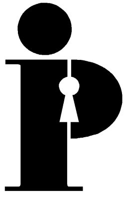

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1237

Appeal MA-980175-1

York Catholic District School Board

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NATURE OF THE APPEAL:

The York Catholic District School Board (the Board) decided to build a new school in its district. For this purpose, the Board retained the services of an architectural firm (the architect). One of the architect's duties pursuant to the contract was to conduct a pre-qualification process, a process by which potential bidders/construction firms are screened to prevent those who are clearly unqualified from bidding.

After the pre-qualification process was completed, the Board received a request for access to information concerning the process from a firm that had been prevented from bidding. The requester's specific request was broken down into three parts as follows:

> 1. Any notes, letters, memos, messages or other records referring in any way to [the requester] received by the Board from anyone other than [the requester].
>
> 2. Any notes, letters, memos, messages or other records in any way referring to [the requester] prepared by the Board for [its] own use, or for the use of others, other than received by [the requester].
>
> 3. All record[s] and other documents used to include or exclude each applicant from bidding for the project through the pre-qualification process, including all comments, submissions and evaluations performed by, or on behalf of the Board.

The requester further indicated that the records described above …

> … may take the form of notes, messages, recordings of voice mail or e-mail, as well as formal and informal written communications or reports from all levels of the administrative hierarchy of the Board, from the Board of Directors down to the lowest administrator. We are interested in all records either received by the Board from others or prepared by the Board for themselves, or others.

The Board located one four page record responsive to part 3 of the request. The Board then notified the requester under section 21(4) of the Act that disclosure of the records may affect the interests of another party, that the other party was being given an opportunity to make representations concerning the disclosure and that the Board would decide within thirty days whether or not to disclose the record. At the same time, under sections 21(1) and (2), the Board notified the architect of the request and sought representations as to whether or not the record should be disclosed.

After receiving representations from the architect, the Board advised the requester that it had decided to disclose portions of all four pages of the record, and to withhold the remaining information pursuant to section 10 (third party information) of the Act. The Board further advised the requester that no records exist which are responsive to the first two parts of the request, and no additional records exist which are responsive to part 3 of the request. In this letter the Board enclosed a severed copy of the record and, in support of the "no records exist" part of the decision, a memorandum from its Superintendent of Planning & Plant.

The requester, now the appellant, appealed the Board's decision (i) to deny access to the severed portions of the record (ii) that no records exist which are responsive to parts 1 and 2 of the request and (iii) that no additional records exist in response to part 3 of the request. In its letter of appeal, the appellant raised the possible application of section 16 of the Act, the "public interest override", to the withheld information. The appellant also suggested that the architect should have additional responsive records in its custody which would be "under the control" of the Board and therefore within the scope of the Act pursuant to section 4(1).

I sent a Notice of Inquiry to the appellant, the Board, the architect and 12 affected parties named in the record identified by the Board as responsive to part 3 of the request (the contractors). Representations were received from the Board, the architect and five of the 12 contractors, one of which consented to disclosure of any information it submitted, and the remaining four of which objected to disclosure of their information. The representations of the Board and the architect, among other things, suggested that certain responsive records, which were in the possession of the architect, were not "under the control" of the Board.

After receiving representations from the parties as set out above, I decided to seek further representations on the issue of control of records from the Board, the appellant and the architect. In response, I received representations from the Board and the architect.

THE RECORD

The record identified by the Board as being responsive to the request consists of four pages. Pages 1 and 2 of the record consist of a letter from the architect which reviewed the submissions from the contractors as part of the pre-qualification process. The letter lists each of the contractors in three categories ("acceptable", "Marginally Acceptable" and "Not Acceptable"), with corresponding scores. The letter also indicates that the firm had forwarded the "Mechanical and Electrical" submissions to a named engineering firm for a review. The Board disclosed all of the information in the letter, with the exception of the number of submissions received, the names of the contractors and their assigned overall scores (other than the appellant's name and score, which the Board disclosed to the appellant), and the name of the engineering firm which was to review the "Mechanical and Electrical" submissions.

