



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

# **ORDER PO-1722**

Appeal PA-990075-1

Management Board of Cabinet



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:**

Management Board of Cabinet (MBC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information about all bids tendered in relation to a specific project. Specifically, the appellant sought access to copies of all the bids that were tendered including that of the successful candidate to whom the contract was subsequently awarded. The appellant also sought access to the identity of the "evaluators" together with particulars of their mechanical background. The appellant was an unsuccessful bidder for the subject contract.

MBC granted full access to information regarding the evaluators and partial access to copies of all the bid forms received in response to the tender call. The bid forms contain the construction bids, maintenance bids, total bid prices and the names of proposed subcontractors. MBC denied access to the names of the proposed subcontractors, under sections 17(1)(a) and (c) of the Act, on the basis that this information was supplied to it in confidence.

In its decision letter, MBC stated that it had notified the companies which had participated in the tender call, of the request, pursuant to section 28 of the Act. MBC indicated to these companies that it was going to disclose all the information pertaining to the bids with the exception of the names of the proposed subcontractors which were withheld under section 17(1) of the Act. The companies were given a period of 30 days to appeal this decision, after which the information would be disclosed to the requester. The companies did not appeal MBC's decision and the records containing the information were disclosed to the appellant.

The appellant, appealed MBC's decision to deny access to the names of the sub-contractors. The appellant also indicated in her letter of appeal that, in response to her request for access to the identity of the "evaluators" together with particulars of their mechanical background, MBC only provided a list of the evaluators. She believes that background information pertaining to the evaluators should exist and be provided to her.

During mediation, the appellant was advised that MBC does not have any background information regarding the evaluators in its custody or control. The appellant conceded that this information does not exist and is, therefore, not at issue in this appeal.

Therefore, the sole issue to be determined in this appeal is whether the mandatory exemption in section 17(1) applies to the names of the proposed subcontractors.

I sent a Notice of Inquiry to the appellant, MBC and the seven companies (the third parties) that submitted bids to MBC. Representations were received from MBC, the appellant and one third party. This third party indicated that it has no objection to disclosure of the information in the record pertaining to its bid.

## **RECORDS:**

The portions of the records at issue comprise the portions of page 2 of each of the seven bid forms, containing the names of the proposed subcontractors

## DISCUSSION:

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) MBC and the third parties 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.

[Orders 36 and P-373]

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

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 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.)].

MBC relies on sections 17(1) (a) and (c). None of the third parties has provided information to this office or to MBC relating to any part of the three part test. Therefore, in determining this issue, I will take into account the representations submitted by MBC and the appellant, the information in the records themselves and previous orders of this office which have addressed the application of section 17(1) and its municipal equivalent (section 10(1)) to bid information.

### **Part One**

MBC submits that the names of subcontractors fall within the definitions of “trade secret” and “commercial information”.

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services (Order P-493). I am satisfied that the bids, which were submitted in response to a tender call, contain information pertaining to the buying, selling or exchange of merchandise or services and that they relate directly to the commercial operations of the third parties. Further, I find that the names of the subcontractors, which formed part of the bid document, qualify as “commercial information”. Therefore, I find that the first part of the section 17(1) test has been met.

### **Part Two**

In order to satisfy Part two of the test, the information must have been **supplied** to MBC **in confidence** either implicitly or explicitly.

#### *supplied*

MBC states that the “Bid Form” documents are completed by the principal contractors and submitted to it during the tendering process. MBC notes that although the subcontractors do not submit their names directly to it, they do so indirectly by agreeing to work with the contractor submitting the bid.

It is clear from the records that the “Bid Forms” were prepared and submitted to MBC by the third parties in response to the tender call. This includes all information on the forms. Therefore, I am satisfied that they were supplied to MBC.

#### *in confidence*

In Order M-169, Adjudicator Holly Big Canoe made the following comments with respect to the issue of confidentiality in section 10(1) of the municipal Act (which is the equivalent of section 17(1) of the Act):

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the 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.

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]

I agree with this approach.

The appellant states that the names of the subcontractors were not provided to MBC by the third parties in confidence. In this regard, the appellant indicates that the advertisement to tender and the tender documents did not state that the information would be treated as confidential. The appellant states further that the contractors did not communicate when they submitted their tenders that they were submitted on the condition that they were confidential.

MBC states that there has always been an implicit understanding amongst third parties that the financial details of their bid submissions, such as unit prices or any similar information that has a proprietary value to the contractor, would be kept confidential by it. MBC indicates that it has always treated this type of information as confidential and never releases it to other contractors or interested parties.

