



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-1158

Appeal MA-980115-1

Toronto Transit Commission



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/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Toronto Transit Commission (the TTC) for the following:

1. Proposal on Don River Bridge Dynamic Analysis, Contract No. P15W8711 submitted by [a named company], specifically the Corporate Experience, Staffing and Resumes;
2. Copy of letter or letters or memos from [a named company] to the TTC declaring [the named company's] interest in submitting a proposal or being invited to submit a proposal for the subject services;
3. Copy of TTC's technical staff's notes after contacting one or more of the references given by [the named company] in their proposal with indication of who was contacted;
4. Copy of notes pertaining to the TTC contact(s) with the Association of Professional Engineers of Ontario, PEO, regarding the fact that a Certificate of Authorization had not yet been issued to [the named company] as of the day of awarding the contract for services to them;
5. Copy of the assessment by TTC technical staff stating the technical merits of the proposals submitted by [the named company] as well as that of [the appellant].

The TTC notified the named company (the third party) of the request pursuant to section 21(1) of the Act and requested submissions on its views regarding disclosure of the records. The third party objected to disclosure of any part of its proposal. Consequently, the TTC denied access in full to one record, and to part of a second record, both of which are responsive to part 1 of the request under section 10 (third party information) of the Act. The TTC granted full access to the records responsive to part 2 of the request. Finally, the TTC indicated that records responsive to parts 3 to 5 of the request do not exist.

The appellant appealed the denial of access and indicated that he believes that records responsive to parts 3 to 5 should exist. Following receipt of the Mediator's Report, the appellant indicated that he believes that the TTC has misconstrued part 2 of the request and thus believes that more records responsive to this part should exist. He also believes that notes from telephone conversations should exist.

This office sent a Notice of Inquiry to the appellant, the third party and the TTC. Because it appeared that one of the records may contain the personal information of identifiable individuals, the Notice raised the possible application of section 14(1) of the Act (invasion of privacy). Representations were received from all three parties.

RECORDS:

Record 1 Form of Proposal - severances have been made to page 2 pursuant to section 10(1).

Record 2 Attachment to Form of Proposal which consists of the third party's Proposal, pursuant to section 10(1).

DISCUSSION:

REASONABLENESS OF SEARCH

The appellant outlines his reasons for believing that more records should exist in response to items 2 through 5 of his request. He is particularly concerned about the manner in which he believes the TTC has interpreted item 2. In his view, the TTC has interpreted this part of the request as being disjunctive as a result of the use of the word "or", thus meaning that it only needs to provide records which respond to any portion of this part. He argues that he phrased this portion of the request in such a manner because he had no idea what form the records would take and wished to cover all alternatives.

The TTC's response addresses all four parts of the request. Attached to its representations, the TTC has provided an affidavit sworn by the TTC's Contract Administrator in the Materials and Procurement Department, as well as internal memoranda regarding the processing of this request.

The TTC's representations and attached documentation indicate the following:

1. With respect to part three, the evidence indicates that TTC technical staff did not contact any of the references given by the third party and therefore, no notes were made which respond to this part of the request.
2. As far as part four is concerned, the Contract Administrator indicates that she had a verbal conversation with the PEO. However, in her affidavit, the Contract Administrator advises that she has subsequently located a hand written note to file of this telephone conversation. She indicates that the note was inadvertently overlooked in previous searches because it was stapled to another document. She attached a copy of the note to her affidavit.

The TTC indicates that the telephone call made by the Contract Administrator was for the purpose of obtaining general information and clarification regarding the "Certificate of Authorization". It indicates further that this certificate was not asked for in the proposal document nor is it required for the type of work to be performed in the contract. The TTC does not specifically address whether it considers this record responsive to the request or that it intends to make a decision regarding access to it.

In reviewing the note, I am satisfied that it refers to a discussion regarding the third party and is responsive to part four. Accordingly, I will order the TTC to make a decision regarding access to this record.

3. Regarding part five, the TTC refers to an attached memorandum prepared by its Design Controls Co-ordinator for the project, in which he indicates that there was no written
[IPC Order M-1158/November 4,1998]

assessment by TTC technical staff listing or comparing the technical merits of the submission. The Co-ordinator indicates that he received a verbal assessment of the third party's submission. Therefore, the TTC advises that no records exist which respond to this part of the request.

