



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

# ORDER 166

Appeal 890239

Ontario Northland Transportation Commission



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## O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On June 23, 1989, legal counsel for the requester wrote to the Ontario Northland Transportation Commission (the "institution") seeking access to the tender documents submitted by the successful tenderer, D. J. Venasse Construction Limited.
2. On August 1, 1989, the institution advised the requester that:

Access is denied to the Venasse tender document under section 17 of the Act. This provision applies because there is a mandatory exemption from disclosure of third party information of a financial nature dealing with pricing practices, particularly when this information is supplied in confidence by the third parties and disclosure may interfere significantly with contractual or other negotiations.

3. On August 16, 1989, the requester's legal counsel appealed the decision of the institution. Notice of the appeal was given to the institution and the appellant on August 18, 1989.
4. The Appeals Officer obtained and reviewed the record.
5. On October 4, 1989, the Appeals Officer wrote to D. J. Venasse Construction Limited to advise of the appeal and to determine whether consent to disclose the record would be granted.
6. On October 17, 1989, D. J. Venasse Construction Limited (the "affected party") wrote to the Appeals Officer stating that "we are not willing to consent to the release of our tender documents."
7. As settlement was not possible, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant's legal counsel, the institution and the affected party on November 20, 1989. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

8. Written representations were received from the appellant's legal counsel and the institution. The affected party chose not to make representations. I have taken these representations into consideration in making this Order.

The sole issue in this appeal is whether the head has properly applied the mandatory exemption from disclosure under section 17 of the Act to the requested records.

In considering the specific issues arising in this appeal, I have been mindful that one of the purposes of the Act, as set out in subsection 1(a), is to provide a right of access to information under the control of institutions. The provision of this right is in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific.

Further, section 53 of the Act provides that where a head refuses access to a record, the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head. In this case, the burden of proving the applicability of the section 17 exemption lies both with the head and the affected party as they are the ones resisting disclosure.

At issue in this appeal is a six page Tender Proposal Form (the "tender") which has been withheld from disclosure in its entirety. The tender was completed by D. J. Venasse Construction Limited and submitted to the institution with respect to construction of the Ontario Northland Intermodal/Intercity/Rail/Bus Terminal in North Bay, Ontario.

The following list indicates the titles of the 15 sections of the tender. Each section provides information or instructions to enable the tenderer to complete the form. The sections indicated in bold lettering, are those which required information to be provided by the tenderer.

1. Project
2. Architects
3. Tender submitted to:
4. **Tender submitted by:**
5. **Offer:**
6. **Construction time**
7. **Addenda**
8. Allowances
9. Tender acceptance
10. Appendices to tenderer
11. **Contractor**
12. **List of subcontractors \_ Appendix A**
13. **List of unit prices \_ Appendix B**
14. **Alternate prices: \_ Appendix C**
15. **Material variations \_ Appendix D**

Also withheld from disclosure in its entirety was a one page Bid Bond, which serves as a security deposit that is forfeited if the successful tenderer fails to enter into a formal contract with the institution.

The appellant and the affected party were the only companies to submit tenders to the institution for the construction project. The appellant's tender was rejected as being incomplete. The appellant's legal counsel requested access to the affected party's tender in order to determine whether it was in fact complete.

Having submitted a tender for the same project, the appellant has a copy of the blank tender form. As an unsuccessful tenderer, the appellant requested and received the identity of the successful tenderer (the affected party in this appeal) and the total amount of the successful tenderer's offer i.e. the total price to complete the work required. In light of the above, the appellant's legal counsel indicated that the appeal could be confined to information provided by the affected party in sections 6, 7, 12, 13, 14 and 15 of the tender and the Bid Bond.

As previously mentioned, the institution withheld the requested records from disclosure pursuant to the mandatory exemption under subsection 17(1) of the Act. Subsection 17(1) of the Act reads as follows:

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, where 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 conciliation officer, mediator, labour relations officer, or other person appointed to resolve a labour relations dispute.

In Order 36 (Appeal Number 880030), dated December 28, 1988, the Commissioner outlined the three\_part test which must be satisfied in order for a record to be exempt under the mandatory provisions of subsection 17(1) of the Act.

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 types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

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\* On January 1, 1990, a subsection (d) was added to subsection 17(1) by virtue of the coming into force of the Freedom of Information and Protection of Privacy Amendment Act, 1989. This new subsection is not relevant to this appeal.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) exemption claim invalid.

In determining whether the first part of the test has been satisfied, I must consider whether disclosure of the information in the parts of the record at issue in this appeal would "reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information".

Section 6 of the tender indicates the amount of time the tenderer will require to complete construction of the project.

Section 7 of the tender requires the tenderer to acknowledge receipt of addenda to the tender documents supplied by the institution to the tenderer. Since disclosure of the information in section 7, i.e. the acknowledgement of receipt of the addenda, would not reveal a trade secret or scientific, technical, commercial, financial or labour relations information, the first part of test for the subsection 17(1) exemption has not been satisfied. I therefore order the head to disclose section 7 of the affected party's tender to the appellant.

Section 12 of the tender lists different types of work or items, for example painting, and requires the name of sub\_contractors the tenderer intends to use. A dollar value for the work to be done must also be completed.

Section 13 of the tender requires the tenderer to submit unit prices, for the addition or deletion of eight different specified types of work from the tender.

Section 14 of the tender requests the amount of money to be saved if one specified type of work was substituted for another.



Section 15 of the tender provides the tenderer with the opportunity to indicate any possible changes to the materials used and the effect such changes would have on the cost.

