



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER M-1150

Appeal MA-980130-1

Dufferin-Peel Catholic District School Board



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NATURE OF THE APPEAL:

The Dufferin-Peel Catholic District School Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to records relating to the award of contracts for the construction of a number of schools by the Board. The requester amended his request to include only “the point score sheets for each of the invited and non-invited tenderers” and the “lists with all firms responding to the invitation for pre-qualification”.

The Board located 326 pages of records, consisting of 304 pages of pre-qualification information on tenderers for 17 school construction projects (Records A to Q) and 22 pages consisting of lists of contractors who did, and did not, pre-qualify (Record R). The Board denied access to all of the records, in their entirety, claiming the application of the following exemptions in the Act:

- third party information - section 10(1)
- economic and other interests - sections 11(c) and (d)

The requester, now the appellant, appealed the Board's decision.

A Notice of Inquiry was provided to the Board and the appellant. Representations were received from the Board only.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(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, if 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 10(1)(a), (b) or (c) the Board 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 Board 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 subsection 10(1) will occur.

[Orders 36, M-29 and M-37]

Part One of the Test

Types of Information

The Board submits that the disclosure of the information contained in Section A of the documents which comprise Records A to Q would reveal financial and commercial information about each of the contractors listed therein. This information includes the contractor's WCB or WSIB rating, financial references, information relating to bonding and insurance for each firm and the value and size of other projects completed by the contractor.

The Board also indicates that the information in Section B of Records A to Q "could be considered a trade secret and would be of a technical and analytical nature." The Board has not made any submissions with respect to the lists of contractors which are contained in the 22 pages which comprise Record R.

Previous orders of the Commissioner's office have defined the term "commercial information" to mean information which relates to the buying, selling or exchange of merchandise or services (Orders 47, 179 and P-318).

In Order 47, former Commissioner Sidney Linden defined the term "financial information" as follows:

The term refers to information relating to money and its use or distribution. For example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs.

In Order M-29, former Commissioner Tom Wright considered the definition of "trade secret". He found that:

"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,
[IPC Order M-1150/September 22,1998]

- (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.

In Order P-454, former Assistant Commissioner Irwin Glasberg established the following definition of the term “technical information” for the purposes of the third party information exemption in the provincial Act. He found that:

In my view, technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

Based upon the definitions referred to above, I am of the view that the information which is contained in section A of Records A to Q qualifies as “commercial information” for the purposes of section 10(1). This information relates directly to the bonding and insurance arrangements of each of the contractors, their WCB or WSIB ratings and the value of other projects in which each has previously been involved. I find that this information relates to the buying and selling of the construction services provided by the firms which have indicated an interest in pre-qualifying for projects with the Board.

In addition, I find that the information in Section A of Records A to Q qualifies as “financial information” within the meaning of section 10(1). The information relates to the financial situation of each of the contractors and their ability to obtain insurance and the necessary bonds to complete the tendered projects. In my view, this type of information falls within the ambit of the definition of “financial information” in section 10(1).

The first part of the section 10(1) test has, accordingly, been satisfied with respect to the information in Section A of Records A to Q.

I cannot agree, however, that the information in Section B of Records A to Q can properly be described as “commercial” or “technical” information or a “trade secret” within the meaning of section 10(1). In some cases, these forms consist of a series of scores awarded to each contractor on a number of enumerated criteria. Many of the forms do not contain any scores, particularly with respect to those firms which did not provide the information required in Section A of these records. I find that the scores listed in Section B of Records A to Q and the comments which accompany some of them do not fall within the defined categories

of information which are protected under section 10(1). As such, this information cannot be exempt from disclosure under section 10(1).

Record R consists of 22 pages of lists containing only the names of contractors who did, or did not, pre-qualify for selection to bid on Board projects. No other information relating to these firms is included in this record. Accordingly, I find that the information contained in the 22 pages which comprise Record R does not qualify as either commercial, financial or technical information, nor is it properly described as a “trade secret”, for the purposes of section 10(1). As all three parts of the test under section 10(1) must be satisfied, Record R is not exempt from disclosure under this exemption.

Part Two of the Test

Supplied In Confidence

In order to meet the second part of the test, the Board must establish that the information in the record was supplied to it in confidence, either explicitly or implicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Board (Orders P-203, P-388 and P-393).

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 Board submits that the information in Section A of Records A to Q was provided to it with an implicit expectation of confidentiality. It argues that:

There is a high degree of confidence in the Board’s process of selecting pre-qualified contractors to tender on projects, which are funded by the taxpayers.