There are two single page attachments to the letter (pages 3 and 4). Page 3 lists four of the 11 pre-qualification criteria applied by the architectural firm, with various scores within each criterion. On this page, the Board withheld only the various scores associated with each of the four criteria. Page 4 contains a summary of the scores assigned to each contractor based on each of the 11 criteria. On this page, the Board withheld only the names of the contractors other than the appellant.

DISCUSSION:

CUSTODY OR CONTROL OF RECORDS

Are responsive records in the possession of the architect under the control of the Board?

Section 4(1) of the Act provides a right of access to records "in the custody or under the control of an institution" (emphasis added). The appellant takes the position that additional responsive records should exist within the custody of the architect which would be "under the control" of the Board. The issue for me to decide is whether or not, if such records exist, they would be under the control of the Board within the meaning of section 4(1). If so, the right of access under section 4(1) applies, despite the fact that the records may not be in the custody of the Board.

In the Notice of Inquiry, I asked the parties to provide representations in response to the following questions regarding the "control" issue under section 4(1). I also made reference to various authorities under each question, where appropriate:

1. Does the Board have a statutory power or duty to carry out the activity which resulted in the creation of the records? [Order P-912, upheld in Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), leave to appeal granted [1997] O.J. No. 4899 (C.A.)]

2. Is the activity in question a "core", "central" or "basic" function of the Board? [Order P-912, above]

3. Are there any provisions in any contracts between the Board and the architectural firm in relation to the activity which resulted in the creation of the records, which expressly or by implication give the Board the right to possess or otherwise control the records? [Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner), [1999] B.C.J. No. 198 (S.C.)]

4. Was there an understanding or agreement between the Board and the architectural firm, or any other party, that the record was not to be disclosed to the Board? [Order M-165]

5. Who paid for the creation of the record? [Order M-506]

6. Was the architectural firm an agent of the Board for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the Board to possess or otherwise control the records? [Walmsley v. Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.)]

7. What is the customary practice of the Board and institutions similar to the Board in relation to possession or control of records of this nature, in similar circumstances?

8. What is the customary practice of the architectural firm and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?

9. To what extent did the Board rely or intend to rely on the record? [Order P-120]

10. Who owns the record [Order M-315]?

These questions reflect a purposive approach to the "control" question under section 4(1). A similar approach has been adopted in other access to information regimes. For example, in a recent decision under the federal Access to Information Act, the Federal Court of Appeal said:

> The notion of control referred to in subsection 4(1) of the Access to Information Act … is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.
>
> It is, in my view, as much the duty of courts to give subsection 4(1) of the Access to Information Act a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature as "[i]t is the duty of boards and courts", as Chief Justice Lamer of the Supreme Court of Canada reminded us in relation to the Canadian Human Rights Act … "to give s. 3 a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature" … It is not in the power of this court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning … On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information … [Canada Post Corp. v. Canada (Minister of Public Works) (1995), 30 Admin. L.R. (2d) 242 at 244-245]

I will address each of the above-listed questions below.

Analysis of "control" factors

1. Statutory powers

Based on Order P-912, upheld in Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.), leave to appeal granted [1997] O.J. No. 4899 (C.A.), the statutory framework is the starting point for any "control" analysis.

The Board submits that in accordance with section 171(1)7 of the Education Act, it has the statutory obligation to establish and maintain schools:

> …The design and construction of all schools is performed by architects and contractors retained by the Board …The architects have recommended in previous years that pre-qualification of contractors be done. The Board accepted that recommendation and has, as

> common practice, had architects perform the pre-qualifications. All pre-qualification forms are submitted to the architects who review the information and provide the outcome of that [analysis] to the Board.

The Board refers to and provides a copy of its policy regarding the selection of architects.

The architect did not make submissions on this point.

Section 171(1)7 of the Education Act reads:

> A board may,
>
>> determine the number and kind of schools to be established and maintained and the attendance area for each school, and close schools in accordance with policies established by the board from guidelines issued by the Minister.

