

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4539

Appeal MA22-00026

City of Ottawa

June 28, 2024

**Summary:** The City of Ottawa received a request under the *Act* for access to records relating to the successful bid response to a specified RFP for healthcare procurement services. The city granted partial access to the records, withholding portions pursuant to various exemptions. The requester appealed the city's decision and claimed a public interest in the disclosure of the withheld information.

In this order, the adjudicator finds that the third party information exemption in section 10(1) of the *Act* applies to the remaining information at issue. She finds that the public interest override in section 16 does not apply. She upholds the city's decision and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1) and 16.

**Order Considered:** Order MO-3058-F.

### OVERVIEW:

[1] This order addresses the application of the third party information exemption in section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to a record relating to the successful bid for healthcare procurement services in response to a specified RFP.

[2] The requester made a request under the *Act* to the City of Ottawa (the city)

seeking access to:

Regarding Healthcare Procurement Services Program [specified RFP]  
Contracting Authority; Special Projects; Community and Social Services  
Dept.

I would like access to the following:

- 1-The proposal of the successful proponent
- 2-The contract award recommendation made to the appropriate approval authority at [the city]
- 3-The purchase order issued to the successful proponent
- 4-The letter of award issued to the successful proponent

[3] The city located 56 pages of responsive records and notified the successful proponent (the third party) of the request and its intention to grant partial access to the records. The city invited the third party to comment on disclosure.

[4] The third party objected to disclosure of its proposal and its contract with the city. The third party stated that these records met the requirements of the third party information exemption in section 10(1) of the *Act*. The city issued a decision to the requester granting partial access to the responsive records, including the third party's proposal and contract. The city cited the exemptions in sections 10(1) (third party information), 11 (economic and other interests) and 14(1) (personal privacy) as the basis for withholding portions of the records.

[5] The requester (now appellant) appealed the city's decision to the Information and Privacy Commissioner of Ontario and a mediator was appointed to explore resolution. Despite its objection to the disclosure of its proposal and contract by the city, the third party did not appeal the city's decision.

[6] During mediation, the appellant advised that they are not pursuing access to any personal information in the records. The application of the mandatory personal privacy exemption in section 14(1) is therefore not an issue in this appeal.

[7] The third party confirmed that it does not consent to disclosure and the city advised that it maintains its decision to grant partial access.

[8] The appellant advised that he wishes to pursue access to withheld portions of the records and raised the possible application of the public interest override in section 16 of the *Act*. This issue was added to the appeal.

[9] As a mediated resolution was not achieved, the file was transferred to the

adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[10] I invited the city and the third party to submit representations addressing the facts and issues set out in a Notice of Inquiry. I received representations from the city. The city stated that it is no longer relying on the economic and other interests exemption in section 11 of the *Act* and it issued a revised decision to the appellant granting access to two pages of records, which had previously been withheld. A severed copy of the city's representations was shared with the appellant, with portions redacted due to confidentiality concerns.

[11] The third party did not submit representations.

[12] I invited and received representations from the appellant. The appellant stated that in light of the city's additional disclosure in its revised decision, he is only pursuing access to information withheld from one page of the records (page 3 of the released records) on the basis of the third party information exemption in section 10(1).

[13] For the reasons that follow, I find that the information at issue is exempt under the third party information exemption in section 10(1). I further find that the public interest override at section 16 does not apply in the circumstances of this appeal. I uphold the city's decision and dismiss the appeal.

## **RECORDS:**

[14] The information at issue is the withheld portion of one page of a contract approval request form.

## **ISSUES:**

- A. Does the mandatory third party information exemption in section 10(1) apply to the information at issue?
- B. Does the public interest override at section 16 apply to the information at issue?

## **DISCUSSION:**

### **Issue A: Does the mandatory third party information exemption in section 10(1) apply to the information at issue?**

[15] 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.

[16] Section 10(1) states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

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

(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.

[17] 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.

