



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

# ORDER P-1353

Appeal P\_9600421

Ministry of Transportation



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:**

The Ministry of Transportation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to contracts entered into by a ministry of Ontario, Crown Corporation or Board of Management with a named company relating to a project known generally as ServiceOntario, and more specifically, as ServiceOntario Kiosk. The requester, an unsuccessful bidder, sought access to all contracts and amendments together with all subcontracts and amendments and all invitations/requests for proposals related to the supply of equipment and services for the named project.

The Ministry located one responsive record and determined that the interests of a third party (the affected party) would be affected by disclosure of the record. Pursuant to section 28 of the Act, the Ministry notified the affected party who objected to the release of certain parts of the record. Accordingly, the Ministry issued its decision to the requester, granting partial access to the record and denying access to the remainder, based on the exemption in section 17(1) of the Act. The requester appealed the decision to deny access and claimed that a public interest exists in the disclosure of the record (section 23).

The record at issue consists of the withheld portions of an agreement with 13 schedules between the affected party and the Ministry.

This office provided a Notice of Inquiry to the appellant, the Ministry and the affected party. Representations were received from all parties.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

Sections 17(1)(a), (b) and (c) of the Act state:

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 sections 17(1)(a), (b) or (c), the party resisting disclosure, in this case, the Ministry and/or the affected party must satisfy each of the following three requirements:

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 Ministry 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.

### **TYPE OF INFORMATION**

I have reviewed the parts of the record withheld by the Ministry and I find that they relate to the provision of services which are the subject of the agreement between the Ministry and the affected party. In particular, the record describes the particular kiosk system and equipment specifications to be provided by the affected party and sets out the financial and other obligations of each party. The record also describes the security measures designed to protect the kiosk system and the fee structure and pricing arrangement unique to the affected party's agreement with the Ministry. I find that this information can be properly characterized as technical, financial and/or commercial for the purposes of section 17(1) of the Act, and the first requirement has been satisfied.

### **SUPPLIED IN CONFIDENCE**

The affected party submits that the record was supplied to the Ministry both implicitly and explicitly in confidence. The affected party states that the record carries a statement which specifically restricts duplication, use and disclosure of the information. The affected party points out that the record is also stamped "CONFIDENTIAL", which adds to the fact that it was supplied to the Ministry explicitly in confidence.

The Ministry submits that the record was supplied to it by the affected party both implicitly and explicitly in confidence. The Ministry states that the documentation submitted by the affected party was clearly marked as confidential and the Ministry itself has a longstanding policy of treating such records as confidential.

I have reviewed the record and I find that it was supplied to the Ministry by the affected party explicitly and implicitly in confidence. I find that the affected party had a reasonable expectation that the record would be treated as confidential. I find that the second requirement has been met.

### **HARMS**

The affected party submits that disclosure of the information in the record would interfere significantly with its contractual negotiations with other customers and significantly prejudice its competitive position. The affected party points out that the terms of the contract with the Ministry have been structured to meet the Ministry's specific needs and disclosure of this information would result in other customers expecting the same terms and concessions. The affected party argues that disclosure of the fee structure and pricing arrangement would significantly prejudice its competitive position in the marketplace. The affected party adds that the record contains technical information and equipment specifications about the kiosk system and the security system, and that disclosure of this information could reasonably be expected to result in an undue loss to the affected party and undue gain to its competitors.

The appellant submits that since the contract has been tailored to meet the Ministry's specific needs, it is unlikely that there would be a market for it and therefore, disclosure could not reasonably be expected to result in any harm to the affected party within the marketplace.

I have reviewed the record together with the representations of the parties and I find that disclosure of the record could reasonably be expected to prejudice significantly the competitive position of the affected party (section 17(1)(a)) and result in undue loss or gain (section 17(1)(c)). All three components set out above have been met and I find that the record is properly exempt under section 17(1) of the Act.

## **PUBLIC INTEREST**

The appellant submits that it is in the public interest that the best possible deal be obtained for government contracts, and this can only be achieved when the terms of such contracts are made available to the public. On this basis, it is the appellant's position that a public interest exists in disclosure of the record.

Section 23 of the Act states as follows:

An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling **public** interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

I have carefully considered the representations of the parties. While I agree with the appellant it is in the public interest that the government be able to negotiate and obtain the "best possible deal", I find that disclosure of the information in the record would not achieve this result. I find that the interest in disclosure of the withheld information is a private interest and section 23 does not apply in the circumstances of this appeal.

## **ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
Mumtaz Jiwan  
Inquiry Officer

\_\_\_\_\_ February 27, 1997