Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2228

Appeal MA-050302-1

City of Toronto

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NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1) Request for Proposal No. 9119-03-7275.
2) Loan agreement with the Federation of Canadian Municipalities for Green Municipal Investment Fund (GMIF) on financing.
3) Report: "A Framework for Establishing an Energy Retrofit Program and Financing Strategy."
4) Any interim or final document from [a named company] giving recommendations for City arenas and A.I.R. [artificial ice rinks] energy savings (incl. Committee minutes).

The City granted access to the records responsive to Items one and three of the request.

In response to Item two, the City determined that no records existed, as the agreement had not been completed.

In response to Item four, the City advised that disclosure of the responsive record might affect the interests of a third party (the affected party), under section 10(1) of the *Act*. The City provided the affected party with an opportunity to make representations concerning disclosure of the record under section 21 of the *Act*.

After receiving representations from the affected party, the City advised the requester that a decision had been made to deny access to the responsive record, pursuant to the mandatory third party information exemption in section 10(1) of the *Act*.

The requester (now the appellant) appealed the City's decision.

During mediation, the City wrote to this office on November 24, 2005, and advised that no agreement had been reached in response to Item number two of the request. As the appellant believes that a loan agreement with the Federation of Canadian Municipalities for Green Municipal Investment Fund should exist, the reasonableness of the City's search for this record pursuant to section 17 of the *Act* is an issue in this appeal.

As no further mediation was possible, the file was moved to the adjudication stage of the appeals process. The Adjudicator assigned to the file sent a Notice of Inquiry, setting out the facts and issues, to City and the affected party, seeking their representations. Both the City and the affected party provided representations. The Adjudicator then provided a copy of the City's and the affected party's representations to the appellant and sought representations from it. The appellant provided representations in response. The Adjudicator then provided a copy of the appellant's representations to the City and sought and received reply representations from the City. The file was then assigned to me to complete the appeal. I sought and received further representations from the City, including representations on whether the public interest override

in section 16 of the *Act* applies to the record, as the appellant had raised this issue in its representations.

RECORD:

The record at issue is the 705 page draft Concept Report for the City of Toronto's Energy Retrofit Program, except for pages 492 to 500 which are not responsive to the appellant's request.

DISCUSSION:

BACKGROUND

The City describes how the record at issue came into existence as follows:

> In 2000, Toronto City Council approved an environmental plan, that included measures to reduce energy use by 15% in all its departments' facilities, including Parks and Recreation rinks and arenas.
>
> The staff report to City Council had recommended that the [affected party]:
>
> > …conduct feasibility studies and provide detailed concept reports for each measure for the City's approval. The Concept Report will outline, in detail, the costs, savings, operating costs and maintenance requirements for each measure. Prior to moving to the engineering and implementation stage, the City must approve a concept report for each site.
>
> In July of 2003, the City issued a Request for Proposal No. 9119-03-7275 for the provision of professional services to provide energy and water efficiency improvements in the City's arenas. Subsequently, a $10.2 million contract was awarded to [the affected party].
>
> [The affected party] is to be involved in the "arena retrofits project" which is part of the Energy Retrofit Program that was approved by Toronto City Council in 2004 to reduce building operating costs and to deliver environmental benefits. Part of the financing for this program is to be in the form of loans from the Federation of Canadian Municipalities (Green Municipal Investment Fund).
>
> [The affected party] will be implementing facility improvements at over 100 City owned arenas and recreation complexes that include 126 indoor and outdoor ice pads. The improvements will include building automation systems, lighting retrofits; heat recovery systems; heating ventilation and air conditioning upgrades; building air sealing; brine header insulation, etc.

THIRD PARTY INFORMATION

The City has claimed that the mandatory exemptions at sections 10(1)(a) and (c) apply to the record. The affected party has claimed that sections 10(1)(a), (b) and (c) apply to the record.

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…

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)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third 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, financial or labour relations 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), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The City submits that the record contains commercial and technical strategies and therefore this information meets the definition of commercial, financial and technical information.

The affected party submits that the record contains labour relations information in addition to commercial, financial and technical information.

These types of information as listed in section 10(1) have been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *Labour relations information* has been found to include:
>
> - discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
>
> - information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],
>
> but not to include:
>
> - an analysis of the performance of two employees on a project [MO-1215]
>
> - an account of an alleged incident at a child care centre [P-121]

- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

In particular, the City submits that:

> The record at issue includes draft details of [the affected party's] methodology/processes, implementation and approach to the project including its analyses of current conditions, measurement and verification, proposed modifications, impact on maintenance, analyses of new skills and procedures required, specific training, roles and responsibilities, management and communications. The record sets out specific timelines and detailed costs (including labour rates and mark-ups) to carry out the proposed retrofits as well as identifying those items for which [the affected party] will seek competitive bids and those items for which [the affected party] intends to engage specific companies to do the work or supply the materials/equipment.

