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

ORDER PO-1753

Appeal PA-990059-1

Ministry of the Environment

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/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for:

> all documents, memoranda, information, responses and correspondence filed by [a specified company] (the Company) in response to the Ontario Ministry of the Environment ("MOE") request for expressions of interest and any responses to request for proposals (RFPs) issued by the MOE in relation to the MOE's proposed Drive Clean Program and/or proposed motor vehicle emissions testing programs for the years 1995 to [September 30, 1998].

The request included the following:

1. Identification of all materials provided to [the Company] for the purposes of responding to any request for expressions of interest or requests for proposals issued by the MOE.

2. Copies of all such documents, information, communications, memoranda, requests, etc.

3. The filings of [the Company] with the Ministry of the Environment.

4. Copies of all technical and/or other data referenced in the aforesaid materials upon which the Drive Clean or proposed motor vehicle emissions testing programs have been predicated; and

5. Copies of all technical and/or other data prepared by, generated and/or produced by other parties upon which [the Company] based all or any portion of their filings with the MOE.

The Ministry issued an interim decision to the requester granting partial access to the responsive records. The Ministry also provided a fee estimate of $117.40 for search, photocopying and delivery charges, which was paid by the requester.

In discussions with the Ministry, the requester narrowed the scope of the request to records relating to the Company's bid reply. These records consist of three binders submitted by the Company in response to the Ministry's Request for Proposals. Binder 1 contains the actual proposal and is titled: "Response to Government of Ontario - Ontario's Vehicle Emission Inspection and Maintenance Program" dated February 12, 1998; Binder 2 carries the same title and contains 10 "Attachments"; and Binder 3 contains presentation material and is titled: "Ontario Vehicle Emissions, Inspection and Maintenance Program".

Before issuing its final decision, the Ministry notified the Company, pursuant to section 28 of the Act, and sought its views on disclosure of the records. After considering the Company's response, the Ministry advised the requester that it had decided to grant access in full to the three-page "Request for Tender/Quotation" and the financial statements contained in Binder 1, and the first three "Attachments" contained in Binder 2, and denied access to the rest of the records pursuant to sections 14(1)(c) and (l), 17(1)(a) and (c) and 21(1) of the Act. The Company did not appeal the Ministry's decision, and the Ministry provided the requester with those records it had decided to disclose.

The requester (now the appellant) appealed the Ministry's decision to deny access to the rest of the records.

I sent a Notice of Inquiry to the appellant, the Ministry, the Company and seven other parties whose interests might be affected by disclosure of the records (the affected parties).

The appellant, the Ministry, the Company and two of the affected parties submitted representations.

PRELIMINARY ISSUE:

In its representations the Company asks that the appeal not proceed until the identity of the appellant's client is disclosed, and the Company and affected parties are provided with a copy of the appellant's representations and an opportunity to respond to them. The Company also objects to the fact that it was not made aware of this appeal during the mediation stage.

The Company has been provided with the name of the appellant, a law firm representing a client. The issue of disclosure of the name of the client is a matter between the client and his/her counsel, and not something I am required to deal with in order to dispose of the issues raised in this appeal.

Because of the way I will be disposing of this appeal, it is also not necessary for me to address the issue of access to the appellant's representations.

As to the Company's concern regarding notification during mediation, in my view, the Company has suffered no prejudice through the absence of notification. The Company and the affected parties were provided with a Notice of Inquiry and the opportunity to participate fully in all issues affecting their interests.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 17(1)(a), (b) and (c) of the Act state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, 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;

For the record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected 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 Ministry in confidence, either implicitly or explicitly; **and**
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

In Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.), the Court of Appeal for Ontario upheld my decision in Order P-373. In that judgment 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 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]

Requirement One - Type of Information

The Company claims that the records contain trade secrets as well as scientific, technical, commercial and financial information. The representations provided by the Ministry and the affected parties support the Company's position.

The appellant's brief representations on this issue consist of the following:

> The Evaluation Criteria described in the RFP sets out the parameters of the information contained in the Records. Based on these criteria, there are no trade secrets or scientific, commercial, or labour relations information in the Records. If there is any technical or financial information in the records, its disclosure will not cause harm to any party with respect to the considerations set our in section 17(1) of the Act.

"Commercial information" has been defined in past orders to mean information which relates solely to the buying, selling or exchange of merchandise or services [Order P-493].

The Ministry made a decision to solicit expressions of interest by various private sector organizations to deliver its Drive Clean Program. It issued a Request For Proposals, with the intention of buying the services of the successful bidder. In my view, the records were prepared by the Company for the sole purpose of entering into a commercial venture with the Ministry, and I find that the information contained in the records satisfies the definition of "commercial information".