MBC refers to the following statement which is contained on the "Bid Form":

I/We have no knowledge of or the ability to avail myself/ourselves of confidential information of the Crown (other than confidential information which is disclosed to Bidders in the normal course of the bidding process) and the confidential information is relevant to the work, its pricing or the Bid evaluation process.

MBC acknowledges that this statement does not establish that it has agreed to keep the "Bid Forms" confidential, but argues that it does demonstrate that there is an element of confidentiality to the tendering process.

I do not accept MBC's interpretation of this statement. In my view, it is clearly designed to protect the Crown's interests in dealing with non-governmental third parties. I do not read into this statement an implicit understanding that third party records will be maintained in confidence.

While I accept that bidders may have a reasonably held expectation of confidentiality with respect to financial details of their bid submissions, such as unit prices and other "proprietary" information, I am not persuaded by MBC's submissions that the information at issue falls into this category. In reviewing the records, there is no indication on them that any of the information would be held in confidence or that it was being submitted in confidence. Further, MBC's position on this issue is not supported by any of the third parties although they were invited to comment on the application of section 17(1) to this information and, it is clearly in their interest that they do so.

I am not persuaded that the third parties submitted the "Bid Forms", and in particular, the names of the subcontractors with an expectation of confidentiality. Therefore, I find that MBC has not established the second part of the test. In order for section 17(1) to apply, all three parts of the test must be met. In most cases, I would end my analysis at this point. However, I have decided to address MBC's submissions regarding the third part of the test.

### **Part Three**

In order to satisfy the third requirement of this exemption claim, MBC and/or the third parties must present evidence which is detailed and convincing, and must describe a set of facts or circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17 would occur if the information was disclosed (Orders P-278 and P-249; see also, Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) cited above).

MBC submits that contractors conduct business in a highly competitive industry in which their success is often contingent on their ability to successfully bid for work. MBC states further that effective bid strategies incorporate not only low unit prices but "value added" features as well. MBC submits that the ability to attract and offer reputable subcontractors is a "value added" feature of a bid. MBC argues that contractors bidding for work would not want competitors to know which subcontractors they hire as competitors may attempt to engage the same subcontractors in future bids. MBC submits that this could ultimately result in the contractors losing contracts and revenue.

In another vein, MBC submits that information regarding the need to hire subcontractors for a particular job provides information about the third parties' resources and capabilities and its disclosure may reveal weaknesses. In this regard, MBC implies that disclosure might lead to competitive harm.

Finally, MBC suggests that disclosure of this information may cause harm to the subcontractors themselves as it would reveal their alliances with particular contractors. MBC submits that this could seriously impair any competitive edge they may have.

The appellant points out that disclosure of the names of the subcontractors could in no way reveal the contractors' calculations of tendering amounts (ie. unit prices) and essentially takes the position that since these documents were submitted to MBC with an expectation that they would be made available, there could be no reasonable expectation of harm as a result of their disclosure.

A number of previous orders of this office have considered the application of section 17(1) (and its municipal equivalent in section 10(1)) to the names of subcontractors (Orders M-602, P-166 and P-610). In all of these cases, the exemption in section 17(1) was not upheld with respect to lists of subcontractors on the basis that the parties did not establish a reasonable expectation of harm. I note that similar arguments as those made by MBC were made in Order M-602 and were not considered to establish sufficient evidence of harm in that case. Although these previous decisions are not conclusive on this issue, I have found them of assistance in arriving at my conclusions in the current appeal primarily because none of these orders has outlined any argument or discussion which would serve to support MBC's position in this regard.

In considering MBC's submissions, I find that it has failed to draw a sufficient nexus between disclosure of the names of the subcontractors and the loss of contracts or business. I find that MBC has not provided evidence which is detailed and convincing, nor has it described a set of facts or circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17, in particular sections 17(1)(a) and/or (c) would occur if the names of the subcontractors were disclosed. Further, none of the arguments presented by MBC is supported by the third parties although they were provided with an opportunity to do so. Therefore, I find that the subcontractors' names are not exempt under section 17(1) and should be disclosed to the appellant.

**ORDER:**

1. I order MBC to disclose the names of the subcontractors to the appellant by providing her with an unsevered copy of the relevant records on or before November 26, 1999 but not before November 22, 1999 after the date of this order.
2. To verify compliance with Provision 1 of this order, I reserve the right to require MBC to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_

Laurel Cropley  
Adjudicator

\_\_\_\_\_  
October 21, 1999