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

ORDER MO-1239

Appeal MA-990072-1

Regional Municipality of Haldimand-Norfolk

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NATURE OF THE APPEAL:

The Regional Municipality of Haldimand-Norfolk (the Region) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from one of its Regional Councillors. The request was for access to copies of bid documents and related correspondence submitted by two named companies. One company (Company #1) was the successful bidder on a tender issued by the Region.

The Region identified 15 responsive records, consisting of the two bid submissions and thirteen letters. The Region denied access to all these records pursuant to sections 10(1)(a), (b) and (c) the Act (third party information).

The requester, now the appellant, appealed the Region's decision. He also claimed that "this information is relevant to my responsibilities as a Regional Councillor acting in the Public Interest", thereby raising the possible application of section 16 of the Act.

During mediation, the appellant clarified that he does not want access to the actual contracts entered into by the Region with the two companies.

Also during mediation, the Region disclosed parts of two of the letters to the appellant (Records 3 and 4 described below). These letters were submitted by Company #1 to the Region and outline price adjustments following the contract award. Only unit price information was severed from these two records.

Further mediation was not possible, and I sent a Notice of Inquiry to the appellant, the Region and the two companies. Representations were received from the Region and Company #1 only.

In its representations, Company #1 consented to the disclosure of a number of records and parts of records. As a consequence, the scope of this inquiry is reduced to the following nine records:

Record 1 - June 3, 1998 letter from Company #2 to the Region re bid submission

Record 2 - July 13, 1998 letter from the Region to Company #2 re deposit cheque

Record 3 - July 16, 1998 letter from Company #1 to the Region - partially disclosed
- only unit price information remains at issue

Record 4 - August 5, 1998 letter from Company #1 to the Region – partially disclosed
- only unit price information remains at issue

Record 5 - October 22, 1998 letter from Company #1 to the Region re pickup haul and slag aggregate

Record 6 - October 22, 1998 letter from Company #1 to the Region re revised price

Record 7 - November 10, 1998 letter from the Region to Company #1 re contract -

only unit price information remains at issue

Record 8 - bid submission by Company #2

Record 9 - bid submission by Company #1

A tenth record (Record 10) is a July 28, 1998 letter from the Region to Company #1 regarding the company's deposit cheque and a photocopy of the actual cheque. Company #1 has agreed to the disclosure of all parts of this record with the exception of the company's banking information contained on the cheque. The appellant has confirmed that he does not require access to the banking information. I will include a provision in my order which requires the Region to disclose Record 10, with the banking information on the cheque severed.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a), (b) and (c) the Act read as follows:

> 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, if 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 a record to qualify for exemption under these sections, the parties resisting disclosure, in this case the Region and the construction company, 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 Region 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 10(1) will occur.

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

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 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:

Type of Information

"Commercial information" is information which relates solely to the buying, selling or exchange of merchandise or services (Order P-493).

The bid documents were submitted by the two companies as part of the tendering process for road paving work being undertaken by the Region. In my view, information contained in these records relates to the buying and selling of services, and I find that it qualifies as "commercial information" for the purposes of

section 10(1). All of the various letters identified by the Region contain refinements of the bid or other information directly relating to the paving project, including unit price details. As such, I find that they too contain "commercial information".

Therefore, the first requirement for exemption under section 10(1) of the Act has been established.

PART 2:

Supplied

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 Region, or its disclosure would permit the drawing of accurate inferences with respect to information actually supplied to the Region (Orders P-203, P-388 and MO-1143).

The bid documents and all letters authored by the two companies were sent to the Region by these companies and describe aspects of the tendered project for road paving work and subsequent contractual arrangements. Accordingly, I find that they contain information that was "supplied" for the purposes of section 10(1).

Two of the letters originated with the Region. Record 2, which was sent to Company #2, describes administrative arrangements regarding that company's deposit payment. It does not contain information originally supplied by Company #2, nor would it's disclosure reveal information originally supplied by this company. In contrast, Record 7, which was sent to Company #1, makes reference to a unit price originally supplied by Company #1 as part of the bidding process, and disclosure of this record would reveal information originally supplied by this company.

