



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

# ORDER M-662

Appeal M\_9500507

Wellington County Board of Education



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/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## NATURE OF THE APPEAL:

The requester in this appeal is a trade union. The request, made pursuant to the Municipal Freedom of Information and Protection of Privacy Act (the Act), was submitted to the Wellington County Board of Education (the Board). The request was for a copy of a tender submitted by a named contractor (the appellant), pertaining to custodial services at a school operated by the Board. The requester union is the bargaining agent for the appellant's employees. The requester and the appellant are engaged in negotiations for a new collective agreement between the appellant and his employees.

The Board identified four responsive records. These are as follows:

- Record 1: Contract for caretaking services between the Board and the appellant dated January 1, 1992;
- Record 2: Addendum to Record 1 dated December 7, 1992, executed by the Board and the appellant;
- Record 3: Letter of intent re: extension of the contract identified above as Record 1; and
- Record 4: Contract for caretaking services between the Board and the appellant dated January 1, 1995.

The parties should note that I have not used the Board's numbering system from its index. Instead, I have numbered the records in chronological order.

Under section 21 of the Act, the Board gave notice of the request to the appellant, indicating that it was considering disclosure of the records, and inviting comments on the possible application of the exemption in section 10(1) (third party information). In response to the notice, the appellant indicated his objection to disclosure of the records.

The Board decided to grant partial access, and advised the requester and the appellant to that effect. The passages the Board decided to withhold appear in Records 1 and 4. The same information was to be withheld from both these records. It consists of the appellant's address (which appears to be a home address) and the timing of payments to the appellant under the contracts. The Board's letter to the appellant advised that, unless an appeal was filed by the appellant by a specified date, the remainder of the records would be disclosed. After receiving this letter from the Board, the appellant filed an appeal with the Commissioner's office, objecting to this proposed disclosure.

A Notice of Inquiry was sent to the requester, the appellant and the Board. In response to the notice, the Board and the appellant submitted representations.

It is important to note that this appeal arises from the Board's decision **to grant access** to parts of the records, and the appellant's objection to the disclosure of this information. Despite the fact

that the Board advised the requester of its right to appeal the Board's decision to withhold some information from the records (as described above), the requester did not appeal this decision. Accordingly, **only the information which the Board decided to disclose is under consideration in this order.** The information which the Board decided to sever would only be at issue if the requester had filed an appeal objecting to the severances.

The sole issue in this appeal is whether the information which the Board has decided to disclose is exempt under section 10(1) of the Act.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

This exemption appears in section 10(1) of the Act. The relevant parts of this section state 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;
- (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), (b) or (c), the Board and/or 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), (b) or (c) of section 10(1) will occur.

### **Part One**

The appellant's representations do not refer to this part of the test. However, the appellant's letter to the Board objecting to disclosure at the request stage indicates that, in the appellant's view, the records contain financial and commercial information, and trade secrets.

The Board disagrees with this view. The Board concedes that the dollar amounts in the contracts are financial information, but states that the remaining information it intends to disclose does not fit within any of the categories listed in section 10(1) (and repeated in part one of the test).

I have reviewed the records to assess this issue. In my view, all of the records at issue relate to and define the business relationship between the appellant and the Board. Thus, in a broad sense, the records deal with the buying and selling of services, and I find that they consist of commercial information. In addition, in my view, the dollar amounts in the contracts are financial information.

Accordingly, I find that part one of the test has been met.

## **Part Two**

In order to meet part two of the test, the Board or the appellant must establish: (1) that the information at issue was actually supplied to the Board, and (2) that it was supplied in confidence, either explicitly or implicitly, and the expectation of confidentiality had a reasonable basis.

In this regard, I note that the records at issue are all of a contractual nature, having been executed by the Board and the appellant. These records were not actually supplied to the Board by the appellant. Many previous orders have indicated that, where the records are contracts arrived at as the result of negotiations, only the parts of the records which would reveal information **actually supplied** to an institution could meet the first requirement under part two of the test, as outlined above.

In its representations, the appellant focuses on only one aspect of the information at issue, namely the total contract price. Given that the original contract prices in Records 1 and 4 were arrived at by means of the tendering process, I am prepared to accept that they were, in fact, supplied to the Board by the appellant.

However, I have not been presented with any evidence to indicate that the contract prices in Records 2 or 3 were the result of a tendering process or otherwise supplied to the Board. Record 2 was executed during the term of the contract set out in Record 1, and simply amends the contract price in Record 1. Record 3 is an extension of the contract set out in Record 1. The circumstances surrounding Records 2 and 3 are consistent with a negotiated price, rather than a price supplied by the appellant and accepted with no changes by the Board.

To summarize, I have not been provided with any information to support the view that the prices listed in Records 2 or 3, or any of the other information at issue in the records generally, were actually supplied to the Board. I find that the contract prices in Records 1 and 4 were "supplied" to the Board, but such a finding with respect to the other information at issue has not been substantiated. Therefore the other information at issue has not met part two of the test.

I will now consider whether the contract prices in Records 1 and 4 were supplied “in confidence”.

The appellant’s representations merely state that this information was “given by our client in confidence”. In the appellant’s letter to the Board indicating opposition to disclosure at the request stage, the appellant asserts that the tender package was supplied to the Board explicitly in confidence because it was delivered in an envelope marked “confidential”. In this context, the appellant also asserts that “[a] sealed tender by implication is an invitation for a confidential bid rather than an auction style tender ...”.

The Board disputes this view. It refers to the following statement in the Board’s Policy on the Purchase of Goods and Services:

Information will be collected and used in accordance with the [Act] ... The Board may find it necessary to release information in the tender form which has been supplied in confidence.

The Board also states that its long-standing practice is “to announce the name of the winning tender **as well as the dollar amount**”. (emphasis added)

The Board also indicates that the practice of disclosing the name of the winning bidder and the total contract price is not unique to the Board; rather, this is the practice for public sector contracts with the construction and caretaking trades in general.

Under the circumstances, it appears that the appellant may well have submitted its bids with an expectation of confidentiality regarding the total contract prices which are revealed by Records 1 and 4. However, given the Board’s established practice of disclosing this information, and the general practice that such information will be disclosed in public sector contracts with the caretaking trade (and I expressly accept the Board’s submissions in that regard), I find that such an expectation, if it existed, did not have a reasonable basis.

Therefore, I find that part two of the test has not been met with regard to the contract prices in Records 1 and 4. I have already found that part two of the test has not been met for the other information at issue. Therefore, none of the information at issue has met part two of the test. Since it is necessary to satisfy **all three parts** of the test in order to qualify for exemption under section 10(1), I find that the information at issue is not exempt under this section.

Under these circumstances, it is not necessary for me to consider whether part three of the test has been met. For this reason, I will not address the appellant’s submissions arguing that his competitive position would be prejudiced by disclosure, which relate to part three of the test.

## **ORDER:**

1. I order the Board to disclose Records 2 and 3, in their entirety, to the requester 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.

2. I order the Board to disclose Records 1 and 4 to the requester, with the exception of the information it decided to withhold in its original decision, 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. The information which the Board originally decided to withhold consists of the timing of payments, which appears on page 2 of both documents, and the appellant's address, which appears on page 3 of both documents.
3. In order to verify compliance with the terms of this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 1 and 2.

Original signed by: \_\_\_\_\_  
John Higgins  
Inquiry Officer

\_\_\_\_\_ December 8, 1995