Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4337

Appeal MA21-00505

Township of Puslinch

February 24, 2023

Summary: The Township of Puslinch (the township) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records provided by a successful bidder (the affected party) in response to a specified Request for Proposals (the RFP) for a cab-over rescue truck for the fire department. Following payment of a fee, the township disclosed three records to the appellant but denied access to one record in full and to another record, in part, pursuant to the mandatory third party information exemption at section 10(1) of the *Act*. In this order, the adjudicator allows the appeal. She finds that the mandatory third party information exemption does not apply to the records and orders the township to disclose the records to the appellant. She also finds that part of the fees charged by the township is not reasonable and she orders the township to provide a partial refund to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1) and 45(1); Ontario Regulation 823, section 6.

Order Considered: Order PO-2435.

OVERVIEW:

[1] By way of background, the Township of Puslinch (the township) issued a Request for Proposals (RFP) for a cab-over rescue truck for the fire department (the vehicle), which included a 'fillable' fifty-page schedule A, setting out the minimum technical specifications and a 'yes'/'no' column regarding compliance with each

specification, and a four-page schedule B, setting out a proposal template. After submitting a bid in response to the RFP, the successful bidder (the affected party) entered into an agreement with the township to provide the vehicle, which has now been delivered to the township.

[2] The township received a request under the *Act* for:

> Chassis, body specifications & compliant completed RFP for fire [specified RFP number] cab-over rescue truck.

[3] The township issued a decision, granting access to the RFP document, addendums to the RFP document and an amended report to council in full, and denying access to the successful completed schedule B proposal (the proposal) in full and the completed schedule A – specifications (the schedule) in part, pursuant to sections 10(1)(a) and (c) of the *Act*. It also advised that the fee to process the request was $32.50 for copies on a CD-ROM.

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

[5] During mediation, the mediator was unable to obtain the consent of the successful proponent of the RFP (the affected party) to disclose the records.[1] The appellant advised the mediator that it wished to proceed to adjudication in order to obtain access to the records and a refund of the fees paid.

[6] No further mediation was possible and this appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator may conduct an inquiry under the *Act*.

[7] I am the adjudicator assigned to this appeal and I decided to conduct an inquiry into this matter. I began by inviting representations from the township and the affected party on the issues set out in a Notice of Inquiry. I received representations from both parties and provided a copy to the appellant, inviting it to respond to the issues and the other parties' representations. The appellant did not submit any representations.

[8] In this order, I allow the appeal. I find that the third party information mandatory exemption at section 10(1) of the *Act* does not apply to the records and I order the township to disclose them to the appellant. I also find that part of the fees charged by the township is not reasonable and I order it to provide a partial refund to the appellant.

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[1] The affected party, who is the supplier of the vehicle, also represents the manufacturer of the vehicle.

RECORDS:

[9] The two records remaining at issue in this appeal are:

- completed schedule B - proposal - comprised of 43 pages, withheld in full (the proposal); and
- completed schedule A - specifications - comprised of 50 pages, partially withheld (the schedule), (collectively, the records).

ISSUES:

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

B. Should the IPC uphold the institution's fee?

DISCUSSION:

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

[10] 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]

[11] Of relevance to this order, 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,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (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;

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[2] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

[12] 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.

[13] Assuming, without deciding, that the first two parts of the section 10(1) test have been established, I consider whether part three of the test has been established.

Part three: Could disclosure of the drawings result in the harms listed in section 10(1)?

[14] For the reasons explained below, I find that part 3 of the three-part test has not been met and, as a result, the mandatory third party information exemption does not apply to the records.

[15] Sections 10(1)(a) and (c) seek to protect information that could be exploited in the marketplace,[4] while section 10(1)(b) seeks to prevent similar information from no longer being supplied by private sector organizations to institutions. While its decision only refers to sections 10(1)(a) and (c) to withhold information in the records, the township submits representations that disclosing the records could reasonably be expected to lead to the harms specified in sections 10(1)(a), (b) and (c) of the *Act*.