Therefore, I find that the information contained in all records, with the exception of Record 2, was "supplied" for the purposes of section 10(1).

In Confidence

In order to satisfy the confidentiality component of part two of the test, the parties resisting disclosure must establish that there was a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. An expectation of confidentiality on the part of the supplier is not sufficient; this 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 circumstances, including whether the information was:

(1) Communicated to the Region 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 companies 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)

Company #1 submits that:

> It is established practice in this commercial context that all communications between contractors and the Region are confidential unless otherwise indicated, and both parties hold this expectation of confidentiality.

The Region submits that the information was supplied implicitly in confidence:

> Bids are provided to the Region with the expectation that competitors or the general public would not have access to the information. The Region follows a practice, common to the public sector, of disclosing the name of the bidders and the total proposed cost but not the details of bids and it is reasonable to expect that the Region would maintain consistencyand afford the same consideration to the bidders in question.

I accept Company #1's position, as supported by the Region, that the information contained in the bid documents, with the exception of the name and total bid price of the responding companies, was supplied in confidence. The bids were submitted with the implicit understanding that they would be kept confidential; the contents, other than the total bid price, have been treated confidentially by the companies and the Region; the bid documents are not otherwise publicly available; and they were prepared for a purpose which would not entail disclosure, as per the Region's established practice.

For the same reasons, I find that the unit pricing information reflected in Records 3, 4 and 7, and the follow-up information provided by Company #1 in Records 5 and 6, and by Company #2 in Record 1, was supplied in confidence for the purposes of section 10(1).

PART 3:

Harms

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 section 17(1) would occur if the information was disclosed (Order P-373).

The bid submissions contain the following items:

(a) cover page

(b) overall offer, including quoted price

(c) schedule of items (unit pricing information)

(d) agreement to bond form

(e) list of proposed sub-contractors

(f) list of company's experience in similar work

(g) list of staff to be employed under the contract

(h) proposed geotechnical engineering firm to be used by the company

(j) tender checklist

(k) completed agreement to bond form (Record 8 only).

The address, business phone and fax numbers of Company #1included in item (b) have already been disclosed to the appellant during the course of the appeal, and this type of information relating to both companies is also otherwise readily available. The overall offer and quoted price included in this item have also been disclosed, as per the Region's regular practice with respect to tendering contracts. Therefore, I find that disclosure of the information contained in item (b) could not reasonably be expected to result in any of the harms outlined in section 10(1).

Items (a), (d), and (j) are standard documents which form part of the Region's public tendering process. Information on the cover page is innocuous; the agreement to bond is a blank form supplied by the Region; and the checklist is a summary of the various types of documents included in the bid package. I find that disclosure of these items could not reasonable be expected to result in any of the harms outlined in section 10(1).

The representations provided by the Region and Company #1 do not deal directly with the contents ofitems (e), (g) and (h). In my view, disclosing information that would identify sub-contractors, a list of employees

involved in the projects, and the geotechnical consultant to be hired by the companies could not reasonably be expected to result in any of the section 10(1) harms. As far as Company #1 is concerned, most, if not all, of this information would become known in the context of performing the work reflected in the tender. As far as Company #2 is concerned, in the absence of evidence from the Region and/or Company #2 that would establish any of the section 10(1) harms, I find that none are evident on the face of the records, and that these items do not qualify for exemption under section 10(1).

Item (f) of each bid submission identifies various past projects of a similar nature undertaken by the two companies. Included is the name of the organization that hired the company, the date of the work, the value of the contract, and a brief description of the work. All past contracts identified by the two companies are with public sector bodies, including the Region in some instances. The fact that the companies performed similar work is presumably broadly known in the community. The work of construction and paving companies is highly visible, and they invariably display their names prominently on work sites. As far as the contract value is concerned, only a rough overall figure is included in item (f), with no breakdown that could identify any unit pricing information. In the case of previous work with the Region, the overall contract price would have been made publicly available in accordance with its tender policy. This practice is common place among other public sector bodies as well. Again, in the absence of evidence from the Region and/or the two companies that would establish any of the section 10(1) harms in disclosing the contents of item (f), I find that the information contained in this item does not qualify for exemption under section 10(1).

