



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

# **ORDER P-610**

**Appeal P-9300188**

**Ministry of Housing**



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# ORDER

## BACKGROUND:

The Ministry of Housing (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to tendering information related to the construction of a non-profit housing development. The Ministry provided the requester with the name of the company awarded the project, the number of bids received, and the timing for building construction and occupancy. The Ministry denied access to the five bids, which includes the name and address of the contractors and the value of their bid, pursuant to section 17(1) of the Act. The requester appealed the Ministry's decision.

During mediation the appellant agreed that he did not require the attachments to the bids which include general covering letters, and documents related to the bonds posted by the contractors. Further mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, the five contractors, and the non-profit group which oversees the housing project. Written representations were received from the appellant, the Ministry, and two contractors. One of the contractors advised that they had no objection to the disclosure of the construction bids, provided that all bids are disclosed, or if only selected parts are disclosed, that they are the same for each bid.

The five bid records which remain at issue each consist of:

- (a) a "Stipulated Price Bid Form";
- (b) a "Bid Form Appendix "A"- List of Proposed Subcontractors";  
and
- (c) a "Bid Form Appendix "B"- Unit Prices".

Four of the bids also contain a "Bid Form Appendix "C"- Alternatives and Substitutions".

## PRELIMINARY ISSUE:

The five bids were provided directly to the architect employed by the non-profit group by the contractors. The architect then provided the bids to the Ministry. The Ministry submits that the records are not within its custody or control as specified in section 10 of the Act. The Ministry states that the true custodian of the records is the non-profit group and requested that its representations be sought regarding the release of this information.

The Ministry submits that it is in possession of the records because, as the funding agency, it is its role to review and comment on the recommendations of the project architect regarding the bids. The Ministry states that it accepts or rejects the project architect's assessment of the bids, but is not a party to the decision; however, it does transfer funds to the architect. In discussions with the Appeals Officer, the Ministry indicated that if it did not concur with the architect's recommendation or assessment of the bids, or with the non-profit group's choice of bid, it could refuse to fund the housing project.

In Order 120, former Commissioner Sidney B. Linden made the following comments regarding the issue of custody and control: "I feel it is important that [custody and control] be given broad and liberal interpretation in order to give effect to [the] purposes and principles [of the Act]." He went on to outline what he felt was the proper approach in determining whether specific records fell within the custody or control of an institution:

In my view, it is not possible to establish a precise definition of the words "custody" or "control" as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether "custody" or "control" has been established in the circumstances of a particular fact situation.

The former Commissioner listed a number of factors to assist in determining whether an institution has custody or control of a particular record.

I agree with former Commissioner Linden, and have considered the records in light of the factors set out in Order 120 and the Ministry's representations. In my view, the records are within the custody or control of the Ministry. The Ministry's concern regarding the interests of the non-profit group has been addressed through the notification of the group and the request for representations from them.

## **ISSUE:**

The only remaining issue in this appeal is whether the mandatory exemption provided by section 17(1) of the Act applies to the five bid records.

## **SUBMISSIONS/CONCLUSIONS:**

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

For a record to qualify for exemption under section 17(1)(a),(b) or (c) of the Act the Ministry and/or the affected 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 (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

## **Part One**

The Ministry states that the records contain highly technical commercial information related to the residential construction industry, including very detailed itemized unit costs for a specific project. The Ministry submits that the information requested falls under the definition of commercial and technical information of the third parties. One of the contractors submits that the construction bids contain financial information.

In my view, technical information is information belonging to an organized field of knowledge in applied sciences or mechanical arts (Order P-454); commercial information is information which relates to the buying, selling or exchange of merchandise or services (Order P-493); and financial information is information which relates to finance or money matters (Order 47). I find

that the records contain technical, commercial, and financial information and, therefore, the first part of the test has been met.

## **Part Two**

The second part of the test has two elements. First, the information must be **supplied** to the Ministry and secondly, it must be supplied **in confidence**, either implicitly or explicitly.

The Ministry has stated that the bids were submitted to the non-profit group's architect, who in turn submitted them to the Ministry. I have reviewed the records and am satisfied that they were supplied to the Ministry.

