

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4316

Appeal MA21-00054

City of Vaughan

January 10, 2023

Summary: The appellant sought access to information from the City of Vaughan (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) about the work undertaken by a third party that was contained in invoices. The city denied access to this information, relying on the mandatory third party information exemption in section 10(1) of the *Act*.

In this order, the adjudicator orders the city to disclose the information at issue in the records, as she finds that it was not supplied to the city within the meaning of section 10(1).

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

Orders Considered: Orders MO-3372, MO-3258, and PO-2806.

OVERVIEW:

[1] This order concerns the application of the mandatory third party information exemption to certain information in invoices pertaining to an environmental assessment.

[2] Specifically, the City of Vaughan (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to information about a specific construction project (the project), including:

Copies of all invoices submitted by [named company, affected party #1] pertaining to the [named location] Class Environmental Assessment.

[3] The city issued a decision granting the requester access in part and denying access in full to some records. The city attached an index of records containing a general description of each document. The requester received partial access to the responsive records with severances pursuant to sections 7(1) (advice or recommendations), 10(1) (third party information), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. Additional records were denied in full pursuant to section 10(1) of the *Act*.

[4] The requester, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] During the course of mediation, the appellant advised the mediator that he is pursuing access to only the information contained in the "Activity Description" portion of the invoices relating to work that was completed by another affected party (affected party #2) at the request of affected party #1, information that was withheld pursuant to section 10(1) of the *Act*. The appellant advised that he was not interested in the information in the invoices about the individuals who performed the work or the hourly breakdown of the work by each individual.

[6] Therefore, individual names and hours worked in the invoices are not at issue in this appeal.

[7] During mediation, the city advised that it would issue a third party notice to affected party #2. Affected party #2 responded, objecting to disclosure of the information in the records relying on both sections 10(1) and 11(c) (economic and other interests) of the *Act*.

[8] The city maintained its decision to withhold information in the invoices pursuant to section 10(1) of the *Act*. The appellant advised the mediator that he would like to proceed to adjudication, where an adjudicator may conduct an inquiry, to pursue access to the information at issue in the invoices under section 10(1) of the *Act*.

[9] I decided to conduct an inquiry and I sought the representations of the city, two affected parties (affected party #1 and #2), and the appellant on the application of the section 10(1) exemption to the Activity Description information in the invoices. All of these parties provided representations, except for the appellant. These representations were shared in accordance with the IPC's *Practice Direction 7*.

[10] I had asked affected party #2 if it still intends to raise the application of 11(c), and if so, to provide representations as to whether this is one of the rare circumstances that a third party can raise the application of a discretionary exemption. This affected party did not provide these representations. Therefore, section 11(c) is no longer at

issue in this appeal.¹

[11] In this order, I find that the information at issue in the invoices was not supplied to the city and is, therefore, not exempt under section 10(1). I order this information to be disclosed to the appellant.

RECORDS:

[12] At issue are 60 pages of invoices for services rendered by affected party #2 to affected party #1 pertaining to the project. The invoices were prepared by affected party #2 and sent to affected party #1. The invoices were then sent by affected party #1 to the city for payment.

[13] The appellant is seeking the information contained in the "Activity Description" portion of the invoices about the work done. Individual names and corresponding hours worked in this portion of the invoices are not at issue. The invoices are found at pages 626-650, 653-679, 762-767, and 846-847 of the records.

DISCUSSION:

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

[14] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,² where specific harms can reasonably be expected to result from its disclosure.³

[15] 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,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

¹ Section 11(c) reads:

A head may refuse to disclose a record that contains, information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

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.

(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.

[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

Representations

[17] The city states that the information at issue consists of “commercial information” as it relates only to the buying, selling or exchange of merchandise or services and that it also meets the definition of “financial information” as relating to money and its use or distribution, such as pricing.

[18] Affected party #1 did not address the application of section 10(1) in its representations, however, it did state that the records contain commercial and financial information.⁴

[19] Affected party #2 appears to state that the records contain commercial information, although it also states that its representations (not the records) contain commercial information.

Findings

[20] The IPC has described the types of information referred to by the parties that

⁴ Affected party's #1's representations consist of a list of a number of sections of *MFIPPA*. They do not address the application of the mandatory section 10(1) exemption to the invoices.

provided representations that are 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 commercial or non-profit organizations, large or small.⁵ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁶

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.⁷

[21] I agree that the records, which are invoices, contain commercial information about the selling of services to the city, as well as financial information about pricing. Therefore, part 1 of the test under section 10(1) has been met.

[22] I will now consider whether part 2 of the test has been met.

Part 2: supplied in confidence

[23] I will first consider whether the information at issue in the invoices was supplied within the meaning of section 10(1). If I find that the information at issue was supplied, I will then consider whether it was supplied in confidence.

[24] The requirement that the information have been "supplied" to the institution reflects the purpose of section 10(1) to protect the informational assets of third parties.⁸

[25] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.⁹

[26] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it

⁵ Order PO-2010.

⁶ Order P-1621.

⁷ Order PO-2010.

⁸ Order MO-1706.