4. Finally, the TTC outlines in great detail the manner in which it responded to part two of the request. In this regard, the TTC indicates that it conducted a search for any record which would respond to part two (in its entirety). The TTC advises that it located one further record and that this record was subsequently disclosed to the appellant. With respect to whether records or memoranda of telephone calls exist, the TTC states as follows:

While we make every effort to keep our bidder's lists as current as possible, it is not uncommon for companies which are not listed, to approach the TTC for tender documents or to be included on the bidder's list for future tenders that may arise. This is often done through telephone calls with the respective buyers or support staff. Given the overall magnitude of the TTC's annual procurement requirements, it would not be feasible or practical to expect every telephone call received from a prospective vendor to be documented and retained on file.

In cases where a requester provides sufficient details about the records which he or she is seeking and the TTC indicates that records do not exist, it is my responsibility to insure that the TTC has made a reasonable search to identify any records that are responsive to the request. The Act does not require the TTC to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the TTC must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request.

I have carefully considered the representations of the appellant and the TTC. In my view, it is not necessary to determine whether the TTC might have misconstrued the appellants request because I am satisfied that it has conducted a search through its files for any and all records pertaining to the third party's proposal. I am also satisfied that the search was conducted by staff who were knowledgeable about the types of records being requested. I am further satisfied with the explanation given as to why further records were located following subsequent searches. As a result, I am satisfied that the search conducted by the TTC for records responsive to all five parts of the request was reasonable.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined to mean recorded information about an identifiable individual including "information relating to the education ... or employment history of the individual ...". I have reviewed the information in the two records at issue and I find that portions of Record

2 contain the resumes and work histories of several employees of the third party. This information relates to the educational and employment history of these individuals and, therefore, constitutes their “personal information”. This information is found on pages 2/7, 3/7, 4/7 and the last six pages of the proposal (which are unnumbered) and relates to items 3 and 4 of the Table of Contents and the third attachment to the document. None of the personal information in the records relates to the appellant.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information to any person other than the individual to whom the information relates. There are a number of exceptions to this rule, one of which is found in section 14(1)(f) of the Act, which reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In order to establish that section 14(1)(f) applies, it must be shown that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy. Sections 14(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. A presumption under section 14(3) may be overcome if the personal information in question falls within section 14(4) or where a finding is made under section 16 of the Act that there exists a compelling public interest in the disclosure of the record in which the personal information is contained, which clearly outweighs that purpose of the exemption.

Previous orders of this office have held that the disclosure of information contained in resumes (Orders M-7, M-319 and M-1084, for example) and work histories (Order M-1087) would constitute a presumed unjustified invasion of personal privacy under section 14(3)(d) of the Act. I agree with these findings and thus find that the presumed unjustified invasion of personal privacy provided by section 14(3)(d) applies to the personal information in Record 2.

The appellant indicates that the principals of the third party were former employees of his company and that their employment history is known to him. He argues that the information contained in the records is not private, that it is the type of information that would be widely publicized in promoting the third party's interests to potential customers and the industry in general. He also believes that the third party has misrepresented the work histories of the employees and that this information should be provided to him in order to compare it with the “authentic records in our files”.

Even if I were to find that the considerations described above were relevant in the circumstances of this appeal, the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy) [IPC Order M-1158/November 4,1998]

Commissioner) (1993) 13 O.R. 767 held that the factors or circumstances in section 14(2) cannot be used to rebut the presumptions in section 14(3). Accordingly, these considerations cannot apply to the records at issue in this appeal.

I find that sections 14(4) and 16 do not apply to the personal information in the records at issue.

In summary, I find that disclosure of the personal information in the records would constitute an unjustified invasion of the personal privacy of the third party's employees and that the records are properly exempt from disclosure under section 14(1) of the Act.

THIRD PARTY INFORMATION

Both the TTC and the third party object to the disclosure of the information contained in the records on the basis that it is properly exempt under sections 10(1)(a) and (c). I found above that the personal information on pages 2/7, 3/7, 4/7 and the last six pages of the proposal (which are unnumbered), which relates to items 3 and 4 of the Table of Contents and the third attachment to the document are exempt under section 14(1). Therefore, I will only consider the remaining portions of the records in the ensuing discussion.

For a record to qualify for exemption under sections 10(1)(a) or (c) the TTC and/or the third party 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 TTC 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) or (c) of section 10(1) will occur.

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

Type of information

The third party and the TTC submit that the records contain information which qualifies as technical information. The TTC also submits that the records contain commercial information and the third party contends that the records contain financial information. The terms "technical information", "financial information" and "commercial information" have been addressed in previous orders of the Commissioner's office.

"Commercial information" has been defined 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 B. 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 P-454, the term “technical information” was characterized by former Assistant Commissioner Irwin Glasberg as 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.