In my view, as submitted by the Board, it is clear that the Board has a statutory obligation under section 171(1)7 of the Education Act to establish and maintain schools. This statutory framework indicates that the Board had a statutory duty to carry out the activity in question, namely the establishment of a school. In carrying out this duty, the Board has discretion to determine what actions to take in furtherance of its duty. In this regard, the activity of setting up and administering a bidding process for the purpose of construction of the school (which in this case involved pre-qualifying bidders) is an integral component of the Board's statutory duty.

2. Core function

The Board submits that "the pre-qualification of contractors process is a function of the architect's office." The architect makes no submissions on this point.

For the reasons cited above, the overall function of establishing a school is a core responsibility of the Board under the Education Act. The pre-qualification of bidders process was clearly directly related to this statutory responsibility. This process was an important initial step towards the broader goal of establishing the school.

3. Contract

The provisions of any contract setting out the relationship between the parties in question may be a relevant factor on the issue of control [Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner), [1999] B.C.J. No. 198 (S.C.)], although it will not necessarily be determinative when in conflict with the statutory framework [Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner) (March 7, 1997), Toronto Doc. 283/95 (Ont. Div. Ct.)].

The Board submits that there are no provisions of any contracts between it and the architect regarding the pre-qualification of contractors process which give the Board the right to possess or control the records. The Board states that the records are in the control of the architect.

The architect states that it consulted with the Ontario Association of Architects on this point and also reviewed the Royal Architectural Institute of Canada's "Canadian Standard Form of Agreement Between Client and Architect" (the standard form agreement). The architect submits that based on the above, the records related to this school project "are entirely our own and … the Board has no express or implied right to access our files." The architect did not, however, provide any policies, guidelines or other documentation in support of this submission.

The written contract between the Board and the architect with respect to the school project (the contract) followed the standard form agreement, with some modifications. The contract states the following with respect to the bidding process:

> - The Architect shall … obtain instructions from and advise the Client on the preparation of the necessary bidding information [and] bidding forms … [article 2.4.3]
>
> - …the Architect shall assist and advise the Client in obtaining bids or negotiated proposals and in awarding and preparing contracts for construction [article 2.5.1]

The contract contains no express provisions respecting the right of possession of documents relating to the bidding process. However, the provisions of the contract cited above support the finding that the architect, at a minimum, was acting on behalf of the Board for the purpose of the bidding process, of which the pre-qualification process is a component. In stating that "the Architect shall assist and advise the Client in obtaining bids", the contract implies that it is the Board which ultimately receives information pertaining to bids, whether or not the records are physically in the possession of the Board or the architect. Moreover, article 2.4.3 suggests that the Board, by giving "instructions" to the architect, has ultimate control over the bidding process. In addition, information and records management are central to the bidding process for which the Board retained the architect's services. Thus, control over the bidding process is a strong indicator of control over the records related thereto. Overall, the contractual provisions referred to above support a finding that the Board has control of the records.

4. Agreement that records not to be disclosed to the Board

The Board submits that there is no understanding or agreement between the Board, the architect or any other party that the records should not be disclosed to the Board.

The architect submits:

> The investigations and inquiries carried out by our firm in the Prequalification process for this project have not been given to the Board except in the form of a report summary. As part of the confidentiality essential to the prequalification process, we understood that the

> Board did not want this information in their files but this is not formally recorded in any document, to our knowledge.

The submissions of the Board and the architect are inconsistent on this point. I note also that the architect's submission that the Board "did not want this information in their files" is inconsistent with its earlier submission under point 3 that the records "are entirely our own ..." The former suggests that the Board had control over whether the records were in its possession. The latter suggests that the Board had no choice in the matter. There is insufficient evidence before me to reach the conclusion that an agreement existed between the Board and the architect that the records should not be disclosed to the Board.

5. Payment for creation of the record

The Board submits that the pre-qualification process is paid for by the architect, who is then reimbursed for services provided in accordance with the contract. The Board states that "it is not a specifically identified process which is paid for as an individual activity."

The architect states that it paid for the work carried out in the pre-qualification procedure.

