



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

ORDER P-1322

Appeal P_9600231
[Reconsideration]

Ontario Clean Water Agency



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NATURE OF THE APPEAL:

On September 26, 1996, I issued Order P-1266, which addressed a decision made by the Ontario Clean Water Agency (the Agency) to grant access to certain pages of tender documents submitted by a named construction firm in respect of the Town of Wasaga Beach Water Works Project No. 53-0057-01 and Sewage Works Project No. 52-0067-01. The requester also asked for and was granted access to all bonding documents provided by the firm in connection with the two tenders including, but not limited to, the Master Surety Agreement. The named construction firm appealed the Agency's decision to disclose the records under the Freedom of Information and Protection of Privacy Act (the Act).

In Order P-1266, I made the following statements with respect to this information:

In light of the previous production of these records [in the context of an Ontario Labour Relations Board hearing] and the lack of limitation on the responding party's use or disclosure of them, I find that the appellant has failed to establish that the prospect of disclosure of these already available records would give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of section 17(1) will occur, and I find that the third part of the test has not been satisfied. Therefore, the records do not qualify for exemption under section 17(1) of the Act.

The construction firm asked this office to reconsider Order P-1266 as the prior production of the records was on the strict understanding that it would remain confidential and only be used for the matter before the Ontario Labour Relations Board.

I invited the original requester, the construction firm and the Agency to make submissions as to whether I should reconsider the order, which would entail conducting a second inquiry and issuing a new order to supersede Order P-1266. In the interests of expediency, I also invited the parties to make submissions on the substantive issue of the application of section 17(1) of the Act. In response, I received representations from the original requester and the construction firm. As was the case in the original inquiry, the Agency did not respond.

I have decided to grant the request for reconsideration and this order, accordingly, will supersede Order P-1266.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the construction firm 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 Agency 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 17(1) will occur.

All three parts of the above test must be met in order for the exemption to apply.

Part 1

Having reviewed the records, I find that they contain commercial and financial information, and the first part of the test has been met.

The construction firm also claims that the information with respect to monetary amounts and the allocation of money, personnel and equipment to particular projects is a trade secret referable to the firm's bidding practices and the calculation of contract amounts. In Order M-29, Commissioner Tom Wright adopted the following definition contained in the Report of the Institute of Law Research and Reform, Edmonton, Alberta and a Federal-Provincial Working Party entitled Trade Secrets (Report 46, July 1986) for the purposes of interpreting this term in section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act, which is the equivalent of section 17(1) of the Act. The definition is as follows:

“trade secret” means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The construction firm has not substantiated claim that the information contained in the records consists of trade secrets. I have reviewed the records, and I am not satisfied that the information therein is not generally known in the construction business or is the subject of efforts that are reasonable in the circumstances to maintain its secrecy. Accordingly, I find that the information contained in the records does not qualify as a trade secret.

Part 2

The second part of the test has two elements. First, the information must have been supplied to the Agency, and second, the information must have been supplied in confidence.

I am satisfied that the information was supplied by the construction firm to the Agency. In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the construction firm at the time the information was provided. It is not sufficient that the construction firm had an expectation of confidentiality with respect to the information supplied to the Agency. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

The construction firm stresses that the information was supplied in confidence implicitly to the Agency. The construction firm has not supported this assertion with evidence which would establish an objective basis for an expectation of confidentiality, such as could be found in correspondence with the Agency or a copy of the call for tender. Despite the fact that the Agency's decision was to disclose the record, the construction firm states that because the requested records are not available "over the counter", this indicates that the Agency is aware of the confidential nature of the records requested.

The requester submits that it is not reasonable for the construction firm to have expected the information in the records would remain confidential after the contract had been awarded. The requester also indicates that the Agency freely disclosed the requested information over the telephone before the request was submitted. The requester submits that this fact suggests that the Agency obviously did not perceive a need for confidentiality after the awarding of the contract.

As stated above, the burden of establishing each part of the test for exemption under section 17(1) is on the party resisting disclosure, in this case the construction firm. In the circumstances of this appeal, I find that the construction firm has not provided evidence sufficient to establish a reasonable expectation of confidentiality respecting the records in the hands of the Agency, and the second part of the test has not been met.

Part 3

Other than asserting that the provisions of sections 17(1)(a) and (c) of the Act apply and that the information is not already available to the requester or to the general public, the only submission the construction firm makes respecting the third part of the test is:

The purpose for which the records sought would be requested is the disclosure of information with respect to individuals in the employ of [the construction firm], or the disclosure of information with respect to monetary amounts and the allocation of money, personnel and equipment to a particular project which is a trade secret referable to the bidding practices of [the construction firm].

I have found that the information does not qualify as a trade secret and, in my view, the construction firm's submissions are not sufficient to establish a reasonable expectation of harm connected to the disclosure of the records. The construction firm has not provided any

explanation of the type of harm expected or any information regarding the reasonableness of this expectation. It has not explained how or why prejudice to their competitive position or interference with their negotiations would be significant, or why any resulting loss or gain would be undue. Accordingly, I find that the third part of the test has not been met, and section 17(1) does not apply.

ORDER:

1. I uphold the Agency's decision to disclose the records to the requester.
2. I order the Agency to disclose the records to the requester by sending a copy by **January 24, 1997**, but not earlier than **January 20, 1997**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Agency to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 2.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ December 20, 1996