"Financial information" has been defined in past orders to mean information relating to money and its use or distribution and must contain or refer to specific data. The type of information found to qualify as financial information includes cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Orders P-47, P-87, P-113, P-228, P-295 and P-394].

Some parts of the records also include various financial aspects of the proposed program, how it will operate, proposed revenues, costs and expenses, as well as program cost comparisons, and a financial plan. I find that these parts of the records also contain "financial information" as that term is used in section 17(1).

The definition of technical information was established in Order P-454 as follows.

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

Some parts of the records were prepared by professionals in the field of automotive emissions testing and describe the operation of various processes and equipment and contain information relating to technical processes associated with the Drive Clean Program testing. I find that these parts of the records also satisfy the requirements of the definition of "technical information".

The term "trade secret" was defined by former Commissioner Tom Wright in Order M-29 as:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The Company submits:

> The information contains trade secrets in that the way [the Company] proposed to provide services to the Ministry pursuant to the Ministry's Drive Clean Program (the "Drive Clean Services") which trade secrets are the proprietary information of [the Company] used to carry on a discrete line of business. That information is not publicly available and is consistently treated as confidential and of commercial value. The Drive Clean Services involved the development of software and services specific to the Drive Clean Program, and the Proposal contained creative, proprietary options for doing so. The scientific and technical nature of the emissions controls requirements for the Drive Clean Program required an equally scientific and technical response, which was derived through extensive study and creativity as well as extrapolations from [the Company]'s experiences elsewhere.

The Company's proposal describes the features of its Drive Clean testing system. The proposal includes various components of the system which, in my view, are accurately characterized as the "methods", "techniques" and "processes" to be utilized by the Company in delivering its testing system.

While certain processes and methods used in Drive Clean testing systems may be generally known within the trade or business, I accept the Company's position that specific methods , techniques and processes developed by the Company are unique to it and not generally known to others in the same trade or business. Some information contained in the records would, if disclosed, provide competitors with a marketable knowledge base which the Company has developed independently. I am persuaded, based on the representations provided by the Company, that its system has economic value which would be compromised should it be known to competitors.

I also accept the Company's position, as described in detail below under my discussion of Requirement Two, that its Drive Clean testing system has been "subject of efforts which are reasonable under the circumstances to maintain its secrecy." The Company believed that the proposal would be subject to the non-disclosure terms as set out in the Ministry's Request for Proposals; the RFP established the guidelines and conditions for the content and submission of the proposals, which contained statements regarding confidentiality; and the Company has continually maintained throughout the process of this request and appeal that its bid reply should be treated confidentially and not be disclosed to the appellant.

Therefore, I find that the Company has established that disclosure of some information contained in the records would reveal information that is a "trade secret" for the purpose of section 17(1) of the Act.

For all of these reasons, I find that the first requirement of the section 17(1) exemption test has been established for all undisclosed parts of the records.

Requirement Two

In order to satisfy the second requirement, the Ministry, the Company and/or the affected parties mustshow that the information was **supplied** to the Ministry, either implicitly or explicitly **in confidence**.

Supplied

All of the parties agree that the records were supplied to the Ministry, and I concur.

In Confidence

In order to establish that the records were supplied either explicitly or implicitly in confidence, the Ministry, the Company and/or the affected parties must demonstrate that an expectation of confidentiality existed at the time the records were submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

(1) Communicated to the Ministry 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 party prior to being communicated to the Ministry.

(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 Company submits:

> In the opening pages of the Proposal, [the Company] explicitly stated that the Proposalwas its confidential information, and claimed entitlement to refuse disclosure of same under the Act. In discussions that followed with the Ministry, [the Company] firmly and consistently reiterated this position.
>
> [The Company] consistently treats proposal information, financial data and proprietary methodologies as proprietary and confidential. Control of such data affects [the Company's] ability to provide competitive prices to its clients. By publishing formal practices and procedures for its employees to follow, [the Company] provides guidelines to enable those personnel to control and thus protect such data. Only select personnel with a "need to know" have access to costing and pricing data as well as methodologies.
>
> [The Company] places all of its employees, officers, subcontractors and business partners under stringent non-disclosure agreements. Internally, all documents dealing with trade secrets and pricing are marked as company confidential. [The Company] requires its commercial customers to maintain confidentiality and relies upon statutory proprietary information protection of the governments with which it deals.

The Ministry states that the records were supplied by the Company explicitly in confidence.

One of the affected parties submits that its information was supplied implicitly in confidence, based on the sensitive nature of the information and its awareness of the Ministry's practice to treat this type of information confidentially.

The other affected party submits that the information it supplied was explicitly marked confidential and it was assured at the time of the bidders meeting prior to the submission of the bid that proprietary information would not be released.

