



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

ORDER P-431

Appeal P-9200489

Niagara College of Applied Arts and Technology



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ORDER

The Niagara College of Applied Arts and Technology (the College) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to "the dollar value of the bids submitted by each bidder ... as well as a confirmation of which parts of the tender were awarded" with respect to the College's invitation for Tender #ADM-PR-486. The College notified four companies which submitted bids (the affected persons) of the request under section 28 of the Act. The affected persons submitted representations to the College objecting to the disclosure of the requested information. The College informed the requester as to the name of the successful bidder and which parts of the tender were awarded, but refused to give access to the dollar values of the bids, pursuant to section 17(1)(a), (b) and (c) of the Act. The requester appealed the College's decision to deny access to the dollar values.

The record which is identified by the College as being responsive to the request is a one-page internal document of the College entitled "Request for Purchase Approval". It contains a list of the bidders who responded to the invitation for tender, along with the dollar amounts of the bids submitted by each of them. The dollar values are the yearly rates that the affected persons would charge the College for the provision of security services specified in the tender documents and are extracted from the actual bids submitted by the affected persons.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the College's decision was sent to the appellant, the College, and the affected persons. Written representations were received from the College and the appellant. Along with its representations, the College has forwarded the correspondence it received from the affected persons objecting to the disclosure of the information.

The sole issue in this appeal is whether the mandatory provisions of section 17(1)(a), (b) or (c) of the Act apply in the circumstances of this appeal.

Sections 17(1)(a), (b) and (c) of the Act read 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;

In order to qualify for exemption under sections 17(1)(a), (b) or (c), the following three-part test must be satisfied:

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 Ministry in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure must give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of section 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the section 17(1) claim invalid [Order 36].

Part One

The College submits that the dollar value in each of the bids is "commercial information." The appellant disagrees. He states that "the contents of the information requested do not include a request for any information that might be construed as ... commercial information".

It has been established in a number of orders that information which relates to the buying or selling of services is "commercial" information, for the purposes of section 17(1) of the Act [Orders 47, 91, 166].

The information contained in the record relates to the sale and purchase of security services for the College, and outlines the affected persons' offers to supply the College with the required services for the prices indicated in the record. In my view, this information is "commercial" information and satisfies part one of the test.

Part Two

With respect to part two of the test, the parties objecting to the disclosure of the records must meet two requirements. They must prove that the information was **supplied** to the Ministry and that it was supplied in confidence, either explicitly or implicitly.

The College submits that the information at issue was supplied to it by the affected persons and was not the product of negotiations between the College and the bidders.

Having examined the record, the representations of the parties as well as the documentary evidence submitted to me along with the representations, I am satisfied that the information relating to the price for the provision of security services was supplied to the College by the affected persons. Therefore, in my view, the "supplied" aspect of part two of the test has been satisfied.

With respect to the "confidentiality" element of the test, the College submits that the bids were received in confidence from the affected persons. The College states that "at least two" of the affected persons submitted their bids with explicit written statements that they were being given in confidence. Further, the College indicates that because the tenders were not publicly opened it was understood that the bids were being supplied in confidence. Finally, the College states that "in situations involving contracts for services where labour is the only or the primary component of the bid" the College's policy and practice is to release only the name of the successful bidder. It says price information in bids is "confidential and access will occur only in narrow circumstances. Only the Board of Governors and the government ministries that fund the College have full access to every bidder's tender price." The College's submissions regarding confidentiality are supported by an affidavit of its Director of Financial Services, who indicates that he has been responsible for the College's Purchasing Department for the last 18 years, and has first-hand experience with the tendering process.

The appellant submits that there is no reason for any of the participants in the bidding process to believe that bids would be held in confidence in light of current security industry practices. He explains that he has considerable experience in the industry and he "had every expectation that Niagara College would handle this bid along reasonable accepted business practices for competitive bidding and not try to keep the rates quoted from interested parties." The appellant

also claims that "[w]ithout exception, every company that bid routinely subjects their bids to other institutions to full access by other bidders", and cites "a recent submission to [a city] for the same services at which all of the bidders were present during the opening of the bids and were given copies of the bid prices as well as the opportunity to examine all submitted documents."

The College indicates in its representations that in processing the tender in question, it employed "the direct bid system in which qualified potential bidders are invited to submit tenders, ... but no mention is made of a public opening. Instead tenders are opened in confidence and bid values are not released."

In their representations submitted to the College, the affected persons indicate that they supplied the information to the College in confidence. One of the affected persons states:

[The affected person] assumed the proposal we submitted would be kept confidential between the College and [the affected person]. Before submitting we had inquired whether there would be public opening, with all bidding security companies attending, and in this case there was no such opening. Therefore, we submitted a proposal with a great deal of commercial information.

Having reviewed the representations of all of the parties, I am satisfied that the bids in this tender were supplied in confidence. Therefore, I find that the second part of the section 17(1) test has been satisfied.

Part Three

Part three of the test requires that the parties resisting disclosure present evidence that is detailed and convincing, and describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the requested information were released [Order 36].

In its representations, the College states that the harm described in section 17(1)(a) of the Act could reasonably be expected to result from the disclosure of the information. It submits that "disclosure of the record would allow a competitor to calculate a Third Party's mark-up and, its profit margin, on security services being offered to the College." The College argues that with this knowledge, a competitor "could under bid with certainty", resulting in the affected person's loss of future contracts.

In its representations submitted to the College, one of the affected persons states:

Pricing information is critical to a company's survival in our highly competitive industry, specifically, marketing strategy components which includes profit margin, cost of sale, and pricing is as confidential as one's bank balance. Pricing singularly [sic] is the most critical factor of all ... To release our bid price would be disastrous, particularly in a tender process where wages are specified.

The review of the tender documents indicates that the weekly hours of service required, the classification of the security officers and the base labour rates of pay are predetermined by the College and are set out in the appendices to the tender documents. The appellant is in possession of the tender documents. The position of the College and the affected persons is that this information would allow a competitor to determine the profit margin and mark-up offered to the College, thereby significantly prejudicing the bidder's competitive position in future bids.

The appellant submits that the information at issue should be disclosed since the College discloses similar information from bids on equipment. The appellant is also of the view that the existence of a labour component in this bid "is insufficient reason to withhold information particularly since no harm can result."

Finally, the appellant submits that "... due to the time frame involved the information supplied could no longer be considered to be competitive information that reflects the current activities of the bidders in the marketplace. This bid was for a three to six year contract and any information on bid amounts will have no value in a competitive sense in the future."

Having carefully reviewed the record and the representations of the parties, I am satisfied that in the circumstances of this appeal, there is sufficient evidence to indicate that disclosure of the record could reasonably be expected to prejudice significantly the competitive position of the affected persons. Accordingly, I find that part three of the test for exemption under section 17(1) of the Act has been satisfied. Because all three parts of the test have been met, I find that the mandatory exemption provided by section 17(1)(a) applies to the records at issue in this appeal.

ORDER:

I uphold the College's decision.

Original signed by: _____
Asfaw Seife
Inquiry Officer

March 9, 1993