⁹ Orders PO-2020 and PO-2043.

reflects information that originated from one of the parties.¹⁰

[27] There are two exceptions to this general rule:

1. the "inferred disclosure" exception. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.¹¹
2. the "immutability" exception. This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.¹²

Representations on supplied

[28] The city states that the information in the invoices was supplied in confidence to it by affected party #1. It states that the invoices were provided to the city in order that affected party #1 could be reimbursed by the city for the costs of services performed by affected party #2 on the project (at the request of affected party #1). It states that at the time the records were provided to the city, affected party #2 was not aware that affected party #1 had sent the invoices to the city. It states:

The invoices were submitted to the city for a purpose other than public access; as noted above, these invoices were supplied by [affected party #1] for reimbursement from the city. The invoices were prepared for a process that would not normally entail public disclosure, outside of a freedom of information request.

The invoices were supplied to the city by affected party #1 with a reasonable expectation of confidentiality, in that it was for a purpose other than public release. At the time of submission, there was no expectation that these records would be made public. The records were not labelled "confidential", but they would have been treated as such. At the time of submission, public release or knowledge of the possibility of public release after submission was not being contemplated

[29] Neither affected party addressed part 2 of the test under section 10(1) directly, although they both objected to disclosure of the information at issue in the records.

¹⁰ 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*).

¹¹ Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

¹² *Miller Transit*, cited above at para. 34.

Findings on supplied

[30] In Order MO-3372, Adjudicator Colin Bhattacharjee discussed the application of the supplied test to invoices sent to an institution by a third party for services rendered by the third party. He stated:

IPC orders have found that pricing information in an invoice that a third party provides to an institution cannot be considered to have been "supplied" by that third party if such information was mutually agreed upon and arises from a contract negotiated between the parties.¹³ For example, in Order PO-2806, one of the records before the adjudicator was an invoice that a third party submitted to Ontario Power Generation (OPG), which contained several pieces of information, including a unit price and total payment for the removal by the third party of each tonne of a particular by-product from OPG's Lambton facility. Adjudicator Daphne Loukidelis found this information was not "supplied" for the purposes of part 2 of the test for section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the provincial equivalent to section 10(1)). She stated:

As regards the withheld price per metric tonne contained in the second affected party's invoice, I also find that it represents a mutually-agreed upon unit price for the removal of each tonne of that particular by-product from OPG's Lambton facility, which is not "supplied."

In my view, the dollar figures mentioned above simply represent calculations arising from negotiated commercial arrangements between OPG and the affected parties. Past orders have established that where an institution has the option to accept or reject a third party's bid or pricing, it cannot argue that the pricing information was "supplied" to it by the third party. In this appeal, there is no evidence to suggest circumstances where OPG was unable to accept or reject the affected parties' unit prices or the terms of its pricing, more generally, for the provision of the removal services. As previously recognized by this office, the option to do so is itself a "form of negotiation" [Orders PO-2435 and PO-2632]. Accordingly, I find that the remaining payment amounts in the spreadsheets and the unit price given on the invoice are not "supplied" for the purposes of part 2 of section 17(1).

¹³ See Orders PO-2806, MO-3258, and PO-3638.

From this finding, it follows that the withheld amount of sales tax and the total for the removal of the specific by-product contained in the second affected party's invoice also does not qualify as "supplied." . . .

[31] I reached a similar conclusion in Order MO-3258, where the information sought by the appellant included unit prices and quantities of goods and services contained on invoices that a third party submitted to the City of Sudbury for carrying out water and wastewater emergency repairs. I followed the reasoning in Order PO-2806 and found that this information was not "supplied" for the purposes of part 2 of the test for section 10(1). I stated:

I also find that the information at issue in the invoices, namely the unit prices and quantity of goods or services sold to the city by the affected party, which information is used to calculate the amount owed by the city to the affected party, simply represent calculations arising from negotiated commercial arrangements between the city and the affected party. Therefore, I find that the information at issue in the invoices was not supplied by the affected party to the city.

Accordingly, I find that none of the information at issue in the records was supplied by the affected party to the city and that part 2 of the test under section 10(1) has not been met. Since all three parts of the test under section 10(1) must be met to find the information exempt under that exemption, I will order the information at issue in the records disclosed to the appellant.

[32] I agree with the reasoning in Orders MO-3372, MO-3258, and PO-2806 and find that it applies to the circumstances of the appeal before me. In my view, the specific type of services that affected party #1 provided to the city by engaging affected party #2 and the price for those services listed in the records are mutually-agreed upon terms. Although the quantity for each specific service provided and the calculated total dollar amount that was charged for each specific service in the invoices might vary over time, they are undoubtedly derived and arise from commercial and financial terms that were mutually agreed upon by the city and affected party #1. I find, therefore, that the specific pricing information in these invoices was mutually generated by the parties rather than "supplied" by the company for the purposes of section 10(1).

[33] Because the invoices were not supplied but were mutually generated, part 2 of the test under section 10(1) has not been met, and the exemption does not apply. It is therefore not necessary for me to consider whether part 3 of the section 10(1) test applies. I will order the information at issue to be disclosed.

ORDER:

I order the city to disclose to the appellant by **February 14, 2023** but not before **February 9, 2023** the information contained in the "Activity Description" portion of the invoices except for the names of individuals and the hours worked in this portion of the records.

Original Signed by: _____
Diane Smith
Adjudicator

_____ January 10, 2023