Representations of the township

Sections 10(1)(a) and (c): prejudice to competitive position and undue loss or gain

[16] The township submits that, while the records contain information largely dictated by the RFP, it is self-evident that there are different ways to comply with minimum specification requirements, which is why different proposals were submitted by different proponents. It explains that a competitor could discern how the affected party was able to meet the minimum specifications in the most efficient manner and at the lowest cost – hence why the affected party's bid submission was successful. It also explains that precedents are helpful for crafting successful future bid submissions because analyzing

[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

how one proponent efficiently and cost-effectively met minimum specifications for a past custom fire truck provides transferable information and allows proponents to use this transferable information to strengthen future bids on other custom fire trucks.

[17] The township also submits that allowing other parties access to the records could permit those parties to more efficiently structure their business operations and provide more competitive quotes without incurring the costs and resources incurred by the affected party. It explains that, notwithstanding the custom nature of the vehicle, if other parties gain access to the records, it will be able to scrutinize these details in conjunction with the publicly available proposed cost. It also explains that while specifications for future tenders will differ, the information gleaned from this comparison will allow other parties to discern transferrable efficiencies and best practices. It further explains that this will allow other parties to provide more competitive bids submissions for future custom fire trucks, at the affected party's expense.

[18] The township further submits that the disclosure of the records will not simply create a "more competitive bidding process." It submits that it will demonstrably result in significant harm to the affected party's competitive standing by undercutting its ability to provide more competitive bids than other parties.

Section 10(1)(b): similar information no longer supplied

[19] The township submits that if the records are disclosed to the appellant, it is reasonable to expect that the affected party (and possibly other parties) may opt not to enter RFP processes for fire trucks. It notes that there are very few producers of fire trucks in North America and the industry is exceptionally small. It explains that the affected party may not want to undermine its competitive advantage by allowing its few competitors to strengthen their bid submissions at the affected party's expense.

Representations of the affected party

Sections 10(1)(a) and (c): prejudice to competitive position and undue loss or gain

[20] The affected party submits that disclosure of the records could reveal information with respect to its technical and proprietary solutions for the type of project described in the RFP and this could provide a significant advantage to its competitors in future negotiations relating to similar projects to the detriment of the affected party and its affiliates. It explains that its competitors could replicate its bid submission (or build on its work to develop competing bid submissions), reaping the benefit of its work and investment in developing the bid submission, without those competitors having expended any efforts or costs for doing so. It explains that a competitor could simply copy or adapt the affected party's solution to perform the type of work set out in the RFP (including the design of the vehicle) and permit the affected party's competitors to "ride its coattails" in this way, which could also result in an undue loss to the affected

party.

[21] It refers to Order PO-2986, which found that disclosure of the format and substance of technical drawings, as well as the format of the technical information could be reasonably expected to be used by a competing engineering firm to prejudice a company's competitive position with respect to future projects it might be competing for. The affected party submits that disclosure of the information in the records, which was developed through its considerable investment in time and human resources, could result in prejudice to its competitive position and undue loss to it, as well as undue gain to its competitors.

[22] In addition, it refers to Order PO-1818, where it was found that the disclosure of pricing information and specific methodologies for the performance of work required in an RFP could reasonably be expected to prejudice the competitive position of the bidder. The affected party submits that the records in this appeal contain a detailed description of how the affected party intends to perform the work described in the RFP and disclosure of this information could be equally prejudicial to the affected party.

[23] The affected party also submits that disclosure of the records could interfere with the affected party's future negotiations in the context of other procurements because it regularly enters procurement processes with public and private procuring entities. It explains that if the records are disclosed, it could be leveraged by other public and private parties in future negotiations, to its prejudice because the affected party would not have similar disclosure of the other party's technical information.

Section 10(1)(b): similar information no longer supplied

[24] The affected party submits that disclosure of the records could also interfere with the township's conduct of future procurements because private entities may be reluctant to share detailed technical information with public procuring institutions or to offer their most favourable terms, if doing so risks placing its sensitive information in the public domain. It also explains that private entities may have difficulty securing partners and subcontractors for future public project if potential partners are unwilling to risk such disclosure of their sensitive information, where the end result could be fewer bid submissions and less competitive bids.

