

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4292

Appeal MA21-00343

Corporation of the Town of Arnprior

November 30, 2022

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records pertaining to bid proposals for the strategic plan for a town museum. The town identified the third party's bid submission as the one record responsive to the request. The third party objected to disclosure of part of the record. The town granted the appellant partial access, withholding a portion of the record on the basis of the mandatory third party information exemption in section 10(1) of the *Act*. The appellant appealed to the IPC to pursue access to the withheld portion of the bid submission.

In this order, the adjudicator finds that the third party exemption in section 10(1) applies to the withheld portion of the record and upholds the town's access decision.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1) and 10(1)(a) and (c).

Orders Considered: MO-1706 and MO-2164.

OVERVIEW:

[1] This order disposes of the issues arising from a request submitted to the Corporation of the Town of Arnprior (the town) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to the following:

For the period of 1 January 2019 up to and including 31 December 2019 provide a copy of the following relating to the strategic plan for [the town] Museum including but not limited to:

- RFP including the proposal package available to bidders;
- Completed bid evaluation grid for all bids received; and
- Bid from selected contractor [named company].

[2] The town identified the company named in the request (the third party) and gave them notice under section 28(1) of the *Act*. The town identified a bid submission from the third party as responsive to the request and invited the third party to comment on disclosure.

[3] The third party objected to disclosure of some of the information in the bid submission.

[4] The town then issued a decision granting the requester partial access to the third party's bid submission, relying upon the mandatory third party information exemption in section 10(1) of the *Act* for withholding a portion of the record. In the access decision, the town also stated that no records exist that are responsive to the remaining parts of the request in relation to an RFP proposal package available to bidders or a completed bid evaluation grid for all bids received by the town.

[5] The requester, now the appellant, appealed the town's decision to the Information and Privacy Commissioner (IPC). A mediator was appointed to explore resolution.

[6] The mediator spoke to the appellant, the town and the third party. The town advised that there was no competition and therefore no RFP relating to the museum's strategic plan. The town explained that it was a sole source contract. The town also advised that it maintains its decision to grant only partial access to the third party's bid submission on the basis of the third party information exemption in section 10(1) of the *Act*.

[7] The appellant advised that they accepted that there was only one responsive record to their request, namely the third party's bid submission, and that they wished to pursue the appeal to adjudication to seek access to the withheld information. Accordingly, the sole issue in this appeal is the application of the mandatory third party information exemption in section 10(1) of the *Act* to the withheld portion of the bid submission.

[8] As a mediated resolution was not achieved, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry.

[9] I decided to conduct an inquiry and invited and received representations from the parties. Non-confidential portions of the parties' representations were shared in accordance with the IPC's *Practice Direction 7*.

[10] In the course of my inquiry, the third party provided consent to disclose additional portions of the bid submission and the town issued a revised access decision. The appellant is therefore pursuing this appeal for access to the remaining withheld portion of the record.

[11] In their representations, the third party submits that the appellant's request under the *Act* is frivolous and vexatious and they ask the IPC to make a finding to this effect. This submission was made in the non-confidential portion of the third party's representations, which I shared with the parties. I address the submissions on this point as a preliminary issue below.

[12] In this order, I find that the mandatory third party information exemption in section 10(1) of the *Act* applies to the information withheld from the bid submission and accordingly, I uphold the town's access decision.

RECORDS:

[13] The information at issue is the redacted portions of a one-page bid submission.

PRELIMINARY ISSUE:

Frivolous or vexatious nature of the request

[14] For the reasons that follow, the frivolous or vexatious nature of the appellant's access request is not an issue before me in this appeal.

[15] The third party prefaces their representations addressing the application of the third party information exemption in section 10(1) of the *Act* with general submissions about the history of their relationship with the appellant.

[16] It is the third party's position that the appellant's access request made pursuant to the *Act* is part of a pattern of harassment that amounts to a campaign to inundate multiple municipalities with similar requests in a personal vendetta against the third party. The third party cites IPC orders disposing of other appeals under the *Act* brought by the appellant and submits that the requests giving rise to the appeals are frivolous and vexatious. The third party submits that the appellant's behaviour demonstrates a pattern of conduct that amounts to an abuse of the freedom of information legislation.

