



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

ORDER P-1611

Appeal P_9800121

Management Board Secretariat



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NATURE OF THE APPEAL:

The appellant submitted a request to Management Board Secretariat (MBS) under the Freedom of Information and Protection of Privacy Act (the Act) for copies of two contracts between the Ontario Realty Corporation (ORC) and a named property management company (the company). The contracts were for the provision of property management services for a Ministry of Transportation complex in St. Catharines and a Ministry of Agriculture and Food complex in Guelph.

MBS located records responsive to the request and determined that the interests of the company would be affected by disclosure of the information. MBS notified the company pursuant to section 28 of the Act, and requested representations with respect to release of the contracts. The company objected to the release of the contracts to the appellant. MBS then denied access to the contracts based on the exemptions in sections 17(1)(a) and (c) of the Act. The appellant appealed the denial of access.

This office sent a Notice of Inquiry to the appellant, the company and MBS. Representations were received from the company and MBS. The appellant indicated that it wished to rely on submissions made in its letter of appeal.

RECORDS:

The records at issue in this appeal consist of two contracts between the ORC and the company for the Ministry of Transportation complex in St. Catharines and the Ministry of Agriculture and Food complex in Guelph.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 17(1)(a) or (c), MBS and/or the company 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), (b) or (c) of section 17(1) will occur.

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

Type of Information

The company submits that the information in the records relates to its proposal for the provision of property management services and thus qualifies as commercial information. Moreover, the company advises that the records also contain financial information such as its fees, budgets and information pertaining to its financial backing.

Commercial information is information which relates to the buying, selling or exchange of merchandise or services (Orders 47, 179 and P-318). Financial information is information pertaining to finance or money matters (Order 47, P-607).

I am satisfied that the records at issue contain both commercial and financial information, thus meeting the first part of the test.

Supplied in Confidence

In order to meet the second part of the test, it must be established that the information was **supplied** to MBS and that it was supplied **in confidence**, either implicitly or explicitly.

Previous orders have addressed the question of whether the information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the third party. Since the information in an agreement is typically the product of a negotiation process between the institution and the third party, that information will not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act.

MBS submits that the records contain the unique methods and strategies on property management services which were specifically developed for the ORC by the company. MBS indicates that the agreements contain the same information that was submitted by the company to the ORC in its proposals. In this regard, MBS relies on Order P-807, which it indicates is analogous to the situation in the current appeal. In Order P-807, it was found that disclosure of the terms of a "single source" agreement would disclose the same information that was provided in confidence by the third party.

The company indicates that the fee and proposal submitted by it to the ORC was accepted. I note that the title of Record 1 indicates that the document is the company's proposal. The title has been crossed out and replaced by the word "Agreement". Record 2 is not similarly marked, however, it is similar in nature to Record 1.

The appellant's representations do not address this part of the section 17(1) test.

I have carefully reviewed the records and the representations of MBS and the company. I accept that the information contained in the company's proposal which was provided to MBS in the context of a commercial bidding process is one and the same as that incorporated into the agreements. Therefore, I find that the information was supplied to MBS.

With respect to the company's expectations of confidentiality, it states that it had a reasonably held expectation of confidentiality in the bidding process. Moreover, the company submits that its proposals were provided explicitly in confidence. In this regard, the company points out the confidentiality clause noted on the title page of each proposal, which reads:

The information contained in this document is proprietary to [the company]. Use or disclosure of this information except for the purposes of evaluation, is prohibited without the written permission of [the company]. This information is copyrighted ...

MBS does not indicate what its policy is regarding the disclosure of information obtained by it through the tender process. The company acknowledges, in the records themselves, that the records are subject to the Act, although it is also indicated in the records that this shall not be construed as a waiver of the company's right to object to disclosure.

Based on the submissions of the company, I am satisfied that it submitted its proposals to MBS explicitly in confidence. Furthermore, I find that its expectations of confidentiality were reasonable.

Harms

MBS submits that the information contained in the records contains unique methods on property management services specifically developed for the ORC and that these methods are not generally known in the industry. MBS takes the position that release of the records could result in competitors using the information to develop competing business strategies or to enhance or design competing systems at considerably reduced expense.

The company indicates that the financial information contained in the records reveals its future budgeted costs for the operation and maintenance of services, including the breakdown into various components and areas where it proposes to realize savings. The company submits that disclosure of this information would enable competitors to underbid on comparable contracts.

Further, the company asserts that the information in the records reveals the proprietary processes and techniques which have been developed by it over years of experience in the field. The company submits that this experience is reflected in its approach, corporate support, staffing and subcontracting structures. Additionally, the company argues that disclosure of this information would reveal its business strategies. The company submits that a competitor could use this information for its benefit in obtaining contracts for the supply of comparable services to the company's prejudice.

Finally, the company indicates that the records reveal its budgeted amounts for wages and benefits and the percentage increases of those amounts over the term of each contract. The company submits that disclosure of forecasted financial information could reasonably be expected to cause significant interference with the contractual and other negotiations with its employees and subcontractors.

The appellant indicates that it is not a competitor of the company. It believes that the only reason one of the enumerated harms in section 17(1) could be realized would be because of irregularities in the contract or contract monitoring process.

Based on the submissions of the parties, I am satisfied that, with one exception, disclosure of the information in the records could reasonably be expected to result in significant prejudice to the competitive position of the company, and could reasonably be expected to interfere significantly with the contractual and other negotiations between the company and its employees and subcontractors (section 17(1)(a)).

With respect to the excepted part of the record, I note that the first section of Record 1 (Instructions to Proponents) contains a copy of the Request for Proposals. In my view, there is no reasonable expectation of any harm which could result from disclosure of this portion of the record. Accordingly, it is not exempt under section 17(1). As all three parts of the test have been met for the remainder of Record 1 and Record 2, they are exempt under section 17(1).

ORDER:

1. I order MBS to disclose the portions of Record 1 under the heading "Instructions to Proponents" to the appellant by providing it with a copy of this portion of the record by **October 15, 1998** but not earlier than **October 12, 1998**.
2. I uphold MBS's decision to withhold the remaining parts of Record 1 and Record 2.
3. In order to verify compliance with the provisions of this order, I reserve the right to require MBS to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Adjudicator

September 10, 1998