[18] 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.<sup>1</sup> I agree with this approach and will adopt it in this appeal.

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<sup>1</sup> 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*.

[19] The third party did not provide representations despite being provided with the opportunity to do so. Section 10(1) is a mandatory exemption, and I will therefore consider it on the basis of the representations before me from the city and the appellant and the circumstances of the appeal. In addition, I have considered the third party's reasons for objecting to the disclosure of the records that it set out in correspondence to the city in response to the notification of the request<sup>2</sup>.

***Parties' representations***

[20] The third party objects to the disclosure of records containing its bid proposal and the contract that resulted from its successful bid in response to the RFP specified in the request. When notified of the request, the third party stated that the information at issue includes its business strategy and pricing information and commercial information, which is confidential. The third party objects to this information being shared because it submits it was provided to the city in confidence and its disclosure could reasonably be expected to harm its competitive position. It also submits that disclosure would place its contract with the city at risk by allowing competitors to entice the city to accept alternate terms.

[21] The city's position is that the information at issue is commercial and financial information that was supplied by the third party to the city in confidence as part of the RFP process. The city states that the records may not meet the test of being "supplied" to the city as the contract entered into with the third party incorporated the proposal.

[22] The city states that the third party is best placed to provide detailed evidence of the harms that may reasonably result from disclosure of the information at issue. The city states that disclosure of the third party's strategy in delivering services, including achieving cost savings, could reasonably be expected to result in competitors gaining insight into the third party's confidential business practices that they have developed over time.

[23] The appellant makes representations about the application of the third party information exemption without having the benefit of seeing the records. The appellant believes the withheld information relates to the names of vendors and distributors engaged by the third party to perform its contract with the city. Accordingly, the appellant's representations address the three-part test for the application of the third party information exemption with reference to the names of the third party's vendors and distributors.

[24] The appellant takes no position on whether the information at issue contains financial or commercial information. The appellant submits that the information in the contract approval request form is "city information" prepared by the city and is not information supplied by the third party but came about as a result of the parties' negotiations.

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<sup>2</sup> I summarized the third party's objections in the Notice of Inquiry sent out to the parties during my inquiry.

[25] The appellant's representations explain the city's contract with the third party, which is called a Membership Agreement<sup>3</sup> (the agreement). The agreement followed the third party's successful bid proposal in response to the specified RFP. The appellant explains that the agreement permits the city to procure services via the third party's online private trading network.

[26] The appellant states that incorporating the third party's proposal into an agreement creates a "public document." The appellant submits that the information at issue, being part of the agreement, was not supplied in confidence to the city.

[27] The appellant submits that there are "no conceivable harms" that could come from releasing the information about the vendors or distributors. The appellant states that this information has already been published by the city and is not confidential but is well known by competitors. The appellant submits that the third party and its primary distributor have been suppliers to the city for decades and that they enjoy distinct advantages due to their incumbency.

[28] The appellant explains that the primary distributor used by the city is the "dominant force" in the food distribution business in the Ottawa region and the only distributor in the city with a national scale distribution centre. In order to meet the capacity and flexibility requirements of the third party's arrangement with the city, the appellant submits that any competitor would need to affiliate itself with the same group of vendors and distributors.

### ***Analysis and finding***

[29] For the reasons that follow, I find that the third party information exemption in section 10(1)(a) applies to the information remaining at issue. As I noted above, the third party did not submit representations during my inquiry. In reaching the conclusions set out below, I have reviewed the representations of the parties, records, section 10(1) of the *Act* and previous IPC orders.

#### *Type of information*

[30] Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply both to profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>4</sup> Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data, for example cost accounting methods or pricing practices.<sup>5</sup>

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<sup>3</sup> The city disclosed the agreement to the appellant withholding one portion, which is no longer at issue in this appeal.

<sup>4</sup> Order PO-2010.

<sup>5</sup> Order PO-2010.

