



Open Contracting: Proactive Disclosure Of Procurement Records

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OPEN CONTRACTING: PROACTIVE DISCLOSURE OF PROCUREMENT RECORDS

Open and accountable government empowers the public to fully participate in the activities of its government and the decision-making that impacts people and the spending of public money. Open Government can only be achieved when the business of the government is carried out publicly and is open to the scrutiny of the people.

The public is interested in understanding how government resources are used. To gain this awareness, the public must be informed about the procurement process, including how contracts are awarded, what has been contracted for, how the successful bidders were chosen, what the various costs of the contract are, and who is responsible for the decision-making relating to the contract. For this reason, the disclosure of records generated as part of the procurement process is an important component of Open Government.

Since 2006, the Office of the Information and Privacy Commissioner (IPC) has been calling for greater transparency through the proactive disclosure of procurement records (that is, the publication or automatic and routine release of information in anticipation of the public's needs and interests). We believe that proactive disclosure of procurement records will strengthen clarity and accountability around government spending, while providing tangible benefits to institutions. For example, proactive disclosure can significantly reduce the number of freedom of information requests and appeals related to procurement and contracts, and their associated resources and costs.

The IPC believes that this kind of openness will improve public trust and confidence, and ultimately result in more competitive, fair and effective procurement processes. There is a growing acceptance that open contracting is not only beneficial to the public but will drive better value for money and increased competition.¹

We urge all institutions governed by the *Freedom of Information and Protection of Privacy Act (FIPPA)* and the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* to explicitly commit to the proactive disclosure of all procurement records, including preliminary analyses, successful and unsuccessful bids, evaluations of bids and contracts. In fact, there is no prohibition against the proactive disclosure of procurement records in the acts. Note that procurement records sometimes contain personal information, such as resumes. As mentioned further on in this paper, if your process is fully transparent and is designed with proactive disclosure in mind, proactive disclosure can be accomplished without intruding on personal privacy.

¹ See, for example, The Open Contracting Partnership: http://www.open-contracting.org/global_principles and U.K. Open Government Partnership Action Plan 2013-2015: <https://www.gov.uk/government/consultations/open-government-partnership-uk-national-action-plan-2013/open-government-partnership-uk-national-action-plan-2013-to-2015#fiscal-transparency-helping-citizens-to-follow-the-money>

Some institutions have already taken the first steps toward openness with online, searchable databases that provide information related to tenders, RFPs and bidders. We applaud these efforts and strongly believe that this can form the basis of a fully transparent procurement process.

We recognize that, in some limited and exceptional cases, there may be legitimate reasons not to publish some information contained in procurement records. However, your institution's procurement process can be designed to ensure that these circumstances are appropriately managed without impeding the goal of an open procurement process. In fact, as procurement evolves to include new methods of crowd sourcing and public participation, planning for proactive disclosure early on is necessary to enable information received from outside your institution to be appropriately disclosed or redacted in those limited circumstances where that may be necessary.

The Open Government movement has been growing internationally and has become a major focus in Ontario with the creation of the Open Government Engagement Team in 2013. *Open by Default: A New Way Forward for Ontario*² summarizes the findings and recommendations of the engagement team, including recommendations on how to improve the transparency of government information. The key theme reflected throughout the report is "open by default." The message is simple: plan and operate with the expectation and intention that all information will be made public.

With some planning, your institution's procurement process can be made open and transparent. This paper has been prepared to assist you in designing a procurement process that takes an open by default approach to procurement records.

2 <http://www.ontario.ca/document/open-default-new-way-forward-ontario>

DESIGN YOUR PROCUREMENT PROCESS WITH TRANSPARENCY IN MIND

Proactive disclosure of procurement records can be simple, with minimal planning. The following tips will make implementation of an open procurement process easy and help you manage and identify the limited and exceptional circumstances in which your institution may need to consider not publishing certain information.

MAKE PROACTIVE DISCLOSURE THE DEFAULT

Take an open by default approach to the design of your procurement process and related records. Part of implementing this approach is ensuring that your institution's policies and procedures reflect a corporate commitment to transparency that extends to the creation and maintenance of any process, procedure, system or record that may need to be developed to support it. Full commitment and engagement at your senior management level is key to ensuring effective implementation of an open procurement process.