In my view, some of the information contained in the records clearly belongs to an organized field of knowledge which falls under the general category of mechanical arts; more specifically, the field of engineering. The records were prepared by a professional in the engineering field and describe the methods to be used in the testing and analysis relating to the Don River Bridge project. Accordingly, I find that this portion of the information in the requested records is properly characterized as “technical information” within the meaning of section 10(1). This information is found on the top portion of page 2/7 and pages 5/7 - 7/7 of Record 2.

Based upon the definitions referred to above, I find that the costing information in Record 1 does not relate to money and its use or distribution as contemplated in the definition. Therefore, I find that the records do not contain “financial information”. However, I am of the view that the information in the records, generally, qualifies as “commercial information” for the purposes of section 10(1). This information relates directly to the services to be provided by the third party, the costs associated with those services and information relating to other projects in which individual employees of the third party have previously been involved. I find that this information relates to the buying and selling of the testing and analysis services provided by the third party.

Therefore, I find that the first part of the test has been met for the remaining portions of the records.

Supplied in confidence

In order to meet the second part of the test, the TTC and/or the third party must establish that the information in the records was supplied to it in confidence, either 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).

Both the TTC and the third party submit that, with the exception of the identity of the tenderer and the total tendered amount, all information provided in the proposal was supplied in confidence. The TTC attached a copy of its policy/instruction for procurement. Section 6 of this document provides that tenders and proposals submitted to the TTC are considered confidential documents and the information contained therein is not to be revealed, except as provided in the section. Essentially, the only information provided, at the time tenders or proposals are opened or in response to queries about the tenders, is the identity of the tenderer and the tendered price(s).

There is nothing in the records which indicates that they were expressly provided to the TTC by the third party in confidence. However, I am satisfied that the expectation of the third party that its tender documents would be treated confidentially was reasonable, based on the stated policy of the TTC. Therefore, I find that, with one exception, all of the information in the records was supplied implicitly in confidence and thus meets the second part of the section 10(1) test.

I note that the TTC has severed out the total contract price on page 2 of Record 1. In view of the TTC's policy with respect to this information as stated above, I find that the third party could not reasonably expect that this information would be considered confidential. Therefore, the amount of the "Total Contract Price" on page 2 of Record 1 does not meet the requirements of part two of the test. As all three parts of the test must be met for a record or part of a record to qualify for exemption under section 10(1), this portion of Record 1 should be disclosed to the appellant.

Harms

In order to meet the third part of the test, the TTC and/or the third party must demonstrate that one or more of the harms enumerated in sections 10(1)(a) or (c) could reasonably be expected to result from the disclosure of the remaining information.

The third party indicates that the services it provides are highly specialized, and that there are very few companies in Canada which have the capabilities to provide such services. The third party indicates further that in most cases, the same companies bid on the same projects. It advises that in order to provide the required services, specialized equipment must be purchased at considerable cost. Additionally, in order to provide the services offered by its company, its employees require specialized expertise and experience in the field. The third party believes that disclosure of its methodology and resources would compromise its competitive edge in bidding on future projects. This, it argues, would prejudice significantly its competitive position, would interfere with its contractual negotiations and result in undue loss to it.

The third party and the appellant have both provided considerable evidence regarding disputes between the principals of the two companies relating to the former employees' past employment with the appellant and the startup of the third party's business. The appellant has clearly stated that his motive in making this request is to determine the "truthfulness" of the information contained in the proposal. The third party has provided documentation which indicates that the appellant has taken steps to undermine the third party's credibility and that the parties are involved in legal action. In my view, quite apart from the legal matters which have arisen between these two parties, and which, to a certain extent, is reflected in the appellant's

motives for seeking this information, the history of this dispute impacts on the competitive nature of their businesses and is directly related to the third party's competitive position and contractual negotiations.

I am satisfied that the third party has provided sufficient evidence to establish that disclosure of the remaining information in the records could reasonably be expected to prejudice significantly its competitive position and interfere significantly with its contractual negotiations under section 10(1)(a). I find this to be the case because of the highly specialized and competitive nature of the business and the acrimony between the principals of the two companies, which, in my view, has a direct bearing on the harms which could reasonably be expected to occur should the records be disclosed to the appellant. Accordingly, as all three parts of the test have been met for the remaining information, I find that these portions of the records are properly exempt under section 10(1).

ORDER:

1. I order the TTC to provide a copy of the information contained under the heading "Total Contract Price" on page 2 of Record 1 to the appellant on or before **December 9, 1998**, but not earlier than **December 4, 1998**.
2. I uphold the decision of the TTC to withhold the remaining information.
3. In order to verify compliance with the terms of this order, I reserve the right to require the TTC to provide me with a copy of the portion of Record 1 which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
 Laurel Cropley
 Adjudicator

 November 4, 1998