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

ORDER M-250

Appeal M-9300158

City of Toronto

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ORDER

On January 4, 1994, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

The City of Toronto (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the unit prices quoted by the successful bidder in a tender for a construction project. The City identified two pages as responsive to the request and notified the successful bidder (the company), pursuant to section 21(1) of the Act. The company objected to the disclosure of the record. The City, after considering the objections of the company, decided to grant full access to the requester. The company appealed the City's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the City's decision was sent to the company (now the appellant), the City and the requester. Representations were received from the appellant and the City.

The record at issue consists of two pages from the tender package submitted by the appellant which contain the unit prices. The sole issue in this appeal is whether the mandatory exemptions provided by sections 10(1)(a) and (c) of the Act apply to the record. These sections 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, if 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;

Pursuant to section 42 of the Act, the burden of proof that a record falls within a specified exemption lies upon the head. However, if, as in this case, a third party appeals the head's decision to release a record, the burden of proving that the record should be withheld from disclosure falls on the third party (the appellant).

For the record to qualify for exemption under section 10(1)(a) or (c) of the Act, the appellant 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) or (c) of subsection 10(1) will occur.

[Orders 36, M-29 and M-37]

Failure to establish the requirements of any part of this test will render the section 10(1) exemption claim invalid.

Part One

In order to meet part one of the test, the appellant must establish that disclosure of the record would reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

The appellant submits that disclosure of the record would reveal trade secrets, technical and financial information. In Order 166, then Assistant Commissioner Tom Wright determined that unit pricing information contained in a tender bid constituted financial and/or commercial information. I agree with that view and adopt it for the purposes of this appeal. In my view, the unit pricing information contained in the record constitutes financial information, and therefore the requirements of the first part of the test are met.

Part Two

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

In their representations, both the City and the appellant state that the information was supplied to the City. As noted above, the record forms part of the tender package submitted by the appellant to the City and I am satisfied that it was supplied to the City.

The next matter to be determined is whether this information was supplied to the City in confidence, either implicitly or explicitly.

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the application of the second part of section 10(1) of the Act:

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(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 institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

I adopt these comments for the purposes of this appeal.

The appellant's bid did not explicitly state that it was being submitted in confidence. However, the appellant submits in its representations that it was supplied implicitly in confidence, stating as follows:

> The information supplied in these tenders is supplied with implicit confidence. Never before in my 25 years of experience, has anyone ever been able to get the unit prices of any contract other than the total tender value. This is the status quo in our industry and holds true for every single City, Municipality, Town, Village, Region and Provincial government. Unit prices are <u>never</u> given out. As a matter of record, we know that applications have been sent to other municipalities and all have been denied.

The City's representations state that the information contained in the record was not supplied to it explicitly in confidence, and the documents were not treated as supplied implicitly in confidence by the City. In support of its position, the City has submitted documentation which it provided to suppliers as guidelines for completing the tender submission, and portions of its procedural by-law enacted in 1988, with amendments, relating to the tender process. The City submits that nothing in these documents implies that tender submissions will be treated in confidence.

I have reviewed these documents, and they are silent as to whether or not unit pricing information would be treated as confidential. They do not contain any provisions which indicate that this type of information would be disclosed.

In order to determine how, in fact, the City treats this type of information, the Appeals Officer made inquiries of the City as to what portions of tender packages were normally disclosed at the public openingof tender bids, and was informed that only the company name and total amount of the bid would be disclosed for each tender. The Appeals Officer was also informed that members of the public requesting information about the bids subsequent to the tender opening would receive the same information. It is not the City's practice to disclose other details of the bids. Therefore it is reasonable to conclude that the City does treat the type of information which is at issue in this appeal as confidential.

Having carefully considered the representations received on this issue, I am of the view that the appellant's expectation of confidentiality was reasonable, and had an objective basis. I am therefore prepared to accept that the record was supplied to the City implicitly in confidence, and the second part of the test has

been met.

Part Three

To satisfy part three of the test the appellant must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harms described in section 10(1)(a) or (c) would occur if the information was disclosed (Order 36).

In its representations, the appellant states:

> We manufacture our own product ... and so disclosing these unit prices will allow our competition a window into our operation. ... Disclosure of the record will be evident when the applicant starts using the information to undercut our tender price. It will also allow them to identify market areas and with in-depth knowledge of cost, take away any competitive spirit ...

In its letter to the City objecting to disclosure, the appellant states:

> Since that individual or organization [i.e. the requester] knows our unit prices, they could quite simply quote lower numbers and therefore have definite advantage over us. This very seriously prejudices our competitive position ...

Based on the facts and circumstances described by the appellant, I am satisfied that disclosure of the record could reasonably be expected to result in the situation outlined in section 10(1)(a) of the Act, and therefore, part three of the test has been met.

ORDER:

I order the City not to disclose the record.

Original signed by: January 20, 1994
John Higgins
Inquiry Officer