The one page Bid Bond submitted by the affected party, was required by the institution. As previously mentioned, the Bid Bond serves as a security deposit that is forfeited if the successful tenderer fails to enter into a formal contract with the institution. The dollar amount for the Bid Bond was specified by the institution.

In his representations, the appellant's legal counsel agrees that "the information requested is of a commercial or financial type."

The Commissioner considered the proper interpretation of the term "commercial" and "financial" information in Order 47 (Appeal Number 880043) dated April 3, 1989. It is my view that the information contained in sections 6, 12, 13, 14 and 15 of the tender and the Bid Bond at issue in this appeal, constitutes commercial and/or financial information and therefore the first part of the section 17 test is established with respect to these sections.

The second part of the section 17 test raises the question of whether the information in the parts of the record at issue in this appeal was "supplied in confidence implicitly or explicitly".

The appellant's legal counsel acknowledged that the information was supplied to the institution "by the Tender document of

Vanasse." (sic) With respect to the matter of whether the information was supplied in confidence he submitted that:

Presumably the head has refused to supply information because the head contends that in the Tender process, there is an element of confidentiality implicitly. There is nothing explicit in the invitation for Tender

that the information supplied by the Contractor will be treated in confidence. In fact, the Ontario Northland Railway is under no legal obligation to treat the information in confidence and a person who submits a Tender always risks that the information will be given to anyone to whom the Tender is submitted. There was no agreement between Vanasse (sic) and the Ontario Northland Railway that the information would be treated in confidence.

The institution advised that a copy of the Summary of Policy Elements Involving Ontario Northland's Sealed Tenders is provided with each request for tenders. A copy of the Summary was provided to the appellant, the affected party and to this office. Page 2 of the Summary states that:

ot (sic) is policy that information regarding tenders will be treated as confidential material normally and with the exception of notifying the successful and unsuccessful bidders no other information will be given out. However, it is approved that on written request any successful tenderer will be provided with information as to the names of the other bidders and the total amount of their respective bid.

A copy of a Summary of Main Policy Elements Involving Ontario Northland's Sealed Tenders dated June 1985 was also provided to this office. Page 2 reads:

It is policy that information regarding tenders will be treated as confidential material normally and with the exception of notifying the successful and unsuccessful

bidders no other information will be given out. However, it is approved that on written request any successful or unsuccessful tenderer will be provided with information as to the names of the other bidders and the total amount of their respective bid.

Other than the above, any person requesting this type of information will be politely advised that this information cannot be released.

I am satisfied that the information in sections 6, 12, 13, 14, 15 and the Bid Bond at issue in this appeal was supplied by the affected party to the institution in confidence. Accordingly, the second part of the test has been met.

The third part of the test is satisfied if it can be demonstrated that disclosure of the information in the records at issue in this appeal, could reasonably be expected to result in one of the types of harms specified in (a), (b) or (c) of subsection 17(1).

Having reviewed the tender completed by the affected party and the representations submitted by the institution and the appellant's legal counsel, I am satisfied that disclosure of sections 6, 13, 14 and 15 of the affected party's tender would prejudice significantly the affected party's competitive position. Accordingly, I find that the third part of the test for the subsection 17(1) exemption has been satisfied with respect to sections 6, 13, 14 and 15 of the tender.

The appellant's legal counsel submitted the following with respect to section 12 of the tender:

There is a possibility there could be prejudice at the competitive position (sic) of either Vanasse or the

sub\_contractor being revealed. We would be content with the name of the sub\_contractor being revealed and the Information and Privacy Commissioner reviewing the Vanasse Tender and advising us that there was in fact an amount inserted beside each of the names of the sub\_contractors. We would be content if we were advised that this amount appeared to be a genuine or bona fide amount, i.e. not a nominal amount such as \$1.00 or \$10.00.

With respect to the names of the subcontractors, I find that there is insufficient evidence in the representations of the institution to satisfy the third part of the test for the subsection 17(1) exemption. Accordingly, I order that the names of subcontractors in section 12 of the tender be disclosed to the appellant.

With respect to the amounts beside the names of subcontractors, I am able to confirm that they are well in excess of the amounts referred to by the appellant's legal counsel. It is my view that disclosure of these amounts would prejudice significantly the affected party's competitive position. Accordingly, I find that the third part of the test for the section 17(1) exemption has been satisfied with respect to the amounts set out in section 12 of the tender.

The institution submitted that disclosure of the Bid Bond would create a reluctance on the part of the affected party to provide such a bond to the institution in the future. It is the institution's position that it is in the public interest that similar information continue to be so supplied.

In my view, the representations made by the institution with respect to the Bid Bond, in the absence of representations from

the affected party, are insufficient to satisfy the requirements of the third part of the test for exemption under subsection 17(1). Therefore, I order that the Bid Bond be released to the appellant in its entirety.

In summary my Order is as follows:

1. I order the head to disclose section 7, the names of subcontractors contained in section 12 of the tender and the Bid Bond to the appellant.
2. I uphold the head's decision to withhold section 6, the amounts listed in section 12, and sections 13, 14 and 15 of the tender from disclosure pursuant to section 17 of the Act.
3. I order the head not to release to the appellant the parts of the record as described in Item 1 of this Order until 30 days following the date of this Order. This time delay is necessary in order to give any party to the appeal the opportunity to apply for judicial review of my decision before the parts of the record described in Item 1 above are actually released. Provided notice of an application for judicial review has not been served on me and/or the institution within this 30 day period, I order that the severed record be released within thirty five (35) days of the date of this Order. The institution is further ordered to advise me in writing as to the date of such disclosure

within five (5) days of the date on which disclosure is made to the appellant.

Original signed by: \_\_\_\_\_ May 4, 1990  
Tom Wright Date  
Assistant Commissioner