I accept the Board's submission that although the pre-qualification process was initially done at the expense of the architect (consistent with the architect's submission), the Board ultimately paid for the expenses associated with this process through reimbursement of the architect. This factor supports a "control" finding, particularly in relation to its significance for my finding on agency in the pre-qualification process, discussed below.

6. Agency

In approaching the "control" analysis, it is useful to ascertain whether or not elements of agency are present and, if so, whether the agency relationship carries with it the right to possess or control the records in question. Although this may assist in the control issue, a finding one way or another is not necessarily determinative [Walmsley v. Ontario (Attorney General) (1997), 34 O.R. (3d) 611 (C.A.)].

"Agency" is the relationship between one party (the principal) and another (the agent) whereby the latter is empowered to act on behalf of and represent the former. Agency can emerge from the express or implied consent of principal and agent [Royal Securities Corp. v. Montreal Trust Co., [1967] 1 O.R. 137 (H.C.), affirmed [1967] 2 O.R. 200 (C.A.)]. Anyone doing something for another person can be an agent for that limited purpose [Penderville Apartments Development Partnership v. Cressey Developments Corp. (1990), 43 B.C.L.R. (2d) 57 (C.A.)]. An agent, though bound to exercise authority in accordance with all lawful instructions that may be given from time to time by the principal, is not subject in its exercise to the direct control or supervision of the principal. However, there must be some degree of control or direction of the agent by the principal [Royal Securities Corp., above]. Among other things, an agent has a general duty to produce to the principal all documents in the agent's hands relating to the principal's affairs [F.M.B. Reynolds, Bowstead on Agency, 15th ed., (London: Sweet and Maxwell, 1985), Article 51 at p. 191; Tim v. Lai, [1986] B.C.J. No. 3171 at pp. 10-11 (S.C.)].

The Board submits that the architect is the agent of the Board with respect to designing and tendering the project:

> ... These skills are not resident in house. If contractors wish to be considered for eligibility, they must comply with the process which is conducted by the architect. The information is forwarded to and controlled by the architect.

The architect makes no submissions on this point.

As stated above, the contract contains provisions which support the finding that the architect, at a minimum, acts on behalf of, and thus is the agent of, the Board for the purpose of the bidding process, of which the pre-qualification process is a component.

I find support for this view in The Canadian Law of Architecture and Engineering, 2nd ed. (Toronto: Butterworths, 1994) by B.M. McLachlin et al. (at pp. 126, 195):

> Architects and engineers are employed primarily as the agent of the owner, to design, supervise and administer the project …
>
> The architect or engineer acts as the agent of the owner in preparing and issuing tender documents and supervising the tender process.

[See also Pielak v. Granville Custom Homes and Renovations Ltd., [1994] B.C.J. No. 565 (S.C.), at p. 15; D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General), [1999] N.S.J. No. 163 (S.C.), at p. 32), in which these passages are quoted with approval].

The next question is whether or not this agency relationship carried with it the right of the Board, as principal, to possess or control the records. As stated above, the general principle is that an agent has the duty to produce to the principal all documents in the agent's hands relating to the principal's affairs. This point is elaborated upon in Bowstead (at pp.192-193):

> The principal is entitled to have delivered up to him at the termination of the agency all documents concerning his affairs which have been prepared by the agent for him. In each case it is necessary to decide whether the document in question came into existence for the purpose of the agency relationship or for some other purpose, e.g., in pursuance of a duty to give professional advice.

Further, The Canadian Law of Architecture and Engineering states (at p. 266):

> … a client who decides to proceed with a project for which an architect or engineer has prepared designs, expressly or by implication appoints the architect or engineer as his or her agent for various purposes … The documents the architect or engineer receives or creates in his or her role as agent for the client are owned by the client.

In my view, in contrast to the situation in Walmsley, there is a strong basis for a finding that the agency relationship between the Board and the architect carried with it, at a minimum, the right of the Board to possess or control the records relating to the pre-qualification process, as ancillary to the overall tender process. This finding is supported by the principles cited above, as well as by the Board's payment for the process which created the records and the terms of the contract which indicate that the Board, as principal, has ultimate control over the tender process and documents related thereto, regardless of whether or not it is the Board or the agent which has actual physical possession of these records.