The affected party submits that the labour relations information in the record includes the affected party's approach to the project, as well as labour rates and mark-ups.

The appellant did not make representations on the type of information contained in the record.

Analysis/Findings

I agree with the City's description of the record. I find that it contains information that qualifies as commercial, financial and technical information. The commercial information relates to the purchase of energy saving services and products. The financial information relates to the overhead and operating costs concerning the facilities identified in the record. The technical information involves information prepared by a professional in the field of energy conservation and describes the operation of an energy saving process. I do not agree with the affected party that the record contains labour relations information. Previous orders have defined "labour relations information" as "information concerning the collective relationship between an employer and its employees" [Order PO-2010]. Although the record contains information concerning employee training, it does not contain "labour relations information" within the meaning of the section 10(1) exemption. Therefore, part 1 of the test under section 10(1) of the *Act* has been met.

Part 2: supplied in confidence

Supplied

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 [Order MO-1706].

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 [Orders PO-2020, PO-2043].

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 [Orders PO-2018, MO-1706].

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Representations

The City submits that:

> The City submits that the draft Concept Report was supplied to the City for its consideration and acceptance.
>
> The City further submits that the information was provided to it with a reasonably-held expectation that it would be treated confidentially…
>
> Section 12.03 of the contract between the City and [the affected party], dated December 2004, states that "The City will not disclose any confidential information obtained by reason of the implementation of this project, nor will it

> use any such information for any purpose without the written consent of [the affected party]".
>
> Clearly then, the expectation of [the affected party] when it supplied the Concept Report to the City was that its contents would remain confidential and not released without [the affected party]'s written consent. [The affected party] confirmed that it did not want any of the Report to be disclosed when the City gave notice of the receipt of the access request. Further, the City has always treated the contents of the Report in confidence and it is not otherwise disclosed or available from sources to which the public has access.
>
> The City submits that therefore there was an explicit expectation of confidentiality by both [the affected party] and the City when the Report was submitted to the City.

The affected party submits that:

> The information in question was supplied to the City of Toronto in confidence. The first page of the document explicitly states the confidential nature of the information. Further, the information at all times has been treated as confidential and at all times protected from disclosure by both parties.

The appellant submits that:

> The question that is most important to us is whether the City can simply agree to label any/all of its plans (devised internally or purchased from consultants) as "confidential." That certainly shuts down any oversight or analysis by citizens. In this case, it appears that even after the contract had been signed and the work had begun, the confidentiality continued - perhaps forever?

Analysis/Findings

The record consists of a compilation of reports sent to the City by the affected party in accordance with the requirements of the contract entered into between the City and the affected party. The contract and the record explicitly provide that the record was provided in confidence. Based on my review of the parties' representations and the record itself, I find that it was supplied to the City with a reasonably-held expectation of confidentiality for the purpose of section 10(1). Therefore, part 2 of the test has been met.

Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a): prejudice to competitive position

The City submits that:

> [The affected party's] business is energy performance contracting; it is a knowledge based one. [The affected party] competes with other companies to undertake projects and work not only for the City but for other municipalities across Canada. Moreover the Report [the record] is not the final and complete report and has not been "accepted" or approved by the City.
>
> The City submits that in such circumstances, the disclosure of [the affected party's] draft report could reasonably be expected to affect its negotiations with the City.
>
> Further the disclosure of [the affected party's] confidential commercial, financial and technological information could undermine its ability to bid on other projects with other Canadian municipalities since this information could be used by its competitors to undercut costs or use [the affected party's] technological information such as its methodology to their own advantage. It is also possible that [the affected party] might experience pressure from other municipalities to provide similar work at the same cost savings as detailed in the draft Report.
>
> The disclosure could also prejudice [the affected party's] competitive position with respect to companies that they intend to engage to provide materials and services for the retrofits, since they will know in advance, what the project costs are including labour.

The affected party submits that:

> The release of this information would significantly prejudice our competitive position with Canadian municipalities as it contains proprietary, commercial, technical and financial information regarding our approach to business, energy retrofit measures and their resulting return on investment, our overhead and mark-up structure and labour rates. [The affected party] would be less able to compete and negotiate contracts for future business if this information was released.

