

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4303

Appeal MA19-00782

City of Toronto

December 20, 2022

Summary: The City of Toronto received a request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records pertaining to a named company's response to a specified RFP. The city identified responsive records and notified the named company (the third party) of the request. The third party objected to disclosure of the responsive records pursuant to the third party information exemption in section 10(1) of the *Act*. The city decided to grant the requester partial access to the responsive records, withholding some information pursuant to the mandatory personal privacy exemption in section 14(1) of the *Act*. The third party appealed to the IPC.

In this order, the adjudicator finds that the third party exemption in section 10(1) does not apply to the portions of the records that the city decided to disclose. The adjudicator 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)(a)-(c).

Order Considered: PO-2755.

OVERVIEW:

[1] This order disposes of the issues arising from a request submitted to the City of Toronto (the city) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a bid proposal from a named company for the provision of engineering services for a water treatment plant process roadmap in response to a

specified RFP (request for proposal).

[2] The city identified the company named in the request (the third party) and gave them notice of the request under section 28(1) of the *Act*. The city identified the third party's response to the RFP as a record responsive to the request and invited the third party to comment on disclosure.

[3] The third party objected to disclosure and asked the city to deny access to its proposal stating that the three-part test for the mandatory third party information exemption in section 10(1) of the *Act* is satisfied.

[4] The city issued a decision to the requester granting partial access to the appellant's RFP response, withholding some information on the basis of the mandatory personal privacy exemption in section 14(1) of the *Act*. The third party, now the appellant, appealed the city's decision to the Information and Privacy Commissioner (IPC).

[5] The original requester did not appeal the city's decision and accordingly the application of the mandatory personal privacy exemption in section 14(1) of the *Act* to the portions of the proposal withheld by the city is not at issue in this appeal.

[6] During mediation, the appellant confirmed that it continues to object to the disclosure of the proposal on the basis that the third party information exemption in section 10(1) of the *Act* applies. The requester confirmed that they wish to pursue access to the portions of the proposal that the city decided to disclose.

[7] As a mediated resolution was not achieved, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. As the appellant is the party opposing disclosure of its proposal, I decided to begin my inquiry by inviting representations from the appellant. In the Notice of Inquiry, I identified the issues to be decided in order to determine whether the third party information exemption in section 10(1) of the *Act* applies to the portions of the appellant's proposal at issue and invited the appellant to make representations.

[8] The appellant did not provide representations within the time limit given for doing so and has not requested an extension of time. I reviewed the file and decided that I had the information I needed to adjudicate the appeal and closed my inquiry without inviting further representations from the parties.

[9] In this order, I find that the three part test for the application of the mandatory third party information exemption in section 10(1) of the *Act* is not met and the exemption does not apply to the portions of the proposal that the city decided to disclose. Accordingly, I uphold the city's decision to provide the requester partial access to the proposal and dismiss the appeal.

RECORDS:

[10] The records at issue consist of the portions of the appellant's response to the specified RFP for the provision of engineering services to which the city has decided to grant the requester access. These portions comprise the Mandatory Proposal Submission (except for the pages severed from Appendix E [pages 54-117] pursuant to section 14(1) of the *Act*) (225 pages), a Man-hour Matrix Sheet (1 page) and a Cost of Services Envelope (3 pages).

DISCUSSION:

Does the mandatory third party information exemption in section 10(1) apply to the information at issue in the appellant's proposal?

[11] The sole issue to be decided in this appeal is whether the third party information exemption in section 10(1) of the *Act* applies to the portions of the appellant's response to the specified RFP to which the city has decided to grant the requester access.

[12] The third party information exemption in section 10(1) is mandatory and I will therefore consider whether it applies to the information at issue in this appeal. In the absence of representations from the appellant during the inquiry, I have reached my determination based upon my review of the records and the circumstances of the request. In addition, I have considered the appellant's reasons for objecting to the city's disclosure, which it set out in correspondence to the city in response to the notification of the request and to the IPC in an earlier stage of the appeal process.

[13] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹ 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.²

[14] Section 10(1) 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,

¹ *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.).

² See Orders PO-1805, PO-2018, PO-2184 and MO-1706.

(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 reconciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[15] 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.

[16] Section 42 of the *Act* provides that where an institution refuses access to a record or part of a record, the burden of proof that a record or part of it falls within one of the specified exemptions in the *Act* lies upon the institution. Previous orders of the IPC have held that when a third party relies upon the exemption provided by section 10(1) of the *Act*, the third party shares with the institution the onus of proving that the exemption applies to the record (or part of it) that is at issue.³

[17] In this appeal, the city has decided to grant access to the parts of the record that are at issue and it is the third party appellant that opposes disclosure under the *Act*. As the party relying upon the exemption in section 10(1) and asserting that it applies to the information at issue, the appellant bears the burden of proof in this appeal.