Develop a well-documented framework for your procurement process that ensures transparency and establishes an equitable procurement process. Your framework must facilitate disclosure of information about procurement on a timely and routine basis.

BE TRANSPARENT ABOUT TRANSPARENCY

It is important, particularly in procurement processes when information is being gathered from third parties, that your institution's commitment to transparency and the implications of that commitment are clear. Be upfront about your intentions to disclose, and do not commit to confidentiality other than in exceptional circumstances. Make clear on any forms or instructions that information received as part or in support of a bid or proposal will be made available to the public. Be as specific as possible, including why, when and how the information will be made available and who to contact for more information on proactive disclosure.

Conduct a review of standard contractual terms used by your institution to ensure they:

- do not include confidentiality provisions, and
- do include provisions setting out your institution's plan to make all of the information in the contract and other related records publicly available.

ENGAGE YOUR STAKEHOLDERS

Consult with your stakeholders about the design of your open procurement process, including the third parties that do business with your institution, members of the public, and your own staff with knowledge of access to information, privacy and general procurement processes.

Once you have developed your open procurement process, take steps to ensure that stakeholders are informed and understand the process. It is important that stakeholders are aware of how to monitor and access procurement information.

DON'T BURY YOUR RECORDS

The evolution of the Internet has changed the way in which information is created, distributed and accessed. Institutions have the opportunity to make their information readily available in a myriad of formats, for use in previously unimaginable ways, and at unprecedented speed. The Internet has also resulted in new expectations on how information is to be made accessible and how quickly. The days of visiting an office for access to a paper record are by and large gone. As such, the onus is on institutions to ensure that information is accessible in a way that meets the public's reasonable expectations.

It is not sufficient for institutions to simply post procurement records to a website in an unorganized fashion. The public must be able to search for records and navigate through different types of records in intuitive and user-friendly ways. As part of your plan to implement proactive disclosure, work with your information technology staff to conduct a review of your technical capacity to make information readily available and easily searchable. Ensure that the way that your institution publishes procurement records will serve the needs of both potential contractors and interested members of the public.

Consider providing members of the public with information to assist in their understanding of the legal and financial elements of specific and complex transactions. Think about whether the public and other stakeholders should be able to subscribe to services that would alert them to certain types of contracting initiatives through the use of email or other means. Some institutions are already using software that allows registration with a website to receive notifications about upcoming bids relevant to specific categories, such as arts, fleet or landscaping.

DESIGN WITH LIMITED EXCEPTIONS IN MIND

There may be some exceptional cases when information provided to your institution as part of the procurement process should not be made publicly available. These instances should be rare and will require some planning in order to address them without impeding your open by default goals.

When determining whether you should proactively disclose procurement records, consider using *FIPPA* or *MFIPPA* as a guide. When an access request is received, there are tests and considerations that your institution would use to determine whether to disclose a record, or part of a record. Applying this approach to proactive disclosure can help inform your evaluation of procurement records for disclosure.

As a general rule, if your institution would be prohibited from disclosing a record in the context of an access request, then you should not proactively disclose the record. When considering the potential application of an exemption to procurement records being considered for proactive disclosure, you may want to involve your Freedom of Information and Privacy Coordinator and legal counsel. They will have valuable knowledge and experience that can help you make your determination.

FIPPA and *MFIPPA* establish two types of exemptions on release of records requested under freedom of information: discretionary and mandatory.

Discretionary exemptions give an institution the discretion to refuse to disclose information contained in a record. In the context of proactive disclosure, discretionary exemptions need not apply. As transparency is the ultimate goal of proactive disclosure, it is recommended that only mandatory exemptions be considered.

In the context of an access to information request, an institution must refuse to disclose information that is covered by a mandatory exemption. The exemption that most likely will apply to your procurement records is commonly referred to as the third party information exemption, found in section 17 of *FIPPA* and section 10 of *MFIPPA*. Generally speaking, this mandatory exemption applies to proprietary information such as trade secrets or financial information that has been supplied to an institution on a confidential basis, and where there is a reasonable expectation that harm could result if the information is disclosed. It should be noted that contracts themselves are not generally covered by this exemption, as they are negotiated rather than supplied.

The Appendix provides guidance on how to determine if your procurement records would be subject to the third party information exemption. If you have verified that the information in question falls within this exemption, document your analysis and why you believe it is appropriate not to proactively disclose this information.