The record includes a compilation of individual energy retrofit concept reports for all of the City's arenas and artificial ice rinks. The appellant obtained five of these concept reports through a process outside of the *Act*. The appellant submits that:

> [It] did not ask for the dollar amounts for any of the items in the [affected party's] Report. Rather, our interest is in the scope and the methods to be used to achieve increased energy-efficiency. This seems a fundamental question.
>
> Furthermore, the five outdoor rink concept reports that [the affected party] has obtained from the City do not reveal any specific technological information or methodology which would lead to any possible harm to [the affected party].
>
> Rather, the reports outline plans to reduce energy consumption in city rinks though three main avenues: retrofitting lighting fixtures and bulbs with low wattage units, air sealing building doors and windows, and installing a central automation system to control refrigeration plants and heating systems. The former two schemes implement readily available technologies that are not exclusive to [the affected party]. The latter (Building Automation System - BAS) involves a decision to centralize simple management schemes that could be easily implemented on site by trained staff. In other words, simple duties of existing staff are to be replaced by central computers.

Analysis/Findings

I sought and obtained from the City a copy of the final version of the record. Therefore, there is no basis for the argument that the disclosure of the record, being the draft Report, could reasonably be expected to affect the affected party's negotiations with the City, as these have been completed.

Neither the City nor the affected party have specifically directed me to, nor can I find, any confidential commercial, financial and technological information in the record that if released could undermine the affected party's ability to bid on other projects with other Canadian municipalities. Furthermore, as the appellant is not seeking any dollar amounts from the record, I do not agree that the affected party could be pressured by other municipalities or by companies that they intend to engage to provide or purchase materials and services based on the financial criteria set out in the record. Further, I do not agree that disclosure of the record would reveal the affected party's overhead and mark-up structure and labour rates, if the dollar amounts are not included. In addition, I agree with the appellant that the record does not reveal any specific technological information or methodology, the disclosure of which would lead to a reasonable expectation of harm.

Therefore, I find that the City and the affected party have not provided me with sufficiently "detailed and convincing" evidence to establish that disclosure of the record could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of either the City or the affected person. As a result, the third

part of the test under section 10(1) has not been satisfied and the record is not exempt on that basis.

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

The affected party submits that:

> The disclosure of this information could result in [the affected party] no longer being able to provide this information as we would no longer be in a competitive position to provide similar information. It is in the public interest that information continues to be supplied as it results in significantly lower energy and operations costs of public facilities. The result of this information no longer [being] supplied would be significantly increased operations and energy costs of public facilities.

As noted above, the appellant submits that it does not require disclosure of the dollar amounts for any of the items in the record. Accordingly, it argues that the remaining information in the record could not be used by the affected party's competitors to undercut its costs.

The City did not provide representations on this issue.

Analysis/Findings

It appears that the affected party is concerned that disclosure of the record would undermine its ability to provide the same services as those contained in the record at a competitive price. Although the total contract amount is publicly available information, as the appellant is not interested in obtaining disclosure of the dollar amounts in the record, the actual financial breakdown for the provision of the goods and services listed therein will not be disclosed. Therefore, I find that the City and the affected party have not provided "detailed and convincing" evidence to establish that disclosure of the remainder of the record could reasonably be expected to result in similar information no longer being supplied to the City, as contemplated by section 10(1)(b). Accordingly, I find that this exemption has no application to the record.

Section 10(1)(c): undue loss or gain

The City submits that:

> …disclosure of the draft Concept Report could significantly prejudice the competitive position of the third party, interfere with its negotiations with the City, thereby resulting in it sustaining an undue loss and its competitors, an undue gain.

The affected party submits that:

> Disclosure of this information would result in undue loss to [the affected party] where [the affected party] has invested in proprietary, technical, commercial and financial information that represents intellectual property that would otherwise

> provide value and a return on our investment. There would be undue gain by competitors obtaining this information and subsequently improving there competitive position without investing in the development of this information…
>
> As a result of the disclosure, [the affected party] "might experience pressure" from other municipalities to provide similar work at the same cost savings as detailed in the draft report.

Analysis/Findings

I agree with the appellant that, as it does not require disclosure of the dollar amounts for any of the items in the record, disclosure of the remaining information in the record would not reasonably be expected to result in an undue loss for the affected party or an undue gain for any of its competitors. As stated by the appellant, the reports that comprise the record "outline plans to reduce energy consumption in city rinks though three main avenues: retrofitting lighting fixtures and bulbs with low wattage units, air sealing building doors and windows, and installing a central automation system to control refrigeration plants and heating systems". I find that I have not been provided with sufficiently "detailed and convincing evidence" to establish that disclosure of the record could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

Accordingly, the third part of the test has not been met and the record does not qualify for exemption under section 10(1)(c).

Conclusion

As I have found that part 3 of the test has not been met, the record is not exempt under sections 10(1)(a), (b) or (c) of the *Act*. Furthermore, as I have found that the record is not exempt from disclosure by reason of section 10(1) of the *Act*, it is not necessary for me to consider whether the public interest override in section 16 is applicable to the record.

