



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

# ORDER M-672

Appeal M\_9500404

Town of Penetanguishene



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## NATURE OF THE APPEAL:

The Town of Penetanguishene (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a tender call for the hiring of a project manager for the expansion and renovation to the Town's Public Library.

The Town identified 20 responsive records, including administrative documents, proposals submitted by 12 bidders, an internal memorandum dealing with negotiation of the agreement with the successful bidder, and reference checks. Following consultation with the various bidders, 17 records were made available to the requester for inspection at the Town's Municipal Office, including the proposals of two bidders who consented to disclosure (Records 25 and 26). The requester was also provided with partial access to the reference checks (Record 29).

Access to the remaining 11 proposals (Records 17-24, 27, 28), the memorandum (Record 16), and the remaining portions of Record 29 was denied by the Town, on the basis of one of the following exemptions contained in the Act:

- third party information - sections 10(1)(a) and (b) (the proposals)
- solicitor client privilege - section 12 (Record 16)
- advice and recommendations - section 7(1) (Record 29)

The requester appealed the Town's decision.

A Notice of Inquiry was sent to the Town, the appellant and the ten remaining bidders. In preparing its representations, the Town identified an additional proposal which it felt also qualified for exemption under sections 10(1)(a) and (b). The appellant agreed to have this record considered as part of this appeal, and a Notice of Inquiry was sent to this bidder.

Representations were received from the Town, and three of the bidders. One of these bidders consented to the release of its proposal (Record 18), and this record should be disclosed to the appellant.

Some of the proposals contain resumes and other information which could be characterized as personal information, as well as professional references and descriptions of past work projects undertaken by individual bidders. The appellant confirms that he is not interested in receiving access to any of this information, and the portions of the remaining proposals which contain resumes, other personal information, references and descriptions of past work projects should not be disclosed.

During the course of processing this appeal, an additional responsive record, a draft of the agreement ultimately entered into between the Town and the successful bidder, was identified and disclosed to the appellant. The appellant also withdrew his request for access to the remaining portions of Record 29, thereby eliminating the need to consider the Town's section 7(1) exemption claim.

Therefore, the records which remain at issue in this appeal are the remaining responsive portions of the 10 proposals from bidders who have not consented to release (sections 10(1)(a) and (b).

## DISCUSSION:

### THIRD PARTY INFORMATION

The Town claims sections 10(1)(a) and (b) as the basis for refusing to disclose the remaining responsive portions of the 10 proposals. These records consist of outlines of approaches taken by various bidders in addressing the requirements of the project, and pricing information.

Sections 10(1)(a) and (b) 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, 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;
- (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;

Each part of the following three-part test must be satisfied in order for a record to be exempt from disclosure under sections 10(1)(a) and/or (b) of the Act:

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 types of harm specified in (a) or (b) of section 10(1) will occur.

[Orders 36 and M-10]

Having reviewed the proposals and the representations, I am satisfied that some contain commercial information, others contain both commercial and financial information, and the first part of the test has been met for all 10 proposals.

The Town submits that the proposals were received in sealed envelopes to ensure confidentiality in the tendering process. The proposals were opened at an open public meeting, at which point

the proposal amount of each bid was announced to the audience. The Town indicates that at no time during this public opening were any of the details of any bid provided to those in attendance.

I find that the information contained in each of the proposals submitted in response to the tender call was supplied to the Town by the various bidders. Based on the details of the tendering process in place at the Town, I am satisfied that the proposals were supplied implicitly in confidence and the second part of the test has been met.

In support of the application of section 10(1)(a), the Town indicates that the present economic climate has increased the degree of competition in the construction industry. The Town submits that any commercial or financial information that can be obtained by a competitor over another would greatly enhance the competitor's ability to compete against them. In the Town's view, information within a proposal could provide information on the strengths and weaknesses of the supplier and provide insight into the competitor's process of managing a construction project. The two bidders who responded to the Notice of Inquiry also maintain that release of their proposals would provide other suppliers with a competitive advantage.

I have carefully reviewed the remaining proposals, and I find that the Town and the two affected parties have not provided sufficient evidence to establish that release of the portions of these records that remain at issue in this appeal would prejudice significantly the competitive position of the bidders. Because this particular tender call was for project management services as opposed to a product, the level of detail varies quite significantly among the different proposals. Some are as short as one page and consist primarily of the personal resumes of the individual bidders, while others go to some length in describing the various professional services offered by the bidder. However, in my view, once the resumes, other personal information, reference details and descriptions of past work projects have been removed, the remaining information contained in the proposals is too general in nature to satisfy the harm envisioned by section 10(1)(a) of the Act.

As far as section 10(1)(b) is concerned, the Town submits that if commercial and financial information supplied during the course of the tendering process is available to the general public, this will limit the amount of information provided by suppliers in response to a tender call, and even cause some suppliers to decline to bid on projects, thereby adversely affecting the Town's competitive bidding process. Neither of the affected parties address the application of this section.

In my view, section 10(1)(b) is not applicable in the circumstances of this appeal. As the Town points out in its representations, there is a high degree of competition in the construction industry. There are strong incentives within the competitive tendering process which encourage bidders to submit comprehensive proposals, and, in my view, the integrity of the Town's tender process is adequately protected through the consideration of potential harms under section 10(1)(a).

Therefore, I find that the remaining portions of the 10 proposals do not qualify for exemption under sections 10(1)(a) or (b) of the Act, and should be disclosed to the appellant. I have attached a highlighted copy of these records with the copy of this order sent to the Town's

Freedom of Information and Privacy Co-ordinator which identifies those portions of the proposals which should **not** be disclosed.

### **SOLICITOR CLIENT PRIVILEGE**

The Town claims section 12 of the Act as the basis for denying access to Record 16, which is a two-page internal memorandum from the Town's solicitor to the Clerk-Administrator.

Section 12 consists of two branches, which provide a head with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for counsel employed or retained by the Town for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Town claims that the common law solicitor-client privilege applies to Record 16.

For a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record either:

- constitutes a written or oral communication of a confidential nature between a client and legal advisor which relates directly to seeking, formulating or giving legal advice; or
- was created or obtained especially for a lawyer's brief for existing or contemplated litigation.

The Town submits that Record 16 is a confidential written communication between a legal advisor (the Town's solicitor) and his client (the Town's Clerk-Administrator), directly relating to the giving of legal advice with respect to a proposed contractual agreement between the Town and the successful bidder. I have reviewed Record 16 and I accept the Town's submissions. I find that the requirements of the first part of the Branch 1 test have been established, and that Record 16 qualifies for exemption under section 12 of the Act.

### **ORDER:**

1. I uphold the Town's decision not to disclose Record 16.
2. I order the Town to disclose Record 18 in its entirety, and those portions of Records 17, 19-24, 28, 29 and the unnumbered record, which do not contain resumes, other personal information, references and descriptions of past work projects. I have attached a highlighted copy of these records with the copy of my order sent to the Town's Freedom of Information and Privacy Co-ordinator which identifies those portions of these records which should **not** be disclosed. Disclosure of the records covered by this Provision are to

be made to the appellant within thirty-five (35) days following the date of this order but not earlier than the thirtieth [30th] 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 Town to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: \_\_\_\_\_

Tom Mitchinson

Assistant Commissioner

December 19, 1995