As a result, I find that the agency factor weighs heavily in favour of a finding of "control" by the Board.

7. Customary practice of the Board

The Board submits that it is customary practice of project architects retained by the Board to conduct the pre-qualification process. The Board states that the architect receives and analyses the information and provides the Board with the result of that analysis. The Board believes this practice to be similar to that of other institutions.

The architect makes no submissions on this point.

I accept that in the normal course it does not receive access to information provided by contractors to architects for the purpose of the pre-qualification process. However, this does not necessarily lead to the conclusion that the Board may not require production of these documents to it.

8. Customary practice of the architect

The Board submits that it is customary practice that the architectural firm receive and maintain possessionof the documents.

The architect submits that since confidentiality is essential to the process, it (and as far as it can determine, other architects) treat the information provided for this process with "the maximum security".

Neither of the above submissions advances the argument that the Board by custom does not have controlof the records. The fact that confidentiality is essential to the process may be relevant in the context of public access under the Act (for example, under section 10(1)), but has no bearing on the "control" issue under section 4(1). Further, as stated above under point 7, the fact that normally only the architect maintains possession does not assist in the control analysis.

9. Reliance on the records

The Board submits that it does not rely on the records but instead on the architect's analysis of the records.

In my view, the Board relied on the records for the purpose of the bidding process, based on the architect's interpretation of the information gathered in the records, for the Board's benefit.

10. Ownership

Both the architect and the Board submit that the architect owns the records. The contract is silent on the ownership issue.

As stated above under the point 6 "agency" heading, The Canadian Law of Architecture and Engineering states that documents the architect receives or creates in his or her role as agent for the client are "owned" by the client. Since I found that the architect was acting as the Board's agent for
the purpose of the pre-qualification process, I conclude that the Board is the owner of the records relating to this process and has the requisite control over them on this basis alone.

Conclusion

The legal framework and factual circumstances as described above support a finding that the Board has control of documents relating to the pre-qualification process in the possession of the architect. This finding is largely dictated by the relevant statutory framework (points 1 and 2), as well as the nature of the agency relationship between the Board and the architect (point 6) pursuant to the express or implied terms of the contract (point 3), and as evidenced by the Board's payment for creation of the record (point 5) and reliance on the record (point 9). This agency relationship carried with it a right of ownership (point 10) and possession (point 6) of the records. As a result, I find that the relevant records are in the "control" of the Township for the purpose of section 4(1) of the Act.

Has the Board conducted a reasonable search for responsive records within its custody?

The appellant takes issue with the Board's decision that no records exist in response to parts 1 and 2 of its request. The appellant also suggests that more records may exist in response to part 3 of the request, in addition to the record already identified by the Board.

Section 4(1) provides a right of access to a record or a part of a record "in the custody or under the control of an institution." The issue to be decided is whether or not the Board has conducted a reasonable search to determine whether or not records (or additional records) exist "in the custody or under the control of" the Board in response to each part of the appellant's three part request. The Board is not required to prove with absolute certainty that responsive records are not in its custody or under its control, but simply that it has conducted a reasonable search for them.

In relation to this issue, the Board attached to its representations sworn affidavits from its Superintendent of Plant & Planning, Controller of Construction and Plant Office Assistant.

The affidavit from the Superintendent of Plant & Planning states that he received and reviewed a copy of the appellant's request, interviewed department staff who have or may have been responsible for maintaining documents related to construction projects and contractors and found that there are no files maintained relating to specific school construction contractors.

On the basis of the material before me, I am satisfied that the Board conducted a reasonable search for records in its custody responsive to the appellant's request. However, because of my finding above with respect to the "control" issue, the Board has not yet discharged its responsibility to locate responsive records in the custody of the architect. I will address this issue in the remedial provisions at the end of this order.

THIRD PARTY INFORMATION

Introduction

I will now consider the application of the exemption at section 10(1) of the Act to the withheld portions of the four page record.