Final Report

During the inquiry stage of this appeal, I sought and received from the City a copy of the final Concept Report for the City of Toronto's Energy Retrofit Program. This report is dated May 2005. I instructed the Adjudication Review Officer to contact the City concerning the responsiveness of this record. In an email response dated September 12, 2007, the City advised that this report is also responsive to the request. As I have not received representations on the final report, I will order the City to issue an access decision under the *Act* concerning the final report.

SEARCH FOR RESPONSIVE RECORDS

I will now determine whether the City has conducted a reasonable search as required by section 17 of the *Act* for the loan agreement with the Federation of Canadian Municipalities for Green Municipal Investment Fund (GMIF).

If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the City's decision. If I am not satisfied, I may order further searches.

The City was asked to provide a written summary of all steps taken in response to the request. In particular, the City was asked to respond to the following:

1. Did the City contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the City did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the institution outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the institution inform the requester of this decision? Did the institution explain to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Representations

The City in its initial representations submitted that:

> The appellant has requested a copy of the final agreement between the City and the Federation of Canadian Municipalities for Green Municipal Investment Fund (GMIF) on financing. Negotiations between the parties are still ongoing and no final agreement exists…
>
> In the current appeal, upon receipt of the Notice of Appeal, staff of Corporate Access and Privacy (CAP) office confirmed with the individual in charge of the Energy Retrofit Program, the Project Manager, Energy and Waste Management

> Unit, Facilities and Real Estate Division that the loan agreement still had not yet been signed…
>
> On January 20, 2006, during the preparation of these representations, CAP again requested written confirmation from the program area regarding the status of the agreement. The Project Manager confirmed that negotiations are ongoing and the agreement has not yet been completed.
>
> The City submits therefore that knowledgeable and experienced staff have been consulted and it has been determined that the "event", i.e. the completion of the agreement which will result in the creation of the requested record has not yet taken place. Therefore, no responsive records exist.

The appellant submits that:

> The City asserts that the requested loan agreement with the Federation of Canadian Municipalities for Green Municipal Investment Fund (GMIF) has not been finalized.
>
> [The affected party] submits that the City's own documentation asserts that the … contract was approved by City Council based on the information that $2.5 million of the total contract price was to be financed through the GMIF loan which had been approved as of or before April 30, 2004.
>
> This makes the City's assertion that the loan agreement has not yet been signed almost two years later (well after the arena work began), very puzzling. How does the City Council report square with the City's response to [the appellant], that the requested record has not yet been created?

In reply the City states:

> In a report dated April 30, 2004 from the Administration Committee to the Policy and Finance Committee, the Administration Committee indicates that it met on April 29, 2004 and gave consideration to a report dated April 24, 2004. The Administration Committee's recommendation number (4) states as follows:
>
> > the Commissioner of Corporate Services, in consultation with the City Solicitor, the Chief Financial Officer and Treasurer and the Chief Administrative Officer be authorized to enter into a loan agreement with the Federation of Canadian Municipalities for Green Municipal Investment Fund (GMIF) financing in order to facilitate a disbursement of approximately $2.521 million from an approved low interest $8.750 million loan to the arenas energy and water retrofit project subject to finalizing an energy and water services agreement with [the affected party];

> Therefore, no agreement was finalized "as of or before April 30, 2004"...

In further reply, the City states

> Although the loan agreement …was signed on March 23, 2006, it appears that the effective date of the agreement was December 31, 2006. This agreement was later amended on July 9, 2007. The City expects its first disbursement under the terms of the amended agreement on August 27, 2007.

Analysis/Findings

The *Act* does not require the City to prove with absolute certainty that further records do not exist. However, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

I find that the City has provided a comprehensive description of the steps it undertook to locate the record responsive to the appellant's request. The appellant's request was received by the City on May 17, 2005. In my view, the appellant has not provided a reasonable basis for concluding that the responsive record existed as of that date. Although the responsive record may now exist, it did not at the time of the appellant's request. If the appellant wishes to obtain a copy of the loan agreement as signed on March 23, 2006, and as amended on July 9, 2007, it will have to file a new request. As I am satisfied that the City conducted a reasonable search for records responsive to the appellant's request, I am dismissing that part of the appeal.

ORDER:

1. I uphold the City's search for responsive records.

2. I order the City to disclose to the appellant the entire 705 page record, except for the non-responsive pages at 492 to 500, *without the inclusion of any dollar amounts* by **October 29, 2007 but not before October 24, 2007.**

3. In order to verify compliance with provision 2 of this Order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant.

4. I order the City to provide the appellant with an access decision concerning the final Concept Report for the City of Toronto's Energy Retrofit Program in accordance with the provisions of section 19 of the *Act*, treating the date of this order as the date of the request, without charging a fee and without recourse to a time extension under section 20 of the *Act*. I further order the City to provide me with a copy of its decision letter to the appellant.

Original signed by: September 21, 2007
Diane Smith
Adjudicator