Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2738

Appeal MA10-426

The Regional Municipality of York

May 24, 2012

Summary: The appellant sought access to a contract for the provision of bus services by the affected party to the region. Access to the contract was denied under the mandatory third party information exemption in section 10(1). The region's decision was not upheld on the basis that the record does not qualify for exemption under section 10(1) because the information contained therein was not supplied to the region by the affected party for the purposes of sections 10(1).

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

Orders and Investigation Reports Considered: PO-2435.

Cases Considered: *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.).

OVERVIEW:

[1] The Regional Municipality of York (the region) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to copies of the contracts between the region and the two businesses that operate the region's transit services. During the request stage, the requester narrowed the request to include only the following eight sections of two of the current contracts:

- Term of Contract
- Scope of Service
- Contractor's Responsibilities
- Region's Responsibilities
- Performance Standards
- Schedule A
- Schedule G
- Schedule H

[2] The region notified the two businesses (the affected parties) under section 21(1)(a) of the *Act*, which provides third parties with an opportunity to make submissions on the disclosure of records that may affect their interests under section 10(1) (third party information) of the *Act*. Both affected parties responded to the region's notification and the region issued a decision to the appellant, granting partial access, but denying access to some of the responsive records under section 10(1) of the *Act*. The region prepared an index of records describing the two affected parties' records to accompany this decision.

[3] The requester, now the appellant, appealed the region's decision to this office and a mediator was appointed to explore resolution of the issues. During mediation, the records relating to the first affected party were disclosed to the appellant and are no longer at issue in this appeal.

[4] In a follow up letter to the appellant dated June 9, 2011, the region advised that they had received the consent of the second affected party to release Schedule H of its contract dated June 1, 2006. The rest of the second affected party's records were not disclosed, based on the submissions received from that party by the region, on the basis that they are exempt under the mandatory third party information exemption in section 10(1)(a), (b) and (c) of the *Act.*

[5] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeals process, where it was assigned to an adjudicator to conduct an inquiry. A Notice of Inquiry outlining the facts and issues was sent to the region and to the second affected party[1], initially, seeking their representations. The region provided representations while the affected party submitted a letter, asking that its submissions to the region during the notification stage be taken as its representations in this appeal.

[6] A modified Notice of Inquiry was then sent to the appellant, along with complete copies of the other parties' submissions, seeking representations on the application of section 10(1)(a), (b) and (c) to the remaining records. The appellant also provided representations in response. The file was then transferred to me to complete the inquiry.

[1] Now referred to simply as "the affected party".

[7] In this order, I find that the records at issue are not exempt under section 10(1)(a), (b) or (c) and I order that they be disclosed to the appellant.

RECORDS:

[8] The records remaining at issue are those portions of the June 1, 2006 contract between the region and the affected party entitled: Contractor's Responsibilities, Region's Responsibilities, Performance Standards, Schedule A and Schedule G.

ISSUES:

[9] The sole issue for determination in this appeal is whether the remaining records are exempt from disclosure under the mandatory exemption in sections 10(1)(a), (b) or (c) of the *Act*.

DISCUSSION:

Are the records exempt under sections 10(1)(a), (b) or (c)?

[10] The region and affected party rely on sections 10(1)(a), (b) and (c) which state the following:

> 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;

[11] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*][2]. Although one of the central purposes of the *Act* is to shed light on the operations of government,

[2] [2005] O.J. No. 2851 (Div. Ct.) leave to appeal dismissed, Doc. M32858 (C.A.).

section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace[3].

[12] For sections 10(1)(a), (b) or (c) to apply, the region and/or the affected party 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 or financial information; and

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) and/or (c) of section 10(1) will occur.

Part 1: type of information

[13] The region submits that the records at issue contain information that qualifies as "technical" generally, and that Schedules A and G contain "financial" information consisting of a summary of billable hours and certain "incentive and disincentive payments applicable under the contract." It also submits that the contract as a whole contains "commercial" information as it "relates to the buying and selling of services."

[14] The affected party takes the position that the records contain information that qualifies as "technical" (information relating to the maintenance of the bus fleet), "commercial" (a detailed code for the supply of bus transit services) and "financial" information (a summary of billable hours, incentives and disincentives, as well as the affected party's hourly rates) within the meaning of section 10(1).

[15] Based on my review of the contents of the Bus Service Agreement, including Schedules A and G thereto, I agree that it contains information that qualifies as financial, commercial and technical information for the purposes of section 10(1). Accordingly, I conclude that part 1 of the three-part test under this exemption has been satisfied.

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

Part 2: supplied in confidence

Supplied

[16] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties[4].

[17] 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[5].

[18] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*[6].

[19] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[7]

[20] The region takes the position that much of the information in the record was supplied to it by the affected party within the meaning of section 10(1). It relies upon several decisions of this office in which submissions made in response to an RFP were found to have been "supplied" under section 10(1). The region submits that the affected party created a manual describing its operations and training schemes and that some of this information found its way into the Agreement between the region and the affected party which comprises the records at issue in this appeal.

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[4] Order MO-1706.
[5] Orders PO-2020, PO-2043.
[6] cited above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).
[7] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).

[21] The region goes on to submit that the information provided by the affected party relating to its unique operating and training standards is subject to the "immutability" exception described above as it is "immutable and not subject to change", representing the "philosophy of a business."

[22] The affected party reiterates this position, arguing that information contained in the Agreement under the headings "Contractor's Responsibilities", Region's Responsibilities" and "Performance Standards" represent immutable information that reflect its operating principles. It goes on to state that the training manual which it provided to the region in December 2006 includes information that is unique to it and would be of interest to its competitors. I note, however, that this record is not at issue in the appeal before me.

[23] The appellant relies on the reasoning set out by Assistant Commissioner Brian Beamish in Order PO-2435, which has been followed in a number of decisions since it was issued. In that decision, the Assistant Commissioner considered whether information that was contained in a contract for the provision of services between an institution and a third party could qualify as having been "supplied" for the purposes of section 17(1), the equivalent provision in the provincial *Act* to section 10(1) of *MFIPPA* and held that:

> The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or SSHA, to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of these SLAs, I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

[24] I have carefully reviewed the contents of the record and all of the representations submitted by the affected party, the region and the appellant. In my view, based on the principles set forth in the decisions of this office referred to by the appellant, I conclude that the agreement does not contain information that was

"supplied" by the affected party to the region within the meaning of that term in section 10(1). I find that the record at issue is a contract entered into between the region and the affected party for the provision of bus services. As such, the information incorporated into the contract was mutually generated, rather than supplied by the affected party, as contemplated by the decisions referred to above, including *Boeing*[8].

[25] Accordingly, I find that the second part of the test under section 10(1) has not been satisfied. As all three parts of the test must be met, the record at issue in this appeal is not exempt from disclosure under section 10(1). As no other mandatory exemptions apply to this information, I will order that it be disclosed to the appellant.

ORDER:

1. I order the region to disclose the record to the appellant by providing him with a copy by **June 28, 2012** but not before **June 22, 2012**.

2. In order to verify compliance with order provision 1, I reserve the right to require the region to provide me with a copy of the record which is disclosed to the appellant.

Original Signed By: May 24, 2012
Donald Hale
Adjudicator

[8] Cited above.