Section 10(1) of the Act reads, in part:

> 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,
>
> (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;

In order for a record to qualify for exemption under sections 10(1)(a), (b) or (c) of the Act, each part of the following three-part test must be satisfied:

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, M-29, M-37, P-373].

To discharge the burden of proof under part three of the test, the parties resisting 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 10(1) would occur if the information was disclosed [Orders 36, P-373].

This three-part test and the statement of what is required to discharge the burden of proof under part three of the test have been approved by the Court of Appeal for Ontario. That court recently overturned a decision of the Divisional Court 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.)].

The analysis set out below follows the Commissioner's traditional tests considered and found reasonable by the Court of Appeal for Ontario in Ontario (Workers' Compensation Board) cited above.

Part one: type of information

As stated above, the information at issue consists of:

Pages 1, 2	the number of submissions received, the names of the contractors and their assigned overall scores (other than the appellant's name and score), and the name of the engineering firm which was to review the "Mechanical and Electrical" submissions
Page 3	the various scores associated with four of the 11 criteria

Page 4 the names of the contractors other than the appellant

As stated above, the Board disclosed the scores for each of the 11 criteria on page 4, but withheld the names of the contractors. The 11 criteria set out on page 4 are as follows:

(i) years in business

(ii) annual volume of business

(iii) completed Canadian Construction Association/Canadian Construction Documents Committee Document #11 (standard form contractor's qualification statement)

(iv) bonding limits and current bonding construction commitments

(v) related experience - schools (or similar) addition and renovation in $4 million range

(vi) references

(vii) ability to plan and complete within budget and on schedule

(viii) description of staffing by position and by personnel

(ix) statement of fair wage practices

(x) certificate indicating injury frequency in the past five years (CAD 7)

(xi) firm's health and safety policy

The Board submits that the information at issue consists of technical information. The architect makes no specific submissions on the type of information contained in the withheld portions of the record. One of the contractors submits that the information in the record includes financial information.

Technical Information

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 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 [Order P-454].

In my view, the number of submissions received, the name of the engineering firm and the various scores associated with four [(i), (ii), (v), (vi)] of the 11 criteria (pages 1, 2 and 3) clearly do not qualify as technical information as that term has been defined by this office. Disclosure of the names of the contractors other

than the appellant on page 4 would reveal the scores assigned to each contractor with respect to each of the 11 criteria. In my view, these scores do not constitute, nor would they reveal, technical information within the meaning of section 10(1).

Financial Information

This term refers to information relating to money and its use or distribution and must contain or refer to specific data, for example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs [Orders P-47, P-87, P-113, P-228, P-295 and P-394].
Similar to my findings above, the number of submissions received and the name of the engineering firm clearly do not qualify as financial information. In addition, the various scores associated with some of the criteria as well as the scores assigned to the contractors with respect to most of the criteria is not itself, nor would its disclosure reveal, financial information as that term has been defined under section 10(1). The sole exception to this is the scoring information associated with criterion (ii) "annual volume of business". Disclosure of this information would reveal financial figures, although in the form of ranges as opposed to specific amounts. Although earlier orders of this office have indicated that the information must be "specific" to qualify as financial information, I am satisfied that the ranges are sufficiently specific to qualify generally as financial information.

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [P-493]. Commercial information has been found to include such things as price lists, supplier and customer lists, market research surveys, economic feasibility studies, tender proposals, bid bond information and negotiation status reports [Orders 16, 41, 47, 68, 166, P-179, P-228].

The number of submissions received, the various scores associated with some of the criteria as well as the scores assigned to the contractors with respect to some of the criteria may be described as "commercial" information, in the sense that it relates directly to the awarding of a commercial contract, and thus relates to the buying, selling or exchange of services. As a result, all of the information in question meets part one of the three part test. The name of the engineering firm, in the context in which it appears in the records, does not directly relate to the awarding of a commercial contract and therefore does not qualify as commercial information.

Part two: supplied in confidence

Supplied

The Board submits that the information at issue was supplied to the architect. The architect's submissions, and those of the four contractors opposed to disclosure, reflect this position.