...

The Board treats all submissions for pre-qualification and each of those contractors’ criteria, as confidential, and is never disclosed at any stage of the process. As well, the details of the Board’s pre-qualification process, or the names of contractors not pre-qualified, are never disclosed at any public meetings.

...

Contractors have an expectation that the information provided by them will be viewed in a confidential manner and not to be released or distributed.

Based on my review of the information contained in Section A of Records A to Q themselves and the submissions of the Board, I am satisfied that this information was supplied to the Board by each of the contractors seeking pre-qualification within the meaning of the section 10(1) exemption. Much of the information also relates to the financial affairs of each of the contractors involved and refers to their past

commercial activities. In my view, this information was submitted with a reasonably-held expectation that it would be treated in a confidential manner by the Board.

I find that part two of the section 10(1) test has been met with respect to the information in Section A of Records A to Q.

Part Three of the Test

Harms

In order to meet the third part of the test, the Board must demonstrate that one or more of the harms enumerated in sections 10(1)(a), (b) or (c) could reasonably be expected to result from the disclosure of the information in Section A of Records A to Q.

The Board submits that contractors will restrict the submission of documentation or opt not to provide the information requested in the pre-qualification process if the information they provide is to be disclosed to their competitors. The Board adds that this would limit the pre-qualification review and eliminate the competitive process. This argument appears to refer to the circumstances described in section 10(1)(b). In my view, it would not be in the interests of contractors to decline to provide the Board with the information which it requires to pre-qualify for a particular construction project. I find that it cannot reasonably be expected that information of this type would no longer be provided to the Board should it be disclosed; contractors who wish to bid on projects with the Board would continue to provide whatever information it required in order to be considered for such work.

The Board goes on to submit that the disclosure of the information contained in Section A of Records A to Q could reasonably be expected to result in harm to the competitive position of the contractors who have supplied the information, as contemplated by section 10(1)(a). In my view, the disclosure of the information contained in Section A of Records A to Q, particularly the information with respect to the contractors' WCB or WSIB rating, their bonding and insurance arrangements, past project work and financial strengths and weaknesses, could reasonably be expected to prejudice their competitive position in the provision of contracting services to clients such as the Board. This type of information is not normally widely-known in the construction industry and I find that its disclosure, in light of the very competitive nature of this industry, could reasonably be expected to result in significant harm to the firm to which it relates.

Accordingly, with respect only to the information contained in Section A of Records A to Q, I find that all three parts of the section 10(1) test have been satisfied. As all three parts of the test have been met with respect to this information, it is exempt from disclosure under section 10(1).

ECONOMIC OR OTHER INTERESTS

The Board has also claimed the application of the discretionary exemptions in sections 11(c) and (d) to the information in Section B of Records A to Q and to the 22 pages of lists of contractors names in Record R which I found were not exempt under section 10(1). These sections state:

[IPC Order M-1150/September 22,1998]

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

The Board submits that the disclosure of this information would expose the Board to potentially increased construction costs if contractors were able to manipulate the information which they provide to the Board in its pre-qualification process. It argues that the entire pre-qualification process would be put at risk if the information provided by the contractors was no longer accurate or if certain contractors refused to participate in the competitive process. It argues that the financial interests of the Board would be adversely affected as construction costs would increase if unqualified contractors are awarded projects which they would be unable to properly complete.

In my view, it cannot reasonably be expected that the disclosure of the information contained in Section B of Records A to Q and the 22 pages of lists in Record R could prejudice either the economic interests or the competitive position of the Board. Similarly, I cannot accept the Board's argument that injury to its financial interests could reasonably be expected to result from the disclosure of this information. In my view, the Board has not provided me with sufficient evidence to link the disclosure of the information in Section B of Records A to Q and Record R with the harms set out in sections 11(c) and (d).

As a result, I find that sections 11(c) and (d) of the Act do not apply in the circumstances of this appeal. As no other mandatory exemptions apply to that information in Records A to Q which is not exempt under section 10(1) and all of Record R, they should be disclosed to the appellant.

ORDER:

1. I order the Board to disclose to the appellant all of Records A to R, with the exception of the information in Section A of Records A to Q, by providing him with a copy by **October 28, 1998** but not before **October 23, 1998**.
2. I uphold the Board's decision to deny access to the information contained in Section A of Records A to Q.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant in accordance with Provision 1.

Donald Hale
Adjudicator

September 22, 1998