofar as it is permitted by applicable law, the content of this proposal shall be treated as strictly confidential work product and not disclosed to competitors without expressed written consent.

[36] Additionally, the third party submits that each page of the submission is marked as "Confidential" in the bottom left-hand corner of the document.

[37] The third party states that each private interview conducted in preparing its operational review uses its interview questions and is preceded by a statement that the interview process was to be treated as "confidential". It states that the submission emphasizes the confidential nature of the interview process, as follows:

All interviewees will be able to send follow up comments to a confidential email account.

[38] The third party submits that if the interview process was to be treated with anything other than strict confidence, there would be no need to specifically state that follow up information resulting from the interview process would be sent to a "confidential email account".

[39] As well, the third party provided copies of emails exchanged with the township where both parties confirmed during the operational review process that the interview questions, which were provided to the township's staff to answer as part of the process in conducting the operational review of the township's operations, would remain confidential.

¹⁴ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

[40] The third party further submits that it has consistently treated the records confidentially, and given the above-described assertions of confidentiality, and the nature of the information in question, it expected that the records would be treated as confidential by the township.

[41] The township states that the withheld information in the submission was supplied in confidence and refers to the confidentiality clause contained in this document. It states that the interview questions contain confidential methodologies developed by and with the specific expertise of the third party.

[42] The appellant did not address this issue directly.

Findings re part 2

[43] I will first discuss whether the records were supplied, starting with the submission.

[44] The third party provided the submission to the township in response to an RFP issued by the township seeking a consultant to conduct an operational review of the township's operations. The third party was successful in this tender process and was retained by the township to conduct the operational review and prepare a report. The report is available on the township's website; however, the submission is not.

[45] The submission is a winning RFP submission. Several previous IPC orders have found that a winning RFP submission was "supplied" within the meaning of section 10(1).¹⁵ As stated, in Order MO-1706, in discussing a winning proposal, the adjudicator found that:

...it is clear that the information contained in the proposal [the RFP submission] was supplied by the affected party to the [Peel District School] Board [the institution in that appeal] in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution...

[46] I agree with and adopt this finding and find it relevant to the appeal before me in relation to the submission. In summary, I find that the submission, ultimately the winning proposal, was supplied by the third party to the township.

[47] I also find that the interview questions were supplied in confidence. They were provided to the township as attachments to confidential emails and the township was

¹⁵ See, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.

specifically instructed by the third party that the attachments to emails were not to be disclosed.

[48] I will now discuss whether the records were supplied in confidence. The submission and the emails sending the interview questions to the township explicitly refer to the confidential nature of the information. I accept that they were supplied to the township on the basis that they were confidential and that they were to be kept confidential. I accept that the submission and the interview questions were treated consistently by the third party in a manner that indicates a concern for confidentiality, that they were not otherwise disclosed or available from sources to which the public has access, and were prepared for a purpose that would not entail disclosure. I accordingly find both records were supplied in confidence.

[49] In summary, I find that the third party supplied the information at issue in both records to the township in confidence and part 2 of the test under section 10(1) has been met.

Part 3: harms

[50] As I have found that the information at issue in the records has been supplied in confidence, I will now determine whether the harms test in part 3 of the test has been met for the information at issue in the records.

[51] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.¹⁶

[52] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.¹⁷ However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.¹⁸

Representations

[53] As set out above, the township relies on section 10(1)(a)¹⁹, whereas the third

¹⁶ Orders MO-2363 and PO-2435.

¹⁷ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

¹⁹ The section 10(1)(a) harm is: "(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;"

party relies on sections 10(1)(a) and 10(1)(c)²⁰.

[54] The township states that the information at issue in the submission could be exploited in the marketplace and could be expected to significantly prejudice the competitive position or other negotiations of the third party. It states that these operational reviews are continuing to be funded by the province of Ontario and to release the third party's submission could result in loss of future projects for the third party or create a competitive disadvantage as the third party's competitors may use this otherwise confidential material to compete against it in the market.