In order to meet the second part of the test, it must be established that the information in the records was actually supplied to the Board, or its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Board [Orders P-203, P-388, P-393].

In Order P-373, Assistant Commissioner Mitchinson stated:

> Records 1, 2, and 3 list the names and addresses of the employers with the fifty highest surcharges in 1991, together with the amount of surcharge for each employer. Records 4 and 5 list only the names and addresses of the employers with the highest penalties in 1990 under the relevant program.
>
> In my view, the surcharge amounts were not "supplied" to the Board by the affected persons; rather, they were calculated by the Board. While it is true that information supplied by the affected parties on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected persons from the surcharge amounts themselves.

In my view, the reasoning in Order P-373 applies to the scores assigned to the contractors with respect to each of the criteria. In each case, disclosure of these scores would not reveal the specific information actually supplied to the architect (as agent for the Board). Rather, the architect calculated or derived the scores based on the information that was actually supplied, or in some cases the architect arrived at the scores based on a subjective evaluation of the information actually supplied. Further, the number of submissions received and the name of the engineering firm clearly does not constitute information supplied to the Board, or to the architect as agent for the Board.

To conclude, none of the information at issue qualifies as having been "supplied" to the Board, or to the architect as agent for the Board. As a result, I find that part two of the test has not been met with respect to the information at issue.

Part three: harms

Having found that the information at issue does not satisfy the second part of the section 10(1) exemption test, it is not necessary for me to determine whether the requirements of the third part of the test have been satisfied. However, in the circumstances of these appeals, I feel it would be useful to comment on this part of the test.

To discharge the burden of proof under the third part of the test, the parties resisting 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 this section would occur if the information was disclosed [Order P-373].

The Board submits that disclosure of the records would prejudice the competitive position of the contractors "as they contain information concerning contractors' financial references and other information relating to their bonding, insurance, WCB ratings, etc. and could reasonably be expected to result in

significant financial harm to the firm to which it relates." The Board provides no further explanation as to how the general scoring in the various categories could reasonably be expected to bring about such harms. The architect submits that disclosure "might affect the competitive position" of some or all of the contractors. Two contractors make submissions on the competitive harm which could reasonably be expected to arise from disclosure of the information actually supplied during the pre-qualification process, as opposed to the scoring information. One contractor makes a very generalized assertion of competitive harm, while the fourth contractor who provided representations makes no submissions addressing the harm issue.

The evidence before me on the harm issue falls well short of the "detailed and convincing" standard, and does not establish a reasonable expectation of probable harm with respect to the scoring information, the name of the engineering firm or the number of submissions received. The kind of generalized information which might be revealed if the information at issue is disclosed could not reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the contractors within the meaning of section 10(1)(a) of the Act.
No party claimed that the harms under section 10(1)(b), (c) or (d) could reasonably be expected to occur from disclosure of the information at issue, and on the basis of the material before me I find that these sections have no application here.

Conclusion

The information at issue was not supplied to the Board or the architect as agent for the Board, and its disclosure could not reasonably be expected to result in any of the harms described in sections 10(1)(a) through (d). Accordingly, I find that this information is not exempt under section 10(1).

ORDER:

1. I order the Board to disclose to the appellant the withheld information on pages 1, 2, 3 and 4 of the record no later than **November 4, 1999**, but no earlier than **November 1, 1999**.

2. I order the Board to send a written direction to the architect to provide the Board with records responsive to the appellant's request. The Board's written direction should be issued no later than **November 4, 1999**, but no earlier than **November 1, 1999**, and should require delivery of the records no later than **November 18, 1999**.

3. Upon receipt of the records from the architect, I order the Board to issue an access decision to the appellant in accordance with Part I of the Act, treating the date of receipt of the records as the date of the request.

4. I order the Board to provide me with a copy of the written direction referred to in provision 2 above, and a copy of the Board's access decision referred to in provision 3 above.

5. I uphold the remainder of the Board's decision.

6. I remain seized of this appeal with respect to any compliance issues arising from this order.

Original signed by: September 29, 1999
David Goodis
Senior Adjudicator