[17] In support of their submissions, the third party refers to representations made by the appellant in other appeal processes, which the third party describes as a "pattern of

harassment.” The third party submits that the only way for the pattern to end is for the IPC to find that the appellant’s requests are frivolous and vexatious.

[18] The third party’s submissions summarised above formed part of the non-confidential portion of their representations. These representations were shared with the town and the appellant.

[19] Section 4(1) of the *Act* states that

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[20] Pursuant to section 4(1)(b), access requests may be dealt with summarily by institutions when, in the opinion of an institution, a request for access is “frivolous or vexatious.”¹ Such an exercise of an institution’s discretion has serious implications for access rights. Accordingly, the power is not to be used lightly.²

[21] Past decisions of the IPC in which adjudicators have considered the “frivolous or vexatious” provisions have agreed that the provisions were included in the *Act* by the Legislature to protect the interests of institutions in administering the access scheme, not the interests of other parties outside government.³ Had it been the intent of the Legislature to make the “frivolous or vexatious” provisions available to third parties, it would have done so through express language like that used in the third party information exemption in section 10(1) of the *Act*. I agree with this analysis and adopt it in considering the third party’s submission in this appeal.

[22] In this appeal, the town did not deal with the appellant’s access request summarily under the *Act* by exercising its discretion to find the request frivolous or vexatious. The town located a responsive record, notified the third party of the request and granted the appellant partial disclosure to the responsive record. The town responded to the request under section 4(1)(a) by granting partial access to the record and asserting that an exemption applies to the information that it has withheld.

[23] The sole issue before me in this appeal is therefore the application of the third party exemption in section 10(1) to the withheld information. As the town did not find the request to be frivolous or vexatious, it is not open to the third party to raise the

¹ Section 4(1)(b) of the *Act*.

² Order M-850.

³ Order PO-2050.

issue in the appeal.

[24] I am also not persuaded that the identity of the requester is relevant to my determination of the issue on appeal. The right of access provided under section 4(1) of the *Act* is a right of access that “every person” enjoys. The IPC has previously held that as a general rule, the identity of a requester is irrelevant to decisions concerning access to responsive records. An exception to this rule would be when an individual is seeking access to their own personal information.⁴

[25] I adopt this approach in this case. The appellant’s identity is not relevant to the issue that I have to decide in this appeal, namely the application of the third party information exemption to the information withheld from the responsive record.

[26] In the circumstances of the request giving rise to this appeal, where the town did not exercise its discretion to find the request frivolous or vexatious under section 4(1)(b) of the *Act*, the third party cannot request the IPC to make that finding.

[27] While the third party may not avail itself of the *Act*’s frivolous or vexatious provisions, previous orders of the IPC have held that parties to an appeal have a right to argue that a request made under the *Act* constitutes an abuse of process at common law.⁵ However, as the discussion below explains, in this order I find that the third party exemption in section 10(1) of the *Act* applies to the information at issue in this appeal and I uphold the town’s decision. In these circumstances, I decline to consider whether the appellant’s appeal amounts to an abuse of the IPC process.

DISCUSSION:

[28] The town has withheld a portion of the disclosed bid submission from the appellant on the basis of the third party information exemption in section 10(1) of the *Act*. For the reasons that follow, I find that the third party exemption in section 10(1) applies to the portion of the bid submission withheld by the town.

[29] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions, where specific harms can reasonably be expected to result from its disclosure.⁶

[30] 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;

⁴ Order PO-1998.

⁵ Orders PO-3738-I, PO-2906, PO-2490, MO-2635 and M-618.

⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

Type of information

[31] The town and the third party submit that the information withheld from the bid submission is commercial and/or financial information that includes the cost for the provision of services, the identity of a client of the third party's and other proprietary and unique information. The third party submits that the record therefore contains "information that relates to the provision of services (commercial information) and the payment for those services (financial information)" and cites *Toronto (City)(Re)*⁷ in support of its submission.

[32] The third party submits that the bid submission also contains proprietary information that would disclose processes and techniques, combined with the financial information, that are unique to the third party. The third party cites previous IPC orders in which information relating to third party methodologies and processes qualify as commercial information.⁸

[33] The appellant does not address the type of information in their representations but states that "whatever the information in this instance it was acquired by the consultant at public expense during his tenure as CAO and before in other municipal governments. Therefore, it is a public good and cannot be treated as a trade secret or something proprietary in the hands of a private consultant."