[55] The township further states that the interview questions were withheld because they contain confidential methodologies unique to the third party. It submits that this information could be exploited in the marketplace and could be expected to significantly prejudice the competitive position of the third party. It states that to release the third party's method of collecting information, type of data that is analyzed and the processes used to come up with the third party's reports and recommendations could result in loss of future projects to the third party. It states:

This information is proprietary and could be used by competitors to undermine the value that the third party brings to this type of work with its unique process.

[56] The third party states that it operates in a highly competitive and cost-conscious industry and disclosure of the records could be used to severely prejudice its position in subsequent bids, resulting in an undue gain to competitors, and an undue loss to it.

[57] The third party submits that if the submission were to be released in its entirety, a competent person would be able to review its work plan in conjunction with its milestones/cost breakdowns and be able understand how it costs out its services based on the work plan level of effort. It submits that this would obviously give competitors an undue advantage and put the third party at an undue disadvantage when competing for projects.

[58] The third party refers to the client lists in the submission where several IPC orders²¹ have on several occasions concluded that the disclosure of customer or client lists can reasonably be expected to provide a competitor with a significant advantage facilitating its ability to compete and attempt to solicit or influence existing clients away from an affected party. It refers to Order PO-3175, where the adjudicator stated:

Customer [or client] lists are created and compiled as a result of a significant degree of work on the part of company to whom the list relates, and disclosure could reasonably be expected to provide a

²⁰ The section 10(1)(c) harm is: "(c) result in undue loss or gain to any person, group, committee or financial institution or agency;"

²¹ The third party refers to PO-3038, MO-2070 and PO-3175.

competitor with a significant advantage facilitating its ability to compete with the appellant and attempt to solicit existing clients away from the appellant.

[59] Much of the appellant's submission focuses on his personal view of the third party and its principals' business practices and not on the application of the section 10(1) exemption.

[60] The appellant does briefly address the records at issue themselves. The appellant submits that the client list in the submission would list similar public entities funded by the taxpayers of Ontario.

[61] Concerning the interview questions, the appellant states that these questions cover well-established concepts in questionnaire design in the field of problem diagnosis and management consulting. He states that those questions simply take generic consultant-ware questionnaire design technology and apply it to decades-old concepts like sourcing a bill of materials or measuring work flow. He states:

There can be nothing unique about [the third party's] questionnaire design and its supposed secret sauce that was paid for many times over by public funds.

[62] The appellant further states that the third party's fees in this case were paid for by the taxpayers and the records properly belongs in the public domain. He states that transparency would be beneficial for the taxpayers of Ontario and therefore the costing and pricing process should be exposed to public viewing.

Findings re part 3

[63] The third party provided both confidential and non-confidential representations on the specific information at issue in the records.

[64] I will deal first with the submission, then the interview questions.

Submission

[65] To recap, the third party is a consultant whose services include conducting operational reviews of municipalities' operations to provide feedback on how to improve municipalities' services for optimal output and performance. The third party provided the submission to the township in response to an RFP issued by the township seeking a consultant to conduct an operational review of the township's operations.

[66] The township, after consultation with the third party, disclosed the submission to the appellant except for certain portions. The only information in the submission that remains at issue is:

- team's skill set;
- approach to project communications;
- background review of pertinent data, policies and documents;
- consultations with stakeholders;
- approach to the specifics of the report it will generate
- report follow up;
- proposed milestones, cost breakdowns and schedule;
- hourly rates; and,
- customer (or client) list from similar projects.

[67] I find that the information at issue in the submission is information that is unique to the third party and sets out information that, if disclosed, could reasonably be expected to prejudice significantly its competitive position or cause it undue loss or gain to competitors who would use this unique information to compete with the third party.

[68] I am satisfied that the disclosure of information at issue, which in my view pertains to the third party's strategies, planning, operations and skill set, could reasonably be expected to prejudice significantly the competitive position of the third party, or interfere significantly with future contractual negotiations of the third party. I find that the disclosure of the remaining information at issue, which is unique to the third party's approach in providing its report to its clients, could be used by a competitor in future negotiations, which could reasonably be expected to place a competitor at a significant advantage in terms of its competitive position, to the detriment of the third party's competitive position.

