



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

# ORDER PO-1697

Appeal PA-990071-1

Ministry of Natural Resources



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## **BACKGROUND:**

The Ministry of Natural Resources (the Ministry) decided to construct a new amphitheatre in Sandbanks Provincial Park. The contract to construct the amphitheatre was awarded through a tender process.

After bids were received, an addendum was sent out to the bidders, changing the original specifications. Bidders were given the opportunity to fax in a revision to their bid if they felt the changes affected their originally submitted price.

In accordance with the Ministry's usual procedures, the bids were opened in public. In reading the prices at the public opening for this tender, the person conducting the opening read out the bid for one company incorrectly, leaving the appellant with the impression that his price was the low price. Closer scrutiny during the actual review of bids after the opening revealed that the above-mentioned company's bid was not the amount read aloud, but was to be reduced downward by the amount read aloud, making its bid the lowest.

The mistake was noted and relayed to all of the other bidders, including the appellant. Contrary to the appellant's expectations, the contract was awarded to the other company.

## **NATURE OF THE APPEAL:**

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry. The request was for access to information related to Tender T-PET-98-081, regarding the construction of the new amphitheatre in Sandbanks Provincial Park. Specifically, the appellant sought access to the Ministry's record of tender or proposals opened, the Ministry's tender evaluation of bids received and awards recommendation, the bid submission, bid deposit and faxed amendment all received by the Ministry prior to 2:00 pm on October 30, 1998 from the successful company, and the original amendment and documentation of any other bid deposit received by the Ministry by the end of the working day on November 4, 1998 from the same successful company.

The Ministry granted access to its Record of Tenders or Proposals Opened and Awards Made form. The Ministry denied access to the bid submissions and deposits pursuant to section 17(1)(a) of the Act (third party information).

The appellant appealed the Ministry's decision to deny access.

I sent a Notice of Inquiry to the Ministry, the appellant and the named company (the third party). Representations were received from the Ministry only.

## **RECORDS:**

The records at issue consist of a bid submission, a copy of two bid deposit cheques and a faxed and original copy of a revised bid submission.

## DISCUSSION:

### THIRD PARTY INFORMATION

Section 17(1)(a) states:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

For a record to qualify for exemption under sections 17(1)(a), the institution 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 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) of section 17(1) will occur.

[Order 36]

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing**" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing  
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reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

## **PART 1**

The Ministry submits that the information is financial and/or commercial information of the third party.

The information relates to a bid for a contract to construct an amphitheatre. It includes the submission tender by the third party, the bid deposit cheque, the bid deposit and the document amending the bid. In my view, with the exception of a handwritten note on Record 7, this information qualifies as commercial and/or financial information.

The handwritten note is a record of a telephone call from the third party. It does not contain commercial or financial information, and does not meet the first part of the test.

## **PART 2**

### **Supplied in Confidence**

#### *Supplied*

The Ministry submits that the information in question was submitted to the Ministry by the third party as part of a tendered bid.

Records 1-6 are the bid submission. It appears to be a standard form authored by the Ministry, with blanks filled in by the third party. In my view, only the information filled in by the third party can be said to have been supplied by the third party. The remaining records are bid deposit cheques (Records 7, 9 and 11) and faxed amendments (Records 8 and 10). I am satisfied that these records were supplied to the Ministry by the third party.

#### *In Confidence*

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  
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supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly. [Order M-169]

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

The Ministry has provided me with a copy of its procedure SM 1-0714, which governs the process and procedures for bids. Part 2 of that procedure relates to the disclosure of information which is submitted as part of the process. The Ministry has made it clear that the name and the total price of the bid were to be read out at the public opening of the bid.

Because the name and total price of each bidder was to be read out publicly at the opening, there is no objective basis for an expectation of confidentiality with respect to this information. The same logic applies to both the original and revised total amounts of the bid.

As well, it follows that if there is no reasonably held expectation of confidentiality respecting the name of a company, its business address, telephone number and fax number cannot have been supplied in confidence either.

Accordingly, I find that the standard form parts of the bid submission, the name, business address, telephone number, fax number and total price of the third party do not meet the second part of the section 17(1) test.

### **PART 3**

#### **Harms**

To discharge the burden of proof under the third part of the test, the parties opposing disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed. [Order P-373]

The third party has not submitted representations in this appeal. The Ministry submits that section 17(1)(a) applies, but admits that it is not in the best position to present evidence on the question of harm to competitive position. In past orders, a reasonable expectation of prejudice to competitive position has been found in cases where information relating to pricing, material variations, bid break downs, etc. was contained in the records (Orders P-166, P-610 and M-250). Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts (Orders P-408, M-288 and M-511). The total price and the revised price in this bid is broken down into two very broad categories, "architectural, drawings" and "landscaping". There is nothing in this record, in my view, which relates in any specific way to pricing, material variations, bid break downs, nor would any information in this record enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts. Accordingly, I find that disclosure of this record could not reasonably be expected to prejudice the competitive position or interfere significantly with the contractual or other negotiations of the third party, and section 17(1)(a) does not apply. Therefore, the information should be disclosed to the appellant.

**ORDER:**

1. I order the Ministry to disclose the records to the appellant by sending him a copy by **August 25, 1999**, but not before **August 20, 1999**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Adjudicator

July 21, 1999