



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

ORDER P-520

Appeal P-9300088

Ontario Hydro



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ORDER

BACKGROUND:

Ontario Hydro (Hydro) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for the prices paid by the successful bidders for surplus trucks and other equipment sold by Hydro in two tender transactions, 1015-ML and 1047-ML. These tenders were conducted pursuant to Hydro's Investment Recovery Policy (the IRP). The requester indicated that his company had been involved with these two transactions. Hydro denied access to the records pursuant to sections 17(1)(a) and (c) and 18(1)(c) of the Act. The requester appealed the denial of access.

During mediation the Appeals Officer requested a copy of the IRP from Hydro. Pursuant to the terms of the IRP, Hydro provided the appellant with the names of the successful bidders in the two transactions and the rationale for the awards. Hydro declined to give the appellant access to the prices paid by the successful bidders for the surplus inventory.

Further mediation was unsuccessful and notice that an inquiry was being conducted to review Hydro's decision was sent to Hydro, the appellant and the 22 successful bidders (the affected parties) in the two transactions. Representations were received from Hydro, the appellant and two of the affected parties. The two affected parties consented to the disclosure of the prices they had paid for the five vehicles and equipment they had purchased.

The information remaining at issue is the prices paid by the affected parties for the 52 vehicles and other equipment disposed of by Hydro pursuant to the tenders. These prices are contained in the records entitled "Award Summary Sheets" for these transactions in the columns headed "Price Offered". Hydro has confirmed that the "price offered" represents the tender price accepted by Hydro, and consequently the price paid, in each case.

ISSUES:

The issues in this appeal are:

- A. Whether the mandatory exemptions provided by sections 17(1)(a) and (c) of the Act apply to the record.
- B. Whether the discretionary exemption provided by section 18(1)(c) of the Act applies to the record.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemptions provided by sections 17(1)(a) and (c) of the Act apply to the record.

Sections 17(1)(a) 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order for a record to qualify for exemption under section 17(1) Hydro and/or the affected parties 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 (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

Part One

The only information at issue in this appeal is the bid prices tendered by the affected parties and accepted by Hydro for the purchase of the surplus equipment. While Hydro submits that this constitutes "financial" information, in my view, it is more accurately characterized as "commercial" information in that it relates "solely to the buying, selling or exchange of merchandise or services" (Order P-493). Therefore the first part of the test has been met.

Part Two

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

Having examined the record and the representations, I am satisfied that the information contained in the record was supplied to the Ministry by the affected parties as part of the tendering process and, therefore, I find that the "supplied" aspect of part two of the test has been satisfied.

With regard to the issue of whether the information was supplied in confidence, the appellant submits that Hydro, as a public corporation, is owned by the public and should be open and accountable to the public.

In support of its position that the bid prices were supplied in confidence, Hydro refers to certain sections of its "Policies and Procedures Manual for the Disposal of Surplus Equipment & Material" (the manual). These sections of the manual set out the type of information that will be given, on request, to unsuccessful bidders on items sold for less than \$100,000 (as was the case in the transactions at issue). Unsuccessful bidders may request the name of the successful bidder and the rationale for the award.

Under the section on "Rationale", the manual goes on to state that:

Ontario Hydro practices a "policy" of open information and, consequently, the policy of disclosure indicated above is intended to reflect Hydro's long standing position in this regard.

Despite the fact that, in its representations, Hydro refers to the manual as "reflecting its commitment to the confidentiality of bid details", the manual does not contain any explicit statement concerning the non-disclosure or confidentiality of the bid prices.

In its representations, Hydro also refers to Orders 166 and P-367 to support its position that the bid prices were supplied in confidence. Both of these orders dealt with appeals in which access to information involving tenders had been denied.

