



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

ORDER M-836

Appeal M_9600116

Municipality of Metropolitan Toronto



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:

A request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) was submitted to the Municipality of Metropolitan Toronto (the Municipality) by counsel for another municipality (the appellant). The request was for all records relating to a proposal submitted jointly by two named companies (the third party) in response to a request for proposals (an RFP) issued by the Municipality for the disposal of residual solid waste.

The Municipality located records responsive to the request. The Municipality notified the third party pursuant to section 21 of the Act, and requested comments on disclosure of the records. The third party did not object to disclosure of most of the information contained in its proposal, but objected to disclosure of the information contained in the attachments to Parts B and C of the proposal.

Following receipt of the third party's representations, the Municipality granted access to the majority of the records, and denied access to the remainder on the basis of section 10(1) of the Act (third party information). The appellant appealed this decision.

During mediation, the appellant confirmed that, except for pages 77 - 82 of the records, it was pursuing access to all of the records. With respect to pages 77 - 82, entitled "Supplemental Confidential Tables", the appellant indicated that it was only interested in the columns which contained information pertaining to the third party.

This office sent a Notice of Inquiry to the Municipality, the appellant and the third party. Representations were received from all three parties.

RECORDS:

The Municipality has withheld from disclosure the following five records in their entirety:

- Supplemental Confidential Table - only the information in columns 1 and 10 are at issue (pages 77 - 82);
- lease between the third party and another named company for land suitable to be used as a Sanitary Landfill site, with two attachments consisting of a site plan and a site capacity form (pages 84 - 99);
- letter dated November 13, 1995 from Chartered Accountants to the Municipality which is attached to financial statements of the third party for the years 1992, 1993 and 1994 (pages 106 - 127);
- letter dated November 13, 1995 from Chartered Accountants to the Municipality pertaining to the third party (page 140);

- Form C.1 - Respondent Capabilities Summary forms (one form completed by each of the two companies involved in the joint submission (pages 141 - 142).

DISCUSSION:

THIRD PARTY INFORMATION

Both the Municipality and the third party rely on section 10(1)(a) to withhold the records from disclosure. This section provides:

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.

In order for the exemption to apply, the Municipality and/or the third party must provide evidence that each of these elements are present in the records at issue.

Type of Information

The Municipality indicates that the records all formed part of the third party's response to a proposal call related to biosolids management for the Municipality. Both the Municipality and the third party submit that the records contain commercial and financial information. The appellant acknowledges that some of the records (in particular, the lease and the financial statements) contain financial information.

In reviewing the records I find that they all contain information which is directly related to the third party's proposal in response to the RFP. As the description of the records above indicates, some of the records contain details of the financial status and/or undertakings of the third party. Other records contain information which refers to this financial information. In considering the content of the records, I find that they all contain commercial and/or financial information.

Supplied in Confidence

In order to satisfy this element of the exemption, the Municipality and/or the third party must show that the information was **supplied** to the Municipality, either implicitly or explicitly **in confidence**.

In its representations, the appellant indicates that it believes that consultants working for the Municipality produced certain documents which describe or analyze the landfill proposal of the third party. The only record which contains this type of information is the Supplemental Confidential Tables (pages 77 - 82) which sets out different scenarios relating to Capacity Options. However, the Municipality states, and I accept, that this record was prepared by the

third party to illustrate the advantages of its proposal in relation to any option the Municipality may select.

In reviewing the records, I am satisfied that pages 77 - 82, 84 - 99 and 141 - 142 were supplied to the Municipality directly by the third party. I am further satisfied that pages 106 - 127 and 140 were provided to the Municipality by the Chartered Accountants on behalf of the third party and were to be used as part of the third party's proposal. As such, I find that these pages were supplied by the third party to the Municipality.

In its representations, the Municipality indicates that it has a history and practice of sealed bids and that all responses to competitive bid processes are received in confidence. A statement included in all RFPs notifies proponents that proposals are received in confidence subject to the disclosure requirements of the Act.

However, the Municipality also states that it encourages companies in the competitive bid process to consent to substantial disclosure of their records in response to an access request, and notes that, in this case, the third party did consent to disclosure of a considerable amount of information relating to methodology, development and operation of a landfill site.

The third party confirms that it submitted the records at issue to the Municipality in confidence. There is nothing on the face of the records to indicate that they were submitted explicitly in confidence. However, I am satisfied that the third party had a reasonable expectation that its submission was to be received by the Municipality in confidence. Therefore, I find that the third party supplied the records to the Municipality implicitly in confidence.

Harms

As I indicated above, the records at issue in this appeal all formed part of the third party's response to a proposal call related to biosolids management for the Municipality. The Municipality advises that the third party was not among those short-listed at the current time, and that a decision has yet to be made on any of the remaining proposals.

The appellant argues that as a result of the elimination of the third party from further consideration in this bid process, disclosure of the information contained in the records could not result in the harm contemplated by section 10(1)(a).

I do not agree. In my view, the wording of section 10(1)(a) does not restrict the competitive position of a party or the contractual or other negotiations to one specific event. Moreover, the fact that a party is no longer a competitor in one bid does not render its commercial and/or financial information of no value in other or future negotiations. Therefore, this fact alone is not sufficient to take the information outside the protection this section is intended to provide.

The appellant also provides some background to its access request, and describes the history of its dealings with the third party. The third party, in turn, outlines its views of the appellant and the appellant's intentions with regard to the requested records. These comments are all made in the context of a pending landfill application that is proceeding to a public hearing.

According to the appellant, the third party is the proponent of an Environmental Assessment for a landfill proposal in a Quarry located within the appellant's boundaries. A hearing regarding this matter has been pending before the Consolidated Hearings Board for more than four years. The appellant indicates that the third party, in responding to the Municipality's RFP, sought to use the proposal for the Quarry as the disposal site in its current bid with the Municipality. The appellant candidly states that it seeks the information contained in the records in order to assist it in understanding the third party's proposal to landfill the Quarry.

With respect to the hearing before the Consolidated Hearings Board, the appellant refers to the production and disclosure of documents during the hearing process, but does not indicate whether these records would be producible as part of this process. Rather, the appellant simply states that the Environmental Protection Act does not contemplate the production and disclosure of documents until late in the hearing process. The third party, on the other hand, states that in its view, the appellant would not have a right to any of the information contained in the records through the hearing process.

The third party states that the appellant has actively opposed its landfill application, and that it would use the information in the records in an attempt to defeat the landfill proposal in the upcoming approvals hearings. In this regard, the third party submits that disclosure of this information would interfere with its application for a landfill approval and therefore, section 10(1)(a) should apply to exempt it from disclosure.

In reviewing the records and the representations of the parties, I am satisfied that the harms envisioned by section 10(1)(a) could reasonably be expected to occur should the information contained in these records be disclosed. Accordingly, I find that the records are properly exempt under section 10(1) of the Act.

ORDER:

I uphold the Municipality's decision.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ September 18, 1996