



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

ORDER M-772

Appeal M_9500655

Toronto Transit Commission



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>

BACKGROUND:

The Greenwood Yard car house is responsible for the complete running maintenance of the Toronto Transit Commission's (TTC) entire Bloor-Danforth subway fleet of over 300 vehicles. The TTC issued tenders and awarded contracts for the design and construction of additional hoist and pit workstations and other improvements to the yard which will, upon completion, enable the TTC to carry out inspections and repairs for these vehicles in a more efficient manner.

The contract documents for Contract GR1-1 consist of the drawings and specifications for the Greenwood project, and were prepared for the TTC by a design consultant (retained through a previous tender). The design consultant, as part of its investigation during the design process, identified two hoists as acceptable for the Greenwood project and listed the two hoist suppliers/manufacturers in the specifications. The design consultant is also responsible for overseeing design compliance during construction, in conjunction with TTC staff, to ensure that the product specified by the design consultant is the product which is supplied/installed. The contract specified that full compliance with the design specifications was a pre-condition to the award of the contract.

The construction contract was tendered by the TTC and awarded to a company which had selected one of the two acceptable manufacturers listed in the contract documents to be the supplier of the hoists. The construction contract has been transferred to another contractor, which has kept the same hoist supplier/manufacturer.

NATURE OF THE APPEAL:

The TTC has received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for copies of shop drawings, stress calculations and certain correspondence relative to the hoist and lift equipment supplied under Contract GR1-1. The request was made by the hoist supplier/manufacturer listed in the contract documents but not selected by the construction contractor.

The TTC notified the other supplier/manufacturer and the construction contractor of the request, asking them for submissions regarding disclosure of the records. Both companies objected to disclosure, and the TTC denied access to the records under the following exemption:

- third party information - section 10(1)

The hoist supplier/manufacturer which requested the information appealed the TTC's decision to deny access and claimed that there exists a compelling public interest in disclosure of the records. The letter of appeal indicated that it is believed that there are serious public safety implications and a potential defrauding of the public.

A Notice of Inquiry was sent to the appellant and the TTC. This notice was also sent to the construction contractor, the hoist supplier/manufacturer it selected and the design consultant. Representations have been received from all of the parties.

DISCUSSION:

THIRD PARTY INFORMATION

The TTC, the supplier/manufacturer and the contractor rely on section 10(1)(a) of the Act to exempt the records. This section reads:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

For a record to qualify for exemption under section 10(1)(a), the TTC and/or the supplier/manufacturer and/or the contractor 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) of section 10(1) will occur.

Part One

The supplier/manufacturer, the contractor and the TTC submit that the information contained in the records is a trade secret and technical and commercial information. The appellant does not address this aspect of the test in his representations.

“Technical information” is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing (Order P-454).

The records at issue consist of schematic drawings, stress calculations, and correspondence which reflects the design consultant’s review of the drawings submitted by the supplier/manufacturer and the contractor. In my view, all of this information qualifies as technical information, and the first part of the test has been met.

Part Two

The drawings and stress calculations were submitted to the TTC by the supplier/manufacture and the contractor pursuant to the terms of the contract. I am satisfied that this information was supplied to the TTC.

With regard to the correspondence which reflects the design consultant's review of the drawings, these records were actually supplied to the TTC by the design consultant, who has consented to their disclosure. The TTC indicates that, given that the party which created the records has consented to their disclosure, this correspondence should be disclosed to the appellant.

The supplier/manufacture and the contractor, however, object to the disclosure of the correspondence. They submit that its disclosure would enable the appellant to draw accurate inferences about information contained in the drawings which they supplied. In other words, the supplier/manufacture and the contractor submit that disclosing the technical information contained in the correspondence would reveal technical information contained in the drawings.

Having reviewed the records, I am satisfied that while the disclosure of the correspondence would not enable the appellant to reconstruct the drawings, such disclosure would reveal certain technical information contained in the drawings submitted by the supplier/manufacture and the contractor.

The TTC submits that the records were submitted in confidence. As part of its representations, the TTC has provided a copy of its tender policy for publicly opened bids. The policy indicates that only the identity of the tenderers and the "(total) tendered prices(s) submitted by each" are to be revealed. All other information is retained as confidential.

The appellant maintains that the tenders were not provided in confidence to the TTC. In support of this position, he refers to Article 112 of the instructions to tenderers which provides:

A Tender submitted to the Commission shall become the property of the Commission and is therefore subject to the provisions of the Municipal Freedom of Information and Protection of Privacy Act, 1989. Tenderers are encouraged to familiarize themselves with the provisions of this Act.