[31] The records in this appeal concern the city's commercial arrangement for the procurement of services through the third party's online trading network. I find that the information at issue in the contract approval request form is commercial information and financial information relating to the third party's arrangements with the vendors and distributors in its trading network. Without revealing the content of the information, I find that it relates to the third party's commercial strategy for the procurement of services at market value and the specifics of pricing arrangements for the purchase and supply of those services.

[32] From my review of the information at issue, I find that it is financial and commercial information that meets the first part of the test for the application of the third party information exemption.

*Supplied in confidence*

[33] The second requirement is that the information at issue was "supplied" to the institution and that this was done "in confidence", either implicitly or explicitly. The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.

[34] The city submits that the information at issue may not be considered supplied to the city within the meaning of the *Act* because it was incorporated into the agreement. From my review of the contract approval request form, I find that the information at issue was provided to the city by the third party in an email in support of its market value pricing in the proposal. I am satisfied that the information was supplied by the third party for the purposes of section 10(1).

[35] In Order MO-3058-F, the former Assistant Commissioner addressed the question whether information was supplied by a third party in the context of records relating to a successful RFP proposal. She concluded that information in evaluation materials created by an institution's staff were submitted by a proponent in support of its efforts to obtain a contract. She found that this information constituted the proponent's "informational asset" and was "supplied" to the institution by the proponent.

[36] I agree with the former Assistant Commissioner's reasoning and adopt it in this appeal. In the circumstances of this appeal, the information in the contract approval request form was provided by the third party in support of its bid to win the contract with the city. I find that this information constitutes the third party's "informational asset" and was supplied by the third party for the purposes of section 10(1).

[37] I now consider whether the information at issue was supplied to the city "in confidence." In order to meet this requirement, the party resisting disclosure must show that the party supplying the information expected it to be treated confidentially and that this expectation is reasonable in the circumstances.

[38] The appellant's representations address confidentiality in the context of the names

of the vendors and distributors.

[39] In its objections to the records being shared with the appellant, the third party states that its business strategy and commercial information is confidential.

[40] Both the third party and the city state that this information was supplied in confidence. The city's submission is that this information is commercially valuable information that helps the city evaluate the strength of the proposal, which is a purpose that would not entail disclosure to the public or to competitors. I accept this submission and find that the expectation of confidentiality is implied in the third party's supply of commercially sensitive information by email to the city for this specific purpose.

[41] I have already noted that the information at issue in the contract approval request form is taken from an email from the third party to the city, which was sent as part of the RFP process. I find the third party's expectation of confidentiality to be reasonable in these circumstances.

[42] Accordingly, I find that the second part of the test has been met and the information at issue was supplied in confidence by the third party.

### *Harms*

[43] To establish the harms specified in sections 10(1)(a), (b) or (c), the party resisting disclosure cannot simply assert that the harms are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed.

[44] The failure to provide detailed evidence will not necessarily defeat the claim for exemption; harm can sometimes be inferred from the records themselves and/or the surrounding circumstances. However, 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*.<sup>6</sup>

[45] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>7</sup> 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.<sup>8</sup>

[46] The city and the third party have not specified which harm under section 10(1) they rely upon in objecting to disclosure. However, they describe how disclosure will negatively affect the third party's ability to compete for future contracts. Accordingly, I

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<sup>6</sup> Orders MO-2363 and PO-2435.

<sup>7</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>8</sup> *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.



have specifically considered the risk of harm of the type listed in section 10(1)(a) and whether the disclosure of the information at issue could reasonably be expected to significantly prejudice the third party's competitive position.

[47] The third party objected to disclosure stating that knowledge of its pricing strategy would give its competitors insight into its private business practices and minimize its competitive advantage because it would allow competitors to undercut its pricing. The third party explains that by knowing the financial information at issue competitors could induce the city to accept alternative more favourable financial terms.

[48] The city submits that disclosing details of the third party's strategy in delivering services including achieving cost savings could reasonably be expected to result in competitors gaining insight into their otherwise confidential practices that they have developed over time.