In Order 166, an appeal from a decision of the Ontario Northland Transportation Commission, then Assistant Commissioner Tom Wright quoted from a document entitled "Summary of Main Policy Elements Involving Ontario Northland's Sealed Tenders" to determine if the information at issue had been supplied to the institution "in confidence". The relevant term of that policy read as follows:

It is the 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 amounts 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.**

[emphasis added]

Similarly, in Order P-367, Inquiry Officer Holly Big Canoe reviewed the policies of Hydro involving the tenders at issue in that appeal. She noted that the policies stated:

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 my view, both of these Orders involved tender situations in which the institutions' policies governing the conduct of the bid process explicitly provided that the information at issue supplied to the institutions was not to be disclosed and/or was to be treated as confidential.

A determination of whether information was supplied to an institution **in confidence** for the purpose of section 17 of the Act requires an examination of the facts and circumstances surrounding each particular case. In a situation involving tenders, any written documentation such as policies or procedures governing the bid process will provide some evidence as to whether there is a reasonable expectation of confidentiality on the part of the supplier at the time the information was supplied.

In my view, there is nothing on the face of the IRP manual governing the tender process in this appeal that leads one to conclude that the bid prices were supplied explicitly in confidence. Moreover, Hydro has provided me with no evidence to support the conclusion that the information was supplied implicitly in confidence. I do not believe that the fact that there is no reference in the manual to the disclosure of the bids necessarily means that this information was implicitly supplied in confidence. I also note that the two affected parties who submitted representations had no objection to the disclosure of the bid prices and indicated that they would like to have this information published.

On the basis of the above, I find that Hydro has not established that the bid prices were supplied to Hydro in confidence, either explicitly or implicitly, and part two of the test has not been met. Accordingly, it is not necessary for me to deal with the third part of the test.

The records at issue therefore do not qualify for exemption pursuant to section 17 of the Act.

ISSUE B: Whether the discretionary exemption provided by section 18(1)(c) of the Act applies to the record.

Section 18(1)(c) reads as follows:

[IPC Order P-520/August 25, 1993]

A head may refuse to disclose a record that contains,

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

In order to qualify under section 18(1)(c), Hydro must provide detailed and convincing evidence that disclosure of the information contained in the records could reasonably be expected to prejudice its economic interests or competitive position. The expectation must not be fanciful, imaginary or contrived, but rather one that is based on reason (Orders 188, P-346 and P-398).

In all cases where a claim for exemption is made under section 18 of the Act, the onus rests with the institution to demonstrate that the harms envisioned by this section are present or reasonably foreseeable. The evidence submitted by Hydro must be detailed and convincing (Order 141). In the absence of sufficient evidence to support a claim under section 18, the record should be released to the appellant (Order 48).

Hydro's position is that disclosure would undermine the sealed bid process and transform private tendering into a public process. Hydro maintains that future bidders would alter their bidding practices to the detriment of Hydro.

The appellant cites his 23 years as owner of a company for which he tenders jobs and equipment and attends auctions to purchase equipment. At large public auctions, he states, open bidding does not appear to discourage buyers. He submits that if Hydro were to post the prices for the previous month's transactions, as is done by some federal ministries, bidders would have an idea of the prices being paid for particular items and could bid accordingly. He rejects the notion that this would have a detrimental effect on Hydro.

Based on the representations of the parties and my review of the records, I am not satisfied that Hydro has presented detailed and convincing evidence that the harms envisioned by section 18 are present or reasonably foreseeable. The evidence submitted in support of its claim that

disclosure of the selling prices would undermine the sealed bid process and affect the economic interests of Hydro fails to make the necessary connection between the disclosure of the information contained in the records and any specific harm that could reasonably be expected to result. In my view, the records do not qualify for exemption under section 18(1)(c) of the Act.

ORDER:

1. I order Hydro to disclose the bid prices of vehicles and equipment in Award Summaries 1015-ML and 1047-ML within 35 days following the date of this order and **not earlier** than the thirtieth day following the date of this order.

2. In order to verify compliance with the provisions of this order, I order Hydro to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only upon request.**

Original signed by: _____

Anita Fineberg
Inquiry Officer

_____ August 25, 1993