Analysis and findings

[25] 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.*[5]

[26] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[6] 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.[7]

[27] In applying section 10(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).[8]

Sections 10(1)(a) and (c): prejudice to competitive position and undue loss or gain

[28] The township submits that, while the records contain information largely dictated by the RFP, there are different ways to comply with minimum specifications and the records would show competitors how the affected party met the specifications in the most efficient manner and at the lowest costs, which could then be used as a precedent for crafting future bid submissions. The parties also submit that disclosure of the records would interfere with the affected party's ability to negotiate other contracts for the provision of similar vehicles.

[29] While the parties attempt to downplay the fact that the responsive information in the records is largely dictated by the RFP, their representations, along with the records themselves, do not establish that this information is of a form such that competitors could simply copy the affected party's specifications and bid submission format. Presumably, the successful bidder would be the one who could deliver a large portion of these required specifications. Also, I note that some of the specifications are based on industry standards, while some details about the vehicle are available online and would be visible upon seeing the vehicle in person. As the vehicle has been delivered to the township and is in use, it is not clear how disclosure of the records would disclose more information about the vehicle than the vehicle itself, such that the records should be withheld from the appellant.

[30] While the township submits that disclosure of the records will not simply create a "more competitive bidding process", I still agree with Assistant Commissioner Beamish in Order PO-2435, where he stated:

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[5] Orders MO-2363 and PO-2435.
[6] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[7] *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.
[8] Order PO-2435.

> The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.[9]

[31] In my view, the parties' argument that the records could be used by potential competitors on future projects is not sufficient, in and of itself, to establish the harms set out in sections 10(1)(a) and 10(1)(c) of the *Act*. In the circumstances of this appeal, it is my view that, because of the customized nature of the vehicle, the information in the records is not of a form that competitors could simply copy and submit it as part of its own bid submission in response to other requests for proposals.

[32] I do not accept the representations of the township and the affected party that the records reveal sensitive and proprietary information that, if disclosed, could be copied by competitors. I also do not accept their representations that disclosure of the records could be prejudicial to the affected party's competitive position or could result in undue gain to its competitors and undue loss to it. I have not been provided with sufficiently detailed evidence to support this position, nor are these harms self-evident from my review of the records.

[33] Accordingly, I am also not satisfied that it is reasonable to expect that the disclosure of the records could reasonably be expected to result in the harms set out in sections 10(1)(a) and 10(1)(c) of the *Act*. Therefore, sections 10(1)(a) and 10(1)(c) of the *Act* do not apply to the records.

Section 10(1)(b): similar information no longer supplied

[34] I am also not satisfied that disclosing the records could reasonably be expected to result in similar information no longer being supplied to the township in the future. I have not been provided with sufficiently detailed evidence to support this position, nor are these harms self-evident from my review of the records. It is my view that companies doing business with public institutions would not refuse to provide the information necessary to win RFP's or to maintain its relationship with an institution.

[35] Accordingly, I am not satisfied that it is reasonable to expect that the disclosure of the records could result in companies no longer supplying similar information to the township. Therefore, section 10(1)(b) of the *Act* does not apply to the records.

Conclusion – the mandatory exemption at section 10(1) does not apply to the records

[36] In conclusion, I find that disclosure of the records could not reasonably be expected to result in the harms identified in section 10(1)(a), (b) or (c) of the *Act*, thereby not meeting part three of the test. As all three parts of the test must be established, I find that the mandatory exemption at section 10(1) of the *Act* does not

[9] At page 11.

apply to the records.

[37] For these reasons, I find that the records are not exempt from disclosure under the mandatory third party information exemption in section 10(1) of the *Act* and I will order the township to disclose the records to the appellant.

Issue B: Should the IPC uphold the institution's fee?

[38] The appellant seeks a refund for the fees it paid to the township, which the township has refused to provide. I find the township's fee to be reasonable, in part and I order a partial refund.

[39] Institutions are required to charge fees for requests for information under the *Act*. Section 45 governs fees charged by institutions to process requests. Under section 45(3), an institution must provide a fee estimate where the fee is more than $25. The purpose of the fee estimate is to give the requester enough information to make an informed decision on whether or not to pay the fee and pursue access.[10] The fee estimate also helps requesters decide whether to narrow the scope of a request to reduce the fee.[11]

[40] The institution must include:

- a detailed breakdown of the fee; and
- a detailed statement as to how the fee was calculated.[12]

[41] The IPC can review an institution's fee and can decide whether it complies with the *Act* and Ontario Regulation 823 (the regulation).

