

ORDER P-1292

Appeal P-9600212

Ontario Insurance Commission



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BACKGROUND:

The Ontario Insurance Commission (the OIC) is responsible for establishing a roster of independent assessment centres called Designated Assessment Centres (DACs). The DACs are authorized to conduct independent assessments about an automobile accident victim's injuries where there is a dispute between the accident victim and his or her insurance company over entitlement to a specific benefit.

The Ministry of Finance, on behalf of the OIC, issued a Request for Tender (RFT) to select an organization to further develop and expand the assessment process, the educational program and network of the DACs and to initiate a system to monitor and evaluate the DACs. In response to the RFT, a named company (the company) submitted a tender on January 26, 1995 which was accepted by the OIC and resulted in a contract being signed between the OIC and the company.

NATURE OF THE APPEAL:

The OIC received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information pertaining to the contract awarded to the company, resulting from the RFT issued by the OIC.

The OIC notified the company of the request pursuant to the affected party notification provisions found in section 28 of the Act. The company responded to this notice, agreeing to the release of some of the information and indicating its objections to the disclosure of the remaining information. The records identified as being responsive to the request consist of the four-page contract with Schedules A and B, together with the actual proposal dated January 26, 1995 which the company submitted to the OIC.

The OIC disclosed the contract and Schedule A, in their entirety, together with part of Schedule B. Access was denied to the remaining portions of Schedule B and the proposal on the basis of the mandatory exemption found in section 17 of the Act. The requester appealed the decision to deny access.

During mediation, the OIC indicated that it had identified additional records, containing the resumes of the project team members, access to which was denied under section 21(1) of the Act. Some of this information is also contained on page 4 of the proposal. The appellant confirmed that he was not seeking access to the personal information of individuals and accordingly, this information (the resumes and the relevant portion of page 4 of the proposal) is not at issue.

This office provided a Notice of Inquiry to the appellant, the company and the OIC. Representations were received from all parties.

RECORDS AT ISSUE

In their representations, the company and the OIC indicate that they are no longer relying on section 17 for the following records: the covering letter from the president of the company, the cover sheet for the proposal, certain parts of the proposal and the questions listed in Appendix 5.2 to the proposal. No other mandatory exemptions apply to this information and no

discretionary exemptions have been claimed by the OIC. Accordingly, I will order this information to be disclosed in the order provisions below.

The OIC has indicated that it is also withdrawing its claim to section 17 for some but not all of the remaining records. However, because the company has not consented to the disclosure of these other records and because section 17 is a mandatory exemption, I will consider its application to all of the remaining records, which include the following:

- (1) RFT cover sheet
- (2) Table of contents
- (3) the remaining parts of the 14-page proposal
- (4) appendices title page
- (5) Appendix 5.1 containing references
- (6) Appendix 5.2 - 13 pages with responses

In addition, the withheld portion of Schedule B is identical to parts of page 7 of the proposal. Therefore, my findings on this information will apply equally to the withheld portion of Schedule B.

PRELIMINARY ISSUE:

The appellant claims that the company is a public agency, funded by the Workers Compensation Board (the WCB) and therefore, the third party exemption in section 17 cannot be used to withhold access to the records.

In his representations, the appellant states that there are concerns regarding the role of the Accident Benefits Advisory Committee (the ABAC). The appellant explains that the ABAC was appointed under section 7 of the Insurance Act and pursuant to section 63(2) of O.Reg. 776/93 may “establish procedures, standards and guidelines that shall be used by designated assessment centres in conducting assessments”. The appellant states that the RFT was not widely advertised as it was not known to ABAC and he is of the view that the OIC may have circumvented its own ABAC. In my view, these concerns are not relevant to the issue raised by the appellant - whether the company is a public agency.

In response to the appellant’s claim, the OIC states that the company is a corporation without share capital, incorporated under the Corporations Act, and is not authorized under any Ontario statute to perform any function on behalf of any ministry or agency, board or commission of the Government of Ontario.

The company confirms the above and clarifies that, while it does receive funding from the WCB, it operates independently of the WCB. The company states that it is not a public agency nor is it an “institution” for the purposes of the Act. With respect to its relationship with the OIC, the company states that it is a vendor of services for which the OIC pays a fee.

I have reviewed the evidence before me and I am satisfied that the company is not a public agency and is not an institution for the purposes of the Act.

DISCUSSION:

Section 17 of the Act states, in part:

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, where 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 this section, the party resisting disclosure, in this case the OIC and/or the company, must satisfy each part of the following:

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 OIC 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) above will occur.

All three components set out above must be met in order for the exemption to apply (Order 36). I will consider each component in turn.

TYPE OF INFORMATION

The company submits that all of the withheld records contain a trade secret or scientific, technical, commercial or financial information for the purposes of section 17 of the Act. The company submits that it has acquired specific and unique criteria for evaluation and assessment of those involved in the provision of rehabilitative services. The company emphasizes that it does not sell a “product” but rather a “service”, through the use of this innovative methodology.

The company submits that some portions of the records contain the allocation of the contract price in five specific areas and contain a personnel cost analysis. The company points out that the records contain both financial and commercial information.

The OIC submits that pages 5-13 of the proposal, part 3.0 of the Table of Contents and the responses to the questions in Appendix 5.2 contain information that qualifies as a trade secret. The OIC states that the records describe the company's basic approach, its work plan, reporting system, costing of processes and methodologies. The OIC goes on to state that the company's knowledge base, experience and skills is unique to it in the monitoring and evaluation of assessment centres and that the information has economic value in this field.