[18] In the appellant's correspondence to the city and the IPC, it explains that the information in the proposal represents trade secrets, scientific, technical, commercial

³ See for example, Order P-203 where the adjudicator considered the onus that lies on third parties relying on the exemption in the equivalent provision to section 10 in the provisional version of the *Act*.

and financial information including proprietary processes and tools describing its approach to the work to be provided pursuant to the proposal. The appellant states in broad terms that the information also includes intellectual property and its use in the proposed work, together with information on its costs, salaries and fee structure. The appellant states that the confidentiality of this information is fundamental to its ability to be competitive in the marketplace.

[19] The appellant states that it supplied the information in the proposal to the city in confidence, that it is not standard practice for “any municipality to make priced proposals containing confidential business information available to external parties” and that it had no reason to expect that the city would do so. The appellant’s position is that if it had understood that this information would be made public, it would not have provided it.

[20] The appellant states that the disclosure of the information in the RFP response would prejudice significantly its competitive position or interfere significantly with its contractual or other negotiations and the information no longer being supplied to the city even where it is in the public interest that it should be supplied. Finally, the appellant states that the disclosure of the information would result in it suffering undue loss as it may be used by others to gain unfair advantage on future project proposals.

Analysis and findings

[21] For the reasons that follow, I find that the third party information exemption in section 10(1) does not apply to the portions of the records that the city has decided to disclose. As already stated, for the third party information exemption to apply, the party resisting disclosure must establish that all three parts of the test are met. I am not satisfied that the third part of the test is met as there is no reasonable basis for me to conclude that any of the harms specified in section 10(1)(a), (b) or (c) will result from disclosure of the information at issue. I have considered each part of the test, in turn.

Type of information

[22] Based on my review of the records, I am satisfied that the portions of the proposal that the city has decided to disclose contain scientific, technical, commercial and financial information.

[23] Specifically, I note that the records at issue include information prepared by engineers and relating to the processes, strategies and schemes that are to be employed for the proposed work. The mandatory proposal forms include technical data, information about technical processes and scientific articles describing the processes that the appellant proposes. In my view, this information qualifies as scientific and technical information within the meaning of section 10(1).

[24] In addition, the records include a cost of services envelope and man hour matrix that comprises a pricing breakdown for the appellant’s proposal. I am satisfied that the

technical information in the appellant's proposal, in combination with the cost of service envelope and man hour matrix, qualifies as commercial and financial information for the purposes of section 10(1).

[25] However, I am not satisfied that the information at issue includes trade secrets, as the appellant claims. The IPC has previously held that trade secrets include information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- a. is, or may be used in a trade or business;
- b. is not generally known in that trade or business;
- c. has economic value from not being generally known; and
- d. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁴

[26] The appellant has not addressed which information in the proposal it states would qualify as trade secrets but makes a general assertion that the proposal "represents its trade secrets." It is not clear to me which aspects of the appellant's models, techniques or processes that appear in the proposal might be considered in the engineering trade or business to be the appellant's trade secrets. There is no evidence before me of the aspects of the proposal that are not generally known in the engineering field or whether they may be considered to have economic value from not being generally known.

[27] The appellant makes a general statement that the proposal contains its trade secrets but has not provided any explanation to support this assertion and it is not apparent to me from my review of the records themselves. Accordingly, considering the appellant's submission and the records, there is no basis for me to conclude that the information at issue includes trade secret information within the meaning of section 10(1).

Supplied in confidence

[28] 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.⁵ 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

⁴ Order PO-2010.

⁵ Order MO-1706.

of accurate inferences with respect to information supplied by a third party.⁶

[29] In order to satisfy the “in confidence” component, the party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[30] In determining 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- was not otherwise disclosed or available from sources to which the public has access; or
- was prepared for a purpose that would not entail disclosure.⁸

[31] The appellant states that it supplied its proposal to the city in confidence and with the reasonable expectation that it would be treated as confidential. In addition, the appellant states that it is not standard practice for a municipality to disclose confidential priced proposals.

[32] The request giving rise to this appeal is for access to the appellant’s proposal in response to a specified RFP. There is no information before me to indicate that the appellant’s proposal was successful or that the information at issue in the appellant’s proposal has been incorporated into the terms of a contract between the city and the appellant.

[33] In Order PO-2755, the adjudicator considered whether a proposal submitted in response to a call for tenders was considered to have been supplied for the purposes of the equivalent provision to section 10(1) in the provincial *Act*. The adjudicator held that a proposal containing only the contractual terms proposed by a bidder and not the subject of negotiation could not be properly characterized as mutually generated. As such, the adjudicator concluded that the proposal before them was “supplied” by the third party to the institution for the purposes of the third party information exemption.