[34] From my review of the third party bid submission, I note that the third party's proposed fee forms part of the disclosed portion of the submission. Accordingly, I do not agree with the town's and the third party's submission that the withheld portion of the proposal is financial information. This part has already been disclosed to the appellant.

[35] I find that the withheld information is commercial information concerning a proposed commercial transaction between the third party and the town. The information includes the identity of a commercial client of the third party and a description of services to be provided for the quoted financial amount.

[36] From my review of the description of services to be provided, I find that it includes descriptions of the specific processes that form the third party's plan for the strategic plan project. These details, combined with the cost information that the town

⁷ 2019 CanLII 75845, para 50.

⁸ Orders MO-1706 and MO-2164.

has already disclosed in the bid submission, qualifies as “commercial information” under the first part of the test in section 10(1).

[37] I do not agree with the appellant’s submission that the source of the third party’s methodologies is determinative of how the information should be classified under the first part of the test.

[38] Accordingly, I find that the first part of the test under section 10(1) of the *Act* is met.

Supplied in confidence

[39] The second part of the test that the withheld information must meet to qualify for the third party information exemption is that it must have been “supplied” by the third party to the institution “in confidence.” The requirement that the information has been “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁹

[40] 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

[41] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.¹¹

[42] In deciding whether an expectation of confidentiality is based on reasonable and objective grounds, relevant considerations include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- 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.¹²

[43] The town’s position is that the third party supplied the information to the town in

⁹ Order MO-1706.

¹⁰ Orders PO-2020 and PO-2043.

¹¹ Order PO-2020.

¹² Orders MO-2363 and PO-2435.

confidence during the course of an exchange regarding the creation of a strategic plan for the town museum. The town submits that the information was communicated in a manner that was implicitly confidential and should be treated as a proposal, it was not mutually generated but rather supplied by the third party.

[44] The town submits that the information in the record also reveals details about another of the third party's clients, which was implicitly disclosed in confidence solely as a result of the town's relationship with the third party.

[45] The third party's position is that it supplied the information in the record to the town in confidence. The third party submits that the bid submission states it is provided "confidentially" and the assertion of confidentiality and the type of the information in the record demonstrates the expectation by the third party that it would be treated as confidential by the town.

[46] The appellant does not directly address the second part of the test in their representations.

[47] Previous orders of the IPC have found that except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" for the purpose of section 10(1).¹³

[48] The town states that there was no RFP relating to the museum's strategic plan and it was a sole source contract. The appellant's proposal for the contract for the strategic plan for the town museum was the successful bid submission. I have therefore considered whether the information withheld from the record reflects the essential terms of the contract between the third party and the town so that it should be considered the product of a negotiation process and not "supplied" for the purposes of section 10(1).

[49] The request giving rise to this appeal focuses upon records relating to bids and the submission process for the strategic plan for the town museum. The record at issue in the appeal is the successful bid submission.

[50] The IPC has held that the subsequent incorporation of terms in a winning proposal into the contract between an institution and a third party does not "transform the proposal, in its original form, from information 'supplied' to the town into a 'mutually generated' contract."¹⁴

[51] In Order MO-1706, the adjudicator found that a winning proposal submitted to a school board was 'supplied' for the purposes of section 10(1) and stated:

¹³ Orders MO-1706, PO-2371 and PO-2384.

¹⁴ Order MO-3058-F.

...it is clear that the information contained in the proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information is 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 [the IPC] involving information delivered in a proposal by a third party to an institution...

[52] I agree with and adopt this approach from the IPC's case law in this appeal. The bid submission at issue in this appeal contains the third party's proposal in its original form. I find that the information at issue, which is in the third party's bid submission, in its original form, was "supplied" to the town for the purposes of section 10(1) of the *Act*.

[53] I also find that the information in the bid submission was supplied in confidence. From my review of the record, I note that the information is prefaced as being provided "confidentially" and I accept the third party's submission that this assertion of confidentiality and the fact that the submission included information relating to one of the third party clients, created an expectation that the town would treat the information as confidential.

[54] In summary, I find that the second part of the test under section 10(1) is met.

