



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

ORDER P-367

Appeal P-910876

Ontario Hydro



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ORDER

On October 1, 1992, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act (the Act) and the Municipal Freedom of Information and Protection of Privacy Act.

Ontario Hydro received a request under the Act for access to copies of all tenders submitted as well as the final contract or contracts awarded in relation to a particular tender for clerical and drafting supplies. Ontario Hydro denied access to the tender material under sections 17(1)(a) and (c) of the Act, and to the contract stating that none existed. The requester appealed the denial of access to the tender material.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review Ontario Hydro's decision was sent to Ontario Hydro, the appellant, and the five companies which had submitted tenders. Written representations were received from Ontario Hydro, the appellant and two of the companies. A representative of one of the companies notified this office that the company no longer existed.

The sole issue in this appeal is whether the mandatory exemptions provided by sections 17(1)(a) and (c) apply. These sections read:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In Order 36, former Commissioner Sidney B. Linden established a three-part test, each part of which must be satisfied in order for a record to be exempt under section 17(1)(a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section 17(1)(d). This new section is not covered by the test established in Order 36, and is also not relevant in the circumstances of this appeal. The test for exemption under section 17(1)(a), (b) or (c) is as follows:

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 section 17(1) will occur.

Part One

The information contained in the tenders submitted by the five companies relates to the sale and purchase of materials, outlines each company's quote of the cost at which it could supply Ontario Hydro with clerical and drafting supplies, and includes a description of its electronic transmission capabilities. Ontario Hydro submits that this information falls under the definition of technical, commercial and/or financial information. One of the companies also submits that the information qualifies as technical information.

The appellant submits that as the Act deals with access to information, and as all activity can be encompassed by the words "scientific, technical, commercial, financial, or labour relations information" that the first part of the test must be read to mean those items of scientific, technical, commercial, financial, or labour relations information that are trade secrets. The appellant submits that the items requested do not fall within the concept of trade secrets and, therefore, the first part of the test fails.

Because the term "trade secret" is followed immediately by the word "or" in section 17(1), not "and", I do not agree with the appellant's view. In my view, the pricing information, the information about the sale of the products, and the description of the electronic transmission capabilities qualifies as commercial and/or financial information. Accordingly, the first part of the test has been met.

Part Two

The appellant submits that the fact of sealed bids in a tender process should not give rise to an inference of confidentiality. The appellant submits that sealed bids are used for administrative convenience to ensure that, prior to the selection of the winning bid, no one knows of its contents to avoid improper activities by any of the parties. The appellant claims that the written policies of Ontario Hydro do not expressly state that the information is expressly confidential.

Ontario Hydro submits that the tender documents in question were prepared by the five companies and supplied to Ontario Hydro in response to an invitation to tender. Ontario Hydro has provided copies of its tender policies, and submits that these policies establish that the information was supplied in confidence. One of the companies also indicates the tender documents were supplied in confidence and should not be disclosed.

I have reviewed Ontario Hydro's policies relating to tenders. The policies spell out specifically the type of information which will be released, and state:

Under no circumstances are details of the evaluation or unit prices to be disclosed to tenderers, nor in the case of material awards is the bid price of an unsuccessful tenderer to be revealed.

...

Information on competing tenders (including prices) is not to be disclosed nor are the mathematical details of the tender evaluation.

In light of Ontario Hydro's tendering process for this matter, I am satisfied that these tenders were supplied by the companies to Ontario Hydro in confidence, and the second part of the test has been met.

Part Three

The appellant submits that the information deals with mass produced products widely and consistently advertised by price throughout the province and, therefore, Ontario Hydro should be required to release the information.

Ontario Hydro submits that disclosure of the bid pricing, including the unit cost, would provide exact details of the pricing structure to a potential competitor who could adjust his price accordingly on future bids, thereby gaining a significant competitive advantage and placing all five companies at a competitive disadvantage. Additionally, disclosure of the five companies' pricing structures to the appellant, who could be a competitor, would significantly prejudice their competitive position in future tenders, prejudice their contractual negotiations with other customers and result in undue financial loss to the companies while resulting in undue financial gain to the appellant.

One of the companies submits its proposal to Ontario Hydro is basically a "how-to" manual for the design and successful implementation of a contract. It contains full descriptions of structure, systems and procedures in enough detail so that they can be duplicated, which would cause the company to lose its competitive advantage. This company also submits that disclosure of its tender to Ontario Hydro would severely damage its future negotiations for business with other clients.

In this appeal, the third part of the test will be satisfied if it can be demonstrated that disclosure of the information in the records could reasonably be expected to result in one of the types of harms specified in (a) or (c) of section 17(1). Because one of the companies is no longer in existence, I find that no harm can result from disclosure of the records related to it, and the third part of the test has not been established.

I am satisfied that there is sufficient evidence to support the assertion that disclosure of the records supplied by the remaining four companies might reasonably be expected to significantly prejudice the competitive position of these companies as envisioned by section 17(1)(a), and the third part of the test has been met. Because all three parts of the test have been met in respect of these records, I find that section 17(1)(a) applies.

ORDER:

1. I uphold Ontario Hydro's decision to exempt the records supplied by the four companies which are still in existence.
2. I order Ontario Hydro to disclose the records supplied by the company which is no longer in existence to the appellant within fifteen (15) days of the date of this order. I have provided Ontario Hydro with the name of this company in the covering letter which accompanies Ontario Hydro's copy of this order.
3. In order to verify compliance with the provisions of this order, I order Ontario Hydro to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, only upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ November 16, 1992