The appellant, argues that there is no confidential information in the records. The appellant submits that the records were supplied to the Ministry subject to the requirements of the "Request for Proposals" which included the following conditions:

> The Province may, at any time, make public the names of all proponents. Additional information may be released in accordance with [the Act]. Proponents should identify any information in the proposals for which confidentiality is to be maintained by the Province. Confidentiality of such information will be maintained by the Province, except where an Order by the Information and Privacy Commissioner or a Court requires the Province to do otherwise.

The above-referenced conditions of the "Request for Proposals" do not support the appellant's position. These conditions do not remove the expectation of confidentiality; rather, they require the proponents to identify the information considered to be confidential, which will then be held in confidence unless ordered disclosed under the Act.

I find that the Company, as supported by the Ministry and the affected parties, has established that the records were supplied to the Ministry explicitly in confidence. The records contain a statement that they are being submitted on the basis that they will be kept confidential; the business practices of the Company, as described in the representations, reflect a demonstrated concern for the protection of this information from disclosure; there is no evidence to suggest that the information contained in the records is otherwise available from sources to which the public has access; and the records were prepared for the purpose of participating in a bidder selection process, and the Ministry has made clear from both past practice and the contents of the RFP that the submission would not entail disclosure.

Therefore, I find that the second requirement of the section 17(1) exemption test has been established.

Requirement Three

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party or parties with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in 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 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In the present appeal, the Company, the Ministry and the affected parties, as the parties resisting disclosure, must provide detailed and convincing evidence to establish a reasonable expectation of probable harm, in this case one or more of the harms outlines in sections 17(1)(a), (b) and/or (c) of the Act.

Section 17(1)(a)

The Company submits that disclosure of the records could prejudice significantly its competitive position:

> Members of [the Company's] Team are engaged in the provision of services similar to the Drive Clean Services in other jurisdictions elsewhere in North America. The Drive Clean Services as envisioned and proposed by [the Company] in the Proposal were in large part derived from the experience of [the Company's] Team in other jurisdictions. This experience offers a competitive, proprietary asset for which protection is required. Disclosure of that asset would undercut [the Company's] ability to compete elsewhere.
>
> Emissions control programs are being developed throughout North America and abroad. The [Company] should be free to compete fully in such programs. Disclosure of the novel and progressive approach [the Company] had to the Drive Clean Services would unquestionably compromise its ability to compete in future bids. Information that had been a competitive advantage would no longer be of benefit exclusively to the party that expended resources in producing it. If a competitor were to obtain disclosure of the Proposal, it would be able to replicate or adapt [the Company]'s previously unique approach in other bids. For its part, [the Company] would have no parallel insight into its competitor's information ...
> ...
>
> In the event that [the Ministry] were to disclose the level of compensation [the Company] sought under this Proposal, and the method by which those amounts were to be shared, this could irrevocably interfere with [the Company's] ability to compete for future business ... By knowing what [the Company] was willing to accept as compensation, competitors could undercut their own amounts in order to win future business.
> ...
>
> If [the Company]'s financial information was disclosed, other parties could, by direct access or by extrapolation, estimate [the Company]'s costs, rates and mark-ups. This would irrevocably compromise [the Company]'s bargaining position vis-a-vis suppliers, competitors, and customers.

The representations of the Ministry and the affected parties echo those of the Company.

The appellant's representations of section 17(1)(a) are as follows:

> The deadline for submission of proposals pursuant to the RFP was January 12, 1998 (section 5.5.1 of the RFP). The tender has been completed. The competition is over. Negotiations have ended. The resulting contracts have been executed. The prospect of disclosure of the Records to the public can not possibly give rise to a reasonable

> expectation that the disclosure will prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of [the Company].

I do not accept the appellant's position. Section 17(1)(a) identifies two distinct harms: (1) significant prejudice to the competitive position of an organization; and (2) significant interference with contractual other negotiations involving an organization. While the second harm may, in some instances, be linked to the status of negotiations, the first harm is not. In other words, the expectation of harm to the competitive position of the Company is not tied to the fact that the Ministry's Drive Clean Program is operational and being administered by another supplier.

I am satisfied that the records contain the Company's proprietary trade secrets used to carry on its discrete line of business, as well as commercial, financial and technical information, the disclosure of which would have a significant impact on its ability to compete for business in the marketplace. I find that the Company has provided detailed and convincing evidence describing a set of facts and circumstances that could lead to a reasonable expectation of the probability of significant prejudice to the Company's competitive position should the records be disclosed.

Accordingly, I find that the third requirement of the section 17(1) test has been established, and the records qualify for exemption under section 17(1)(a) of the Act.

Because of my findings here, it is not necessary for me to consider the application of sections 14(1), 21 or 17(1)(b) or (c) of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: February 9, 2000
Tom Mitchinson
Assistant Commissioner