[49] The appellant's representations address the harms test in relation to disclosure of information about the names of the vendors and distributors in the third party's trading network. The appellant explains the city's longstanding arrangement for the procurement of services with the third party through its primary distributor. The appellant refers to the primary distributor as a "dominant force" in the food distribution business in the region and the "advantages" it enjoys due to its incumbency.

[50] Previous orders of the IPC have held that disclosure of information that subjects a proponent 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 for the purposes of section 10(1).<sup>9</sup> I agree that the third party could not rely solely on the fact that disclosure of the information at issue might lead to a more competitive bidding process in the future to establish the necessary harm.

[51] However, from my review of the contract approval request form and the circumstances of the appeal, I am satisfied that disclosure of the information at issue might reasonably be expected to cause significant prejudice to the third party. This harm includes enabling competitors to structure future bid proposals in a way that mimics the third party's strategy thereby prejudicing its current competitive advantage built up through the operation of its trading network. I find that the third part of the test is satisfied.

[52] Accordingly, I find that the third party information exemption in section 10(1)(a) applies to the information remaining at issue. As I have found that the harms in section 10(1)(a) have been established, it is not necessary for me to consider the other commercial harms in section 10(1)(b) or (c).

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<sup>9</sup> See Order PO-2435.

**Issue B: Does the public interest override at section 16 apply to the information at issue?**

[53] Section 16 of the *Act* states,

An exemption from disclosure of a record under sections 7, 9, **10**, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

[54] It is the appellant's position that there is public interest in the information remaining at issue in this appeal.

[55] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the information at issue and second, this interest must clearly outweigh the purpose of the exemption.

[56] The *Act* does not state who bears the onus to show that section 16 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that outweighs the purpose of the exemption.<sup>10</sup>

[57] In considering whether there is a public interest in disclosure of the records, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.<sup>11</sup> In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the records must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>12</sup>

[58] A public interest does not exist where the interests being advanced are essentially private in nature.<sup>13</sup> However, if a private interest raises issues of more general application, the IPC may find there is a public interest in disclosure.<sup>14</sup>

[59] The appellant's representations do not directly address the two requirements that must be met for section 16 to apply. The appellant focuses on the city's commitment to sustainable and ethical purchasing and the public role in the complaints- based process that provides accountability for that commitment. The appellant submits that the public needs to know the names of the vendors and distributors to enforce the city's ethical and environmental guidelines.

[60] The city states that the disclosure of detailed information about the third party's

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<sup>10</sup> Order P-244.

<sup>11</sup> Orders P-984 and PO-2607.

<sup>12</sup> Orders P-984 and PO-2556.

<sup>13</sup> Order P-12, P-347 and P-1439.

<sup>14</sup> Order MO-1564.

business strategies would not shed any light on the operations of the city nor serve the purposes of informing the public about its activities. The city states that the appellant's interest in obtaining access to the exempted information is private rather than public in nature as the public already has access to information pertaining to the procurement process and the cost of services relating to the city's contract with the third party.

[61] From my review of the representations, the information at issue and the circumstances of this appeal, I am not satisfied that there is a connection between the information at issue in the contract approval request form and the purposes of the *Act* to shed light on the operations of government.

[62] I find that there is no relationship between the information at issue and the transparency of the city's procurement process concerning its commitment to ethical and environmental guidelines. The information at issue is commercial and financial information pertaining to the third party's pricing strategy provided in support of its bid. There is no reasonable basis for me to find that there is a public interest in disclosure of this pricing information. Accordingly, I find that the first requirement of the test for the application of the public interest override is not met and it is not necessary for me to consider whether the public interest outweighs the purpose of the exemption.

[63] I find that the public interest override in section 16 of the *Act* does not apply and the information at issue is exempt from disclosure under section 10(1)(a).

**ORDER:**

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

Original Signed by: \_\_\_\_\_  
Katherine Ball  
Adjudicator

\_\_\_\_\_ June 28, 2024