Harms

[55] I now turn to the third part of the test under section 10(1). 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 the harms in the *Act*.¹⁵

[56] The town and the third party submit that disclosure of the information at issue could reasonably be expected to cause the harm specified in section 10(1)(a) and (c). Sections 10(1)(a) and (c) specify prejudice to a third party's competitive position and undue loss or gain. These sections seek to protect information that could be exploited in the marketplace.¹⁶

[57] The town states that the third party is a consulting firm that specializes in providing services to local government in a highly competitive environment. The town submits that disclosure of the information at issue would unfairly prejudice the third

¹⁵ Orders MO-2363 and PO-2435.

¹⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

party's competitive position by providing competitors with knowledge of the third party's costing structure, existing clients and specifics of the services received by the town.

[58] The third party explains that there are many techniques available to produce strategic planning and most consultants utilize particular methodologies, which the third party describes in its representations. The third party submits that it has leveraged its professional skills and expertise to create a hybrid consultation method that is unique and, if disclosed, could be used by competitors to increase their advantage when bidding against the third party. The third party states that it is the specific steps, processes and techniques that it proposes in its submission that have been withheld.

[59] The third party cites Order MO-2164 in which the adjudicator found that the portion of a successful proposal for management services that provided detail identifying the proposed work and the approach to the project to be taken by an affected party would result in the harms set out in section 10(1)(a). The third party submits that the information withheld from its bid submission is the workplan for its proposed strategic plan for the town museum and disclosure of this information could reasonably be expected to prejudice the third party's competitive position and be used to undercut the third party's bids in future competitions.

[60] In addition, the third party submits that the information at issue identifies a client and the IPC has held that the disclosure of customer lists can reasonably be expected to provide competitors with a significant advantage to compete with a third party. The third party cites Orders PO-3038 and MO-2070 in support of this submission.

[61] In their representations, the appellant does not respond to the third party's submissions or directly address the risk of harm from disclosure under the third part of the test under section 10(1).

[62] I have reviewed the information at issue and I find that it includes the methodologies and processes that the third party is proposing to use in providing the strategic plan for the town. I accept the third party's submission that this information relates to the unique consultation methods that it has developed from their professional skills and expertise.

[63] I also accept the submissions of the third party and the town that the provision of consulting services to municipalities is a competitive industry. I am satisfied that the third party has demonstrated that the disclosure of its unique methodologies for the proposed work to provide a strategic plan for the town's museum in the context of a competitive industry could reasonably be expected to cause harm.

[64] In reaching this finding, I have considered the approach taken by the adjudicator in Order MO-2164, which is cited by the third party. In that order, the adjudicator considered not only that the information at issue in the proposal set out the affected party's proposed work for the bid but also that it was at a level of detail that disclosed a

particular approach to the project taken by the affected party that could reasonably be expected to prejudice significantly the affected party's competitive position.

[65] I agree with this approach and adopt it in this appeal. The information withheld from the third party's bid submission is the portion of the submission that sets out the specifics of the methodology that the third party proposes for the strategic plan.

[66] I am therefore satisfied that the disclosure of the information withheld from the appellant that pertains to the particulars of the third party's unique strategic planning methodology, could reasonably be expected to significantly prejudice the third party's competitive position in future bids for similar municipal consulting services.

[67] In my view, the disclosure of the identity of the third party's client in the bid submission could also reasonably be expected to cause the harm listed in section 10(1)(a). The third party relies upon previous orders of the IPC that have considered disclosure of customer lists and that refer to the work involved on the part of a company to whom a list relates to create such a list.¹⁷ The disclosure of the identity of a single client is not wholly analogous with the disclosure of a customer list. However, I agree with the third party's submission that disclosure of their client's identity would provide a competitor with a significant advantage and facilitate their ability to solicit an existing client away from the commercial relationship with the third party.

[68] As I have found that the three parts of the test in section 10(1) of the *Act* are met, I uphold the town's decision to withhold portions of the third party's bid submission and dismiss this appeal.

ORDER:

I uphold the town's access decision. The appeal is dismissed.

Original Signed By: _____

Katherine Ball
Adjudicator

November 30, 2022 _____

¹⁷ Orders MO-2070 and PO-3038.