Where possible, your institution should avoid the unnecessary collection of any information that would fall within this exemption as part of the procurement process. However, if it

is necessary that third parties submit information that might fall within the third party information exemption, design your procurement records to ensure that it is simple to remove the specific information that is being excluded from publication from the remaining record.

For example, if your institution requests specific proprietary information that will be provided in confidence, ask the third party to include that information in an appendix to the rest of its submission or on a single page. This will make it easy to simply remove that one page before publishing the rest of the record. Remember, only sever the information to which this exemption might apply – you should disclose all other procurement records or portions of records. This approach can also be applied to personal information. In some cases, it may be necessary for a third party to submit personal information, such as the full resumes of its employees. If the resumes are kept as appendices, they can be easily removed if necessary.

Finally, it is important to be transparent about any information that will not be published. As discussed above, there may be some limited and exceptional cases where information should not be published. In these instances, your institution should publicly state what information received during the procurement will not be made public and why. The public and bidders alike will benefit from knowing in advance what information will and will not be kept confidential and why.

CONCLUSION

Implementing an open by default approach to procurement records will ultimately be beneficial to institutions and the public alike. As a first step, we urge institutions to make a clear commitment to the publication of contracts. This is not only key to supporting transparency, accountability and financial oversight, it will assist your institution in the management of disputes relating to access to this information.

In our experience, members of the public, competitors and the media are primarily interested in obtaining a copy of the contract. Many institutions are willing to disclose the contract but they are not able to do so because they have not managed the confidentiality and other expectations of bidders. Contractors frequently appeal institutions' decisions to disclose, relying on the third party information exemption which results in delaying disclosure, and consuming unnecessary time and resources. Almost inevitably, the appeal process results in the IPC ordering the disclosure of the contract, generally based on the grounds that contracts are negotiated, not supplied – an approach that has been repeatedly upheld by the courts.

By following the advice in this guide, including managing expectations about the open and public nature of the process and the fact that procurement records will be published, your institution can avoid the unnecessary disputes that arise too frequently in relation to procurement records.

ADDITIONAL RESOURCES

Open Government in Ontario: <http://www.ontario.ca/government/open-government>

Open Government Partnership: <http://www.opengovpartnership.org/>

Open Contracting: <http://www.open-contracting.org/>

APPENDIX:

GUIDE TO THE APPLICATION OF THE THIRD PARTY INFORMATION EXEMPTION IN *FIPPA* AND *MFIPPA* TO PROCUREMENT RECORDS

Once your institution has adopted an open by default approach to procurement records, the vast majority of records will be published routinely. *FIPPA* and *MFIPPA* do not prevent you from implementing a policy of proactive disclosure of procurement records. By providing adequate notice of your institution's intention to disclose the information, you will effectively manage the expectations of persons involved in the procurement process. However, in those limited and exceptional cases where confidential third party information is collected as part of the process, this guide will help you determine whether the third party information exemption in section 17 of *FIPPA* and section 10 of *MFIPPA* should be considered.

STEP ONE: IDENTIFY THE TYPES OF INFORMATION

Review your procurement records to determine if they contain any of the following types of information:

Trade secret refers to information related to a secret process, design or formula that is confidential in nature and is used to an organization's economic advantage. Some examples of trade secrets include proprietary recipes (like Coca-Cola) or search algorithms (such as the one employed by Google). The key to defining something as a trade secret is that the information itself is secret, and that secrecy is imperative to maintaining its associated economic value.³

Scientific information is information related to the observation and testing of a specific hypothesis or conclusion conducted by an expert in the natural, biological or social sciences, or mathematics.⁴ Some examples of scientific information may include studies or data collection on water temperatures or historical studies on land claim treaties.

Technical information is information prepared by a professional in the applied sciences or mechanical arts fields, such as architecture, engineering or electronics, describing the construction, operation or maintenance of a structure, process, equipment or thing.⁵ Some examples of technical information may include architectural or circuitry designs.

Commercial information is information that relates to the buying, selling or exchange of merchandise or services. This term applies equally to for-profit and not-for-profit organizations, whether large or small.⁶ The fact that a record might have monetary value

3 See Order PO-2010

4 See Order PO-2010

5 See Order PO-2010

6 See Order PO-2010

or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷ Some examples of commercial information may be operational or development costs and affiliated analyses.