[42] Section 45(1) of the *Act*, in part, sets out the items for which an institution is required to charge a fee:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
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> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record; …

[10] Orders P-81, MO-1367, MO-1479, MO-1614 and MO-1699.
[11] Order MO-1520-I.
[12] Orders P-81 and MO-1614.

[43] More specific fee provisions are found in sections 6 and 6.1 of the regulation. Section 6, in part, applies to general access requests:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
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> …
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> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> …

[44] Under sections 45(1)(a) and 45(1)(b) of the *Act*, search time for manually searching a record and time spent preparing records for disclosure can only be charged for general requests, not requests for the requester's own personal information.[13] An institution can charge for time spent severing (redacting) a record and the IPC has generally accepted that it takes two minutes to sever a page that requires multiple severances.[14] In responding to general requests, an institution can charge fees for records provided on CD-ROMs under section 45(1)(c) of the *Act*.[15]

Representations of the township

[45] The township submits that it followed the fee regime to ensure that only permissible fees were charged. It also submits that the appellant is not entitled to a fee refund because the township complied with the mandatory fee provisions under the *Act* and there is no reason or statutory authority to refund the fees paid by the appellant to the township. It explains that it provided the appellant with the index, expressly stipulating whether each record would be provided in full or redacted, and advised of the time and fees to search and prepare the released records, the number and cost of photocopies of the released records and the cost of providing the released records on a CD-ROM.

[46] It further submits that while the appellant has raised concerns that certain released records were publicly available and has alleged that some of the records were improperly withheld or overly redacted, these complaints are not relevant. It points out that there are no provisions in the *Act* differentiating between the fee if records are

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[13] Ontario Regulation 823, sections 6 and 6.1.
[14] Orders MO-1169, PO-1721, PO-1834 and PO-1990.
[15] Ontario Regulation 823, section 6(2).

withheld or redacted, or requiring the fee to be returned if the appellant is not satisfied. It also points out that the *Act* requires it to withhold exempt records and to provide redacted records in certain circumstances.

Analysis and findings

[47] As noted above, the township advised that the fee to process the request was $32.50, as the appellant elected to have copies provided on a CD-ROM. The fee was comprised of $22.50 for 45 minutes of search and preparation time, and $10 for a CD-ROM. Its fee refers to 102 pages of released records provided to the appellant either in full or in part and it would appear as though no fees were charged for the records withheld in full (namely, the proposal, which is 43 pages in length).

[48] While the appellant did not request a fee waiver under the *Act*, the appellant raises concerns in her appeal to the IPC with the fees charged because some of the released records were publicly available online for some time. The township submits that this is an irrelevant consideration.

[49] The question before me is whether the township properly charged 45 minutes to search and prepare responsive records and $10 to provide them to the appellant on a CD-ROM. I note that three of the released records were available online to the public. I also note that the index advised the appellant that one of the records located by its search would be redacted in part and another one would be withheld in full, while three records would be released in full. After reviewing the index, the appellant could have chosen to only pay for some of the responsive records. Instead, it chose to pay the fees to obtain access to all of the released records, as per the index.

[50] In the circumstances, I find that the fee of $10 to provide the released records on a CD-ROM is reasonable and in compliance with the *Act* and the regulation. However, I find that the fee of $22.50 for 45 minutes to locate and prepare the released records is not reasonable and not in compliance with the *Act* and the regulation because three released records were available online. As a result, it would be reasonable to reduce the search and preparation time by 15 minutes from 45 minutes to 30 minutes.

[51] Accordingly, I uphold the fee of $10 for the CD-ROM and I reduce the fee to locate and prepare the released records from $22.50 for 45 minutes to $15 for 30 minutes.

ORDER:

1. I partially uphold the township's decision with respect to fees and I allow the appeal.

2. I order the township to refund $7.50 to the appellant.

3. I also order the township to disclose the records to the appellant **by March 31, 2023 but not before March 24, 2023.**

4. In order to verify order compliance, I reserve the right to require the township to provide me with a copy of the records disclosed to the appellant in accordance with order provision 3.

Original Signed by: February 24, 2023

Valerie Silva
Adjudicator