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the Ministry. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

The Ministry submits that the information was, as is always the case with tenders, supplied in strict confidence. The Ministry states that it is the practice of the Ministry not to disclose unit prices and per diem to competitors on tenders; it is implied that such highly confidential information submitted will be kept confidential.

One of the contractors states:

It was always our understanding that the construction bid ... was being submitted in confidence and that the information contained in the construction bid would not be released to third parties. It was on the basis of this understanding that the ... submitted its construction bid.

The appellant submits:

It is unthinkable that contractors submitting bids for a public tender process should expect their bids to remain confidential. Otherwise the public tender process is a sham. ... I submit ... that only the most explicit statement that the information supplied will be held in confidence should be accepted. ... the exception for confidential communications should be construed very narrowly.

Based on the representations of the Ministry and one of the contractors, I accept that the records were supplied implicitly in confidence and, therefore, the second part of the test has been met.

### **Part Three**

In order to satisfy part three of the test, the affected party and/or the Ministry must demonstrate that disclosure of the information at issue could reasonably be expected to result in one of the harms specified in (a), (b) or (c) of section 17(1) of the Act. Detailed and sufficient evidence setting out the facts and circumstances that could lead to a reasonable expectation that harm could occur if the information at issue was disclosed is necessary to satisfy the "harms" test (Orders P-246 and P-500).

The Ministry submits:

The technical and commercial information contained in the bids is for multi-million dollar transactions. ... Release of the bids to the appellant would amount to the releasing of the expertise that the companies have developed. The Ministry would, in essence, be releasing the bidders per unit price structure which would lead to an unfair competitive advantage for their competitors, or to the possible price fixing on the part of bidders which may cause the Ministry financial harm.

Another possible harm the Ministry could suffer would be that the provision of the bidders information could result in similar information no longer being supplied to the Ministry/Architects. Contractors may simply choose to supply bottom line figures or for that matter not to do business with the Ministry for fear of having to release their price structure to their competitors and deciding that it would not be a risk worth taking. Despite the absence of evidence, the Ministry submits that the release of the information would harm the bidders as well as the Ministry.

One of the contractors has submitted that the financial information set forth in the construction bid includes financial information which was provided to it in confidence from subcontractors. The contractor states that the release of such information would, in all likelihood, interfere significantly with future negotiations between them and those subcontractors, thereby prejudicing their position in future construction bids. If the records are disclosed, the contractor believes it will be obligated, when submitting construction bids in the future, to advise all subcontractors that all information being provided may potentially be disclosed to the public. The contractor advises that this procedure may result in similar information no longer being supplied to them.

I have carefully reviewed the representations of the parties and the records at issue. It is my view that disclosure of the names and addresses of the contractors, the total value of the bids, the list of proposed subcontractors, and other general information contained in the bid, would not result in one of the harms specified in section 17(1)(a), (b) or (c).

I find that disclosure of the remaining information could reasonably be expected to prejudice significantly the competitive position of the contractors as required by section 17(1)(a) of the

Act, insofar as it relates to the bid breakdown, the unit prices, and alternatives and substitutions proposed with any related prices. In my view, the third part of the section 17(1) test has been satisfied with respect to this information in all of the subject records and it is, therefore, exempt from disclosure:

- (a) Section 6. "Bid Breakdown" in the "Stipulated Price Bid Form";
- (b) Section 1.2, 2.2, 3.1 in the "Bid Form Appendix "B"- Unit Prices";  
and
- (c) "Appendix "C"- Alternatives and Substitutions".

**ORDER:**

1. I order the Ministry to disclose the five records to the appellant, with the exception of the following parts of each record:
  - (a) Section 6. "Bid Breakdown" in the "Stipulated Price Bid Form"; **and**
  - (b) Section 1.2, 2.2, 3.1 in the "Bid Form Appendix "B"- Unit Prices"; **and**
  - (c) "Appendix "C"- Alternatives and Substitutions".
2. I order the Ministry to disclose the records referred to in Provision 1 within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry 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: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ January 13, 1994