Financial information refers to information relating to money and its use or distribution. Unlike commercial information, financial information must contain or refer to specific data. Examples of this type of information may include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁸

Labour relations information is derived from relations and conditions of work, including collective bargaining, and is not restricted to employee/employer relationships. Some examples of labour relations information may include approaches to the management of employees during a labour dispute⁹ or information related to negotiations.¹⁰

If your procurement records contain trade secrets, scientific, technical, commercial, financial or labour relations information, continue to step 2. If your procurement records do not contain those types of information, then they should be proactively disclosed.

STEP TWO: DETERMINE IF THE INFORMATION WAS SUPPLIED IN CONFIDENCE

Identify how your institution received or will receive the information from the third party. You need to determine if the information was “supplied” to the institution “in confidence.” Both factors need to be considered when determining the application of the third party information exemption to your procurement records.

Supplied information means information that a third party provided, in its entirety, directly to your institution. In some cases, information may be considered to have been supplied if the disclosure of that information would reveal or permit someone to accurately infer other information that was supplied by the third party to your institution.

Contracts and terms of contracts involving an institution and a third party will not usually qualify as having been supplied because contracts are viewed as mutually generated, rather than supplied by the third party. This is the case even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.¹¹

In confidence means the party that supplied the information must have had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. Consider the following questions to determine if it is reasonable to assume that the third party would expect confidentiality:

7 See Order P-1621

8 See Order PO-2010

9 See Order P-1540

10 See Order P-653

11 See Orders MO-1706, PO-2371 and PO-2384

- Was the information supplied to your institution on the basis that it was confidential and that it was to be kept confidential?
- Was the information treated consistently by the third party in a manner that indicates a concern for confidentiality?
- Is the information otherwise kept confidential and not made publicly available?
- Was the information prepared for a purpose that would not entail disclosure?
- Were any undertakings of confidentiality provided?

As discussed above, designing your procurement process with an open by default approach and making third parties aware of your institution's intention to make your procurement records publicly available will eliminate any expectation of confidentiality within the parameters of this part of the test.

If you have determined that the information in question was supplied in confidence, continue to step 3.

STEP THREE: IDENTIFY AND EVALUATE HARMS CAUSED BY DISCLOSURE

Determine if proactive disclosure could reasonably be expected to:

- significantly prejudice the competitive position of a person, group of persons or organization,
- interfere significantly with the contractual or other negotiations of a person, group of persons or organization,
- result in similar information no longer being supplied to the institution,
- result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be supplied,
- result in undue loss or gain to any person, group, committee or financial institution or agency, or
- reveal information supplied to a conciliation officer or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Institutions should consult with third parties involved in the procurement process to gather information about potential harms. They are often best placed to understand the possible harms. It is important to note, however, that third parties must do more than make

speculative claims of harm and simply repeat the list of harms noted in the acts. The harms identified must be “reasonably expected” to occur.¹²

If the answer is yes to any of the above questions, and assuming that the first two parts of the third party exemption are also met, there will be sufficient evidence of harm indicating that it may not be appropriate to disclose the procurement records. However, there should be detailed and convincing evidence to establish a reasonable expectation of harm. If there is not sufficient evidence of harm, the procurement record should be proactively disclosed.

12 The Supreme Court of Canada has described the “could reasonably be expected to” standard as requiring evidence that is “well beyond” or “considerably above” a mere possibility. Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), [2014] 1 SCR 674, 2014 SCC 31 (CanLII), <<http://canlii.ca/t/g6lzb>>

ABOUT THE INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO

The role of the Information and Privacy Commissioner of Ontario is set out in three statutes: the *Freedom of Information and Protection of Privacy Act*, the *Municipal Freedom of Information and Protection of Privacy Act* and the *Personal Health Information Protection Act*. The Commissioner acts independently of government to uphold and promote open government and the protection of personal privacy.

Under the three Acts, the Commissioner:

- Resolves access to information appeals and complaints when government or health care practitioners and organizations refuse to grant requests for access or correction;
- Investigates complaints with respect to personal information held by government or health care practitioners and organizations;
- Conducts research into access and privacy issues;
- Comments on proposed government legislation and programs; and
- Educates the public about Ontario's access and privacy laws.



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