The appellant submits that this means that the TTC has unrestricted ownership of the information, and that the contract implicitly and explicitly excludes the confidential submission of information.

Based on the wording of this provision and the submissions of the TTC, I cannot accept this interpretation. In my view, this paragraph simply means that because the tender documents become the property of the TTC, they are records within the custody or control of the institution within the meaning of section 4(1) and are thus subject to a request under the Act. This does not mean that they will automatically be disclosed.

Based on the evidence before me, I am satisfied that the information was supplied to the TTC implicitly in confidence, and the second part of the test has been met.

Part Three

The supplier/manufacturer and the contractor submit that the information contained in the records was submitted to the TTC to verify that the equipment being proposed and supplied met the specifications of the contract. They argue that the records contain important and proprietary information concerning the design and operation of the hoist equipment. They submit that disclosure would have a devastating effect on the supplier/manufacturer both financially and commercially, and would cause serious and irreparable damage to it and the way it conducts business. The supplier/manufacturer of the equipment states that the technology detailed in the records belongs to the supplier/manufacturer and has taken a great deal of time and money to develop.

The TTC supports the representations of the supplier/manufacturer and the contractor, and indicates that the appellant could, by its actions, eliminate the supplier/manufacturer from the marketplace. It is the TTC's view that the information contained in the records is proprietary and that, in the hands of a competitor, the records could adversely and unfairly affect the supplier/manufacturer's position in the marketplace.

I find these submissions convincing, and I am satisfied that the prospect of disclosure of the record gives rise to a reasonable expectation of significant prejudice to the competitive position of the supplier/manufacturer. Accordingly, the third part of the test has been met, and section 10(1)(a) applies.

PUBLIC INTEREST IN DISCLOSURE

Two requirements must be satisfied in order to invoke the application of the so-called "public interest override" contained in section 16: there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 24).

The appellant indicates that it is his obligation under the Professional Engineers Act to express his professional opinion that equipment components supplied from France and using European design standards, as would be the case with the supplier/manufacturer selected under this contract, are not in compliance with the TTC's specifications for this equipment. The appellant submits that the following concerns form a compelling public interest in the disclosure of the records which clearly outweighs the purpose of the exemption:

- operation of this equipment under the assumption that the specifications have been met while using non-conforming equipment will lead to a serious public safety hazard,
- a violation of the Professional Engineers Act may exist
- the TTC and the public may be defrauded by paying good value for equipment that does not comply with the specifications required.

The supplier/manufacturer and the contractor submit that the reason the TTC requested the information originally was to review it to address the specific public interest claimed by the appellant. These parties indicate that TTC personnel and their professional consultants have reviewed in detail the considerable volume of drawings and other information submitted for approval, and that supplementary drawings and calculations were provided in response to questions from the TTC. In their opinion, the public interest has been well served and protected by the TTC's own exhaustive review and approval process, and that no further public interest would be served by disclosing the records to a competitor.

The TTC submits that the design components proposed for the contract are inspected frequently and on a number of levels. Also, by reviewing the responsive records, it can be seen that they contain stamps which reveal a pattern of inspection/reporting and evaluative testing where quality control questions arose. In addition, the services of the design consultant were procured to ensure that all designs met the specifications stipulated in the contract. The TTC has provided correspondence which supports this aspect of their representations.

The TTC indicates that since the contract was awarded, the appellant has received various communications indicating that the TTC will ensure that the equipment is in compliance with the contract specifications, including a letter from the TTC's General Manager - Engineering and Construction. The Chairman of the Municipality of Metropolitan Toronto has also provided his assurance to the appellant that the TTC has committed not to accept an alternative supplier of equipment unless it meets the terms and conditions of the technical specification and the ultimate needs of the TTC. A former Minister of Transportation also wrote to the appellant indicating that he had reviewed the matter with the TTC and had been informed that the selected contractor will be contractually obligated to ensure that they, and all of their suppliers and subcontractors, adhere to the specified terms of the tender documents and any appropriate federal or provincial requirements. The former Minister and his successor indicated that Ministry staff would continue to monitor the situation to ensure that the conditions are satisfied.

Based on the evidence before me I find that, in the circumstances of this particular appeal, the appellant has not demonstrated that there is a **compelling** public interest in disclosure, which **clearly** outweighs the **purpose** of the exemption. Accordingly, I find that section 16 of the Act does not apply.

ORDER:

I uphold the TTC's decision not to disclose the records.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ May 15, 1996