Item (k) of Record 8 is a completed agreement to bond filed by Company #2. I received no representations from Company #2 and no specific reference to this item in the representations provided by the Region. In the absence of evidence that would establish any of the section 10(1) harms with respect to this item, I find that none are evident on the face of the record, and that this item does not qualify for exemption under section 10(1).

The only remaining information concerns unit pricing information contained in item (c) the bid documents and referred to in various letters.

Company #1 states that:

> ... the detailed breakdown of cost [on a per unit basis] would again be only of interest to competitors of [the company] and would significantly prejudice [the company's] position vis-a-vis competitors by allowing [the company's] competitors to deconstruct [the company's] pricing and then to undercut [the company's] bidding in the future.

Again, the Region's representations support Company #1's position. It submits that:

> ... disclosure would prejudice the competitiveness of the tendering process. It is not in the public interest to compromise the integrity of the process by disclosing the details of bids to the detriment of the successful bidder. Disclosure could prejudice significantly the bidders' competitive position by disclosing pricing strategies that can be incorporated by competing

> bidders in future which would ultimately discourage bids. It is in the public's interest to continue to receive competitive bids to ensure the most efficient and effective use of public funds. Hence both the bidders and the Region could be harmed by disclosure and bidders could benefit unfairly from access to the details of competitors' bids.

In Order PO-1697, Adjudicator Holly Big Canoe commented as follows:

> 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) [the equivalent provision to section 10(1) in the provincial statute] 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).

For the same reasons applied in these previous orders, in my view, disclosure of unit price information contained in the bid documents (item(c) in Records 8 and 9), the undisclosed parts of Records 3 and 4, and the unit price information contained in Records 5 and 7, could reasonably be expected to prejudice significantly the competitive position of these two companies, and I find that this information qualifies for exemption under section 10(1)(a) of the Act.

Records 1 and 6 do not contain any direct reference to unit prices, nor would the disclosure of these records reveal this type of information. I have no evidence from Company #2 to establish any of the section 10(1) harms that could arise if Record 1 is disclosed. Regarding Record 6, Company #1 simply states that disclosure would harm its competitive position, but does not provide the level of detailed and convincing evidence required to establish this or any of the other harms outlined in section 10(1). Consequently, I find that Records 1 and 6 do not qualify for exemption under section 10(1), and should be disclosed to the appellant. Similarly, and for the same reasons, I find that the parts of Record 5 that do not relate to unit pricing information do not qualify for exemption under section 10(1), and should be disclosed.

In summary, I find that the only parts of the records which qualify for exemption under section 10(1) are those that contain or would reveal unit pricing information supplied by the two Companies.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that section 16, the public interest override, applies to the information contained in the records.

Section 16 of the Act states:

> An exemption from disclosure of a record under sections 7, 9, **10,** 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

There are two requirements contained in section 16 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption.

In Order PO-1702, I described the purpose of the section 17(1) exemption as follows:

> It is important to note that section 17 is a mandatory exemption whose fundamental purpose is to ensure that third party interests are maintained. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.

The appellant did not submit any representations in response to the Notice of Inquiry.

The Region submits as follows:

> We have received no request other than this one, there have been no media coverage of this tender or ensuing contract, and the project has not been the subject of any controversy from any source.
>
> The requester is a member of Regional Council which affords him the opportunity to raise the issue in a public forum and seek majority Council support for release of the subject information. Moreover the bidding and contract award is a public process, overseen and determined by elected representatives, accountable to the ratepayer and working under close scrutiny of the media.
>
> We reject the argument advanced by the requester/appellant that there is a compelling public interest which overrides the exemptions we have invoked.

I agree. In my view, the appellant has been provided with the degree of disclosure