[34] I agree with this approach and adopt it in this appeal. The information at issue in

⁶ Orders PO-2020 and PO-2043.

⁷ Order PO-2020.

⁸ Orders PO-2043, PO-2371 and PO-2497.

the appellant's proposal contains the appellant's proposed terms in their original form and cannot be properly characterized as having been mutually generated by the parties. Accordingly, I find that the proposal was supplied by the appellant to the city for the purposes of section 10(1).

[35] I have reviewed the correspondence that encloses the appellant's proposal and I note that there is no explicit indication that it is to be treated as confidential. However, as set out above, the determination of whether the information at issue was supplied in confidence should be based upon reasonable and objective grounds. I accept the appellant's submission that it was their expectation, based upon the usual practice of municipalities, that the priced proposal would be treated as confidential.

[36] Notwithstanding the appellant's submission, I note that two scientific articles that comprise Appendix G of the mandatory submission portion of the appellant's proposal appear to me to have already been published at the time that they were included in the proposal. These articles, qualifying as scientific information under the first part of the test, appear to have been published in a scientific journal in one case and consist of an academic paper given at a conference in the other. In my view, it is arguable that the appellant could not have had an expectation of confidentiality in relation to these two articles. However, given my findings below in relation to the third part of the test under section 10(1), it is not necessary for me to determine the question of confidentiality in relation to the information in issue.

Harms

[37] To meet the third part of the test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.⁹

[38] Harm can sometimes be inferred from the records themselves and/or the surrounding circumstances but parties should not assume that the harms under section 10(1) are self-evident so that they can be proven simply by repeating the description of harms in the *Act*.¹⁰ The amount and kind of evidence needed to establish the harm depends upon the context of the request and the seriousness of the consequences of disclosing the information.¹¹

[39] The appellant repeats the descriptions of harm from section 10(1)(a), (b) and (c) of the *Act* and states that these harms will occur if its proposal is disclosed. In the absence of any detail, the appellants submissions provide no reasonable basis for

⁹ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 64 (C.A.).

¹⁰ Orders MO-2363 and PO-2463.

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

concluding that the harms specified in section 10(1)(a), (b) or (c) will arise if the proposal is disclosed.

[40] I have also considered whether evidence of harm can be inferred from the records themselves, however, I am not satisfied that it can be inferred in this appeal.

[41] The portions of the records at issue comprise the pages of the technical and commercial information described above, the cost of services envelope (financial information) and the man hour matrix. I note that the specified RFP process to which the proposal relates took place in 2014 and the records provide no reasonable basis for me to infer the commercial value of the appellant's proposal or its relevance in the current engineering services market or to future unspecified RFPs.

[42] In my view, the technical proposal comprises the specific engineering services that the appellant tailored to meet the city's terms of reference for the RFP and the proposed fees for those services, together with other associated costs. There is insufficient information before me from which to infer that there is a competitive market for the appellant's customised engineering services in this format so that disclosure of the proposal could reasonably be expected to prejudice the appellant's competitive or negotiating position or result in undue loss or gain. Accordingly, I am not satisfied that the harm specified in section 10(1)(a) or (c) can be inferred from the records themselves.

[43] Similarly, I am unable to infer the harm specified in section 10(1)(b) and that disclosure of the information can reasonably be expected to result in similar information no longer being supplied to the city. Previous orders of the IPC have held that the third party exemption in section 10(1) has not applied to third party responses to RFPs where the three parts of the test are not met.¹² There is no reasonable basis for concluding that, as a general principle, the effect of not applying the third party information exemption to this type of information will result in potential proponents declining to participate in municipal RFPs. In my view, it is equally as likely that the transparency of the RFP process provided by disclosure of a proposal may encourage other proponents to participate in future bidding processes.

[44] The appellant does not refer to the harms specified in section 10(1)(d)¹³ in its correspondence and in my view the section does not apply to the information at issue.

[45] In summary and having considered the appellant's correspondence and the circumstances of this appeal, I find that there is no reasonable basis to conclude that the harms specified in section 10(1)(a), (b) or (c) of the *Act* will arise if the information at issue is disclosed.

[46] As all three parts of the test must be established, I find that the mandatory third

¹² See for example, MO-3799 and MO-4162.

¹³ Section 10(1)(d) applies to records containing labour relations information.

party information exemption in section 10(1) of the *Act* does not apply to the portions of the records that the city has decided to disclose. Accordingly, I uphold the city's decision and dismiss this appeal.

ORDER:

1. I dismiss this appeal and uphold the city's decision to grant access to the information at issue.
2. By January 31, 2023 but not before January 27, 2023, I order the city to disclose the responsive records except for the information it withheld pursuant to section 14(1).
3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the records disclosed pursuant to provision 2.

Original signed by: _____
Katherine Ball
Adjudicator

December 20, 2022 _____