In Order M-29, Commissioner Tom Wright considered the definition of "trade secret" and found that trade secret means information that includes but is not limited to a method, or process contained or embodied in a product, device or mechanism which (1) is or may be used in a trade or business, (2) is not generally known in that trade or business, (3) has economic value from not being generally known and (4) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. I adopt the above definition of "trade secret" for the purposes of this appeal.

I have reviewed the information in the records and I find that part 3.0 of the Table of Contents, pages 5-13 of the proposal and the responses contained in Appendix 5.2 contain information which may be characterized as a "method" as it clearly describes the manner in which the company has proposed to assess the DACs for the OIC. The method is evident in the delivery of the service which is the provision of evaluation and assessment of DACs. Accordingly, I find that this information qualifies as a trade secret for the purpose of section 17(1) of the Act. I also find that some portions of the proposal which I have found to contain a trade secret also contain financial and/or commercial information. In addition, I find that Appendix 5.1 contains names of those that the company has done business with and that the company is relying on as references with respect to the tender. In my view, this information has commercial value and qualifies as commercial information for the purposes of section 17(1) of the Act.

Accordingly, the first component of section 17(1) has been met with respect to part 3.0 of the Table of Contents, pages 5-13 of the proposal, Appendix 5.1 and the responses in Appendix 5.2.

I find that the remaining records, which include the RFT cover sheet, parts 1.0, 2.0, 4.0 and 5.0 of the Table of Contents, pages 1-3 and 14 of the proposal, the appendices title page and the questions listed in Appendix 5.2 do not qualify as containing a trade secret. Nor do they qualify as scientific, technical, financial or commercial or labour relations information according to the definitions established in earlier orders of the Commissioner. As I have indicated previously, in order for a record to be exempt under section 17(1), all three components must be met. Accordingly, I find that the RFT cover sheet, parts 1.0, 2.0, 4.0 and 5.0 of the Table of Contents, pages 1-3 and 14 of the proposal, the appendices title page and the questions listed in Appendix 5.2 are not exempt from disclosure under section 17(1) of the Act and I will not consider them further.

SUPPLIED IN CONFIDENCE

In order to meet the second component of this exemption, the OIC and the company must establish that the information in the records was supplied to the OIC in confidence explicitly or implicitly.

Previous orders of the Commissioner have found that in order to determine 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 (Order M-169).

The company states that the information in the records was supplied to the OIC as part of the proposal tendered in response to the RFT. The company states that this was done implicitly in confidence and explains that since the records contain the methodology for assessing and evaluating DACs, it defeats the express purpose of the exercise if the information is considered to be disclosable to the appellant and therefore to the general public.

The OIC relies on the second paragraph on page 14 of the proposal in which the company states that the information in the records is proprietary information and requests the OIC and/or the Ministry not to disclose any part of the information without the consent of the company.

I am satisfied that the information in the records was supplied by the company to the OIC implicitly and explicitly in confidence. I find that the second component of the section 17 exemption has been met.

HARMS

In order to satisfy the third component of the exemption, the company and/or the OIC must demonstrate that disclosure of the information in the records could reasonably be expected to result in one of the harms specified in (a), (b) or (c) of section 17(1).

The company has made submissions on all three harms contemplated by this section.

With respect to sections 17(1)(a) and (c), the company submits that the information at issue contains the methodology for the services that the company provides to rehabilitation provider organizations. The company points out that the records contain the costing, project components and timing of the methodology employed by the company and submits that disclosure of this information would result in significant prejudice to its competitive position. Disclosure would also interfere significantly with the contractual and other negotiations with other institutions as the company would be reluctant to make such extensive information available in any future tender, bid or proposal for the provision of such services. As a result, this would result in similar information no longer being supplied to the OIC and the OIC would not be able to make as informed a decision as possible (section 17(1)(b)).

The OIC submits that disclosure of the records could result in the harms identified in sections 17(1)(a) and (c). The OIC states that the company is a consultant in the business of offering workplace health research and development, education and assessment services. The records at issue contain information on how the company proposes to deliver these services to the OIC and disclosure of this would allow a competitor to use the information to develop competing proposals in the future. In addition, a competitor could use the pricing of components to underbid the company in other transactions. The OIC submits that disclosure of the information in the records would result in an undue gain to the company's competitors who would acquire the research and knowledge base of the company.

The appellant submits that disclosure of the records would not result in any of the harms outlined in section 17(1) because the company was not created to be a competitive organization and therefore, does not have a competitive position. The company is not a public agency and I do not agree.

I have carefully reviewed the information in the records together with the representations of the parties. I find that disclosure of the records could reasonably be expected to both prejudice significantly the competitive position of the company under section 17(1)(a) and result in undue loss to the company under section 17(1)(c). On this basis, I find that the third component of the section 17(1) exemption has been satisfied and the records are exempt from disclosure under section 17(1) of the Act.

In summary, I have found that part 3.0 of the Table of Contents, pages 5-13 of the proposal, Appendix 5.1 and the responses in Appendix 5.2 are exempt under section 17(1) of the Act. I have highlighted this information on the copy of the records provided to the OIC's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions should **not** be disclosed to the appellant.

ORDER:

1. I uphold the decision of the OIC to withhold access to the highlighted parts of the records, a copy of which is provided to the OIC's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the OIC to disclose the remaining (non-highlighted) portions of the records to the appellant by sending him a copy by **December 19, 1996** but not before **December 16, 1996**.
3. To verify compliance with the terms of this order, I reserve the right to require the OIC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

November 14, 1996