



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

ORDER M-531

Appeal M-9400736

City of Oshawa



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant, a company which grows and supplies sod, submitted a request to the City of Oshawa (the City). The request was for information about quotations submitted in connection with two contracts for supplying sod.

The City located nine pages of responsive records, consisting of two requisitions for purchase (issued to the successful bidder) and the bids submitted by three prospective suppliers (including the appellant). Partial access was granted to these records, but parts of each record were withheld pursuant to the following exemption in the Act:

- third party information - sections 10(1)(a) and (c).

The undisclosed information consists of purchase order numbers, City budget information, terms of delivery and payment, and pricing information from the bids. Both unit prices and total bid prices were withheld. For ease of reference, I am adopting the page numbers assigned by the City, and will use them throughout this order.

The sole issue to be decided in this case is whether the exemption provided by section 10(1) of the Act applies to the undisclosed information.

A Notice of Inquiry was sent to the City, the appellant and the two other companies which submitted bids (the affected parties). Representations were received from the City and one affected party.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a) and (c) of the Act provide 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.

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

Part 1

It has been established in a number of previous orders that the term "commercial information" relates solely to the buying, selling or exchange of merchandise and services (Orders 47 and M-29). The undisclosed information in this appeal consists primarily of pricing information pertaining to the sale of goods and services, and I find that this type of information qualifies as commercial. Terms of delivery and payment would also satisfy this definition.

However, the I find that purchase order numbers withheld from the two Requisitions for Purchases of Goods and Services (pages 001(a) and 001(b)) do not qualify as "commercial information", nor do they fit within any of the other categories mentioned in part 1 of the test, and accordingly this information does not meet part 1 of the test.

Part 2

Both the City and the affected person who provided representations submit that the withheld information was supplied in confidence to the City.

However, in my view, information pertaining to the amounts budgeted by the City for these contracts, which appears on the two Requisitions for Purchases of Goods and Services (pages 001(a) and 001(b)) was not supplied to the City. Rather, this represents the amount committed from the City's budget for these items. Nor have I been provided with any evidence to indicate that disclosure of this information could reveal information supplied to the City, in confidence or otherwise. In addition, the purchase order numbers, which appear on the pages just mentioned, were not supplied to the City. I am also not satisfied that the terms of delivery and payment (which appear on page 001(b)) were supplied to the City. Accordingly, none of this information meets part 2 of the test.

In Order M-169, Inquiry Officer Holly Big Canoe indicated that, in order to find that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed, and that it had a reasonable basis. I agree.

The City's representations include the following quote from City by-law 227-72, to support the position that the undisclosed information was supplied in confidence:

The Designated Official, or any appointed or elected official, shall not divulge the prices paid by the City for goods, works and services, unless Council may otherwise direct, **except the total price in the case of public tenders may be revealed ...** (emphasis added).

In my view, this would support a reasonable expectation of confidentiality with regard to unit prices, but not total prices. Accordingly, I find that part 2 of the test has been met, but only with respect to unit prices and other information in the records whose disclosure could reveal unit prices.

Part 3

Both the City and the affected person who provided representations argue that disclosure of unit prices is likely to cause underbidding, and that this could reasonably be expected to "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization" as contemplated in section 10(1)(a). I agree, and I find, with one exception, that part 3 of the test is established with respect to the unit prices submitted, and other information in the records whose disclosure could reveal unit prices.

The exception relates to the bids submitted by the appellant (pages 002-1, 002-2, 002-3 and 002-4). I am at a loss to understand how the harms in section 10(1)(a) or (c) could be triggered by disclosure to the appellant of the bid information it submitted. Accordingly, I find that part 3 of the test has not been met for any part of the appellant's bids.

I am also not satisfied that the evidence provided to me is sufficient to establish that disclosure of the total bid prices, or any other information in the records except information pertaining to unit prices, could reasonably be expected to result in any of the harms in sections 10(1)(a) or (c).

Accordingly, only the unit prices and information which could reveal them, relating to bidders other than the appellant, meets part 3 of the test.

Application of the Exemption

Only information which meets all three parts of the test qualifies for exemption. In this appeal, only the unit prices (and other information which could reveal them) submitted by bidders other than the appellant meet this requirement. The exempt information appears on pages 001(b) and 005 and is highlighted on the copies of these pages which are being sent to the City's Freedom of Information and Privacy Co-ordinator with this order.

ORDER:

1. I uphold the City's decision to deny access to the information which is highlighted on the copies of pages 001(b) and 005 which are being sent to the City's Freedom of Information and Privacy Co-ordinator with this order.
2. I order the City to disclose the remaining parts of the records at issue to the appellant within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

John Higgins
Inquiry Officer

_____ May 18, 1995