[69] In reaching this conclusion I have also considered that the information at issue in the submission includes information about the consultant's hourly rates. In relation to this information, I have taken into consideration that a number of IPC orders have considered the application of section 10(1) (and its provincial equivalent at section 17(1)) to unit pricing information of a successful bidder, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of the successful bidder. I agree with the findings in these orders and find it relevant to the circumstances of the present appeal. That is, I find that there is a reasonable expectation of prejudice to a competitive position where there is disclosure of information relating to pricing, material variations and bid breakdowns

contained in bid submissions.²²

[70] I have also considered the third party's client list contained in the submission. The third party refers to Order PO-3175 where a client list in a response to an RFP was also at issue. I agree with the third party that Order PO-3175 is relevant and applicable to the circumstances of the present appeal. In that order, the adjudicator, relying on Orders PO-3038 and MO-2070, accepted that disclosure of the customer list could reasonably be expected to cause harm to the competitive position of the third party as contemplated by the equivalent provincial section to section 10(1)(a).²³

[71] In Order MO-2070, the adjudicator found that disclosure of customer lists that were created and compiled as a result of a significant degree of work on the part of the company to whom the list relates could reasonably be expected to provide a competitor with a significant advantage facilitating its ability to compete with the company and attempt to solicit existing clients away from the company. Accordingly, she found that the harms listed in section 10(1)(a) and (c) had been established and part 3 had been met for the client lists. I agree with this finding and find it relevant to the present appeal.

[72] In this appeal, the submission contains the third party's customer list from similar projects. Like the adjudicator in Order MO-2070, I find that disclosure of this list could reasonably be expected to provide a competitor with a significant advantage facilitating its ability to compete with the third party and attempt to solicit existing clients away from it.

Interview Questions

[73] The interview questions contain specific templates developed by the third party. They were used by the third party to conduct confidential interviews of the township staff in providing its management consulting services to the township.

[74] Based on my review of them and after considering the representations made by the third party (some of which are confidential), I agree with the third party that they contain specific confidential templates developed and used by it to conduct confidential interviews as part of the services it offered to the township.

[75] I find that the interview questions contain unique information about the business practices of the third party. These are not generic consultant-ware questions as argued by the appellant. Instead, I find that these questions were developed by the third party utilizing their experience in providing management consulting services to municipalities. The questions were used by the third party in delivering its services to the township.

²² Orders P-166, P-610, PO-1932, M-250 and MO-3246.

²³ The adjudicator found that section 17(1)(a) of the *Freedom of Information and Protection of Privacy Act (FIPPA)* applied, which is the equivalent to section 10(1)(a) of *MFIPPA*.

Conclusion re part 3

[76] I find that both the portions of the submission at issue and the interview questions could be exploited in the marketplace, as they could be used by the third party's competitors to compete with the third party in responding to RFPs seeking operational review services for municipalities. This could reasonably be expected to prejudice significantly the competitive position of the third party in competing for contracts and it not being awarded contracts for its municipal consulting services within the meaning of section 10(1)(a). I also find that this loss of contracts could reasonably be expected to cause the third party undue loss within the meaning of section 10(1)(c).²⁴

[77] Specifically, I find that disclosure of the submission and the interview questions could reasonably be expected to prejudice the third party's competitive position or cause it undue loss, as the third party's competitors could utilize the information at issue in the records to copy its process and methodology in conducting operational reviews of municipalities. This could reasonably be expected to allow the third party's competitors to compete unfairly or undercut the third party in providing these specialized services.

[78] Therefore, I find that part 3 of the test under section 10(1) has been met and that the portions of the submission at issue and the interview questions are exempt from disclosure by reason of sections 10(1)(a) and (c). Disclosure of the information at issue in the records could reasonably be expected to prejudice significantly the competitive position of the third party and result in undue loss to the third party.

[79] Accordingly, I will uphold the township's decision and dismiss the appeal as the information at issue in the records is exempt by reason of the mandatory third party information exemption in section 10(1).

ORDER:

I uphold the township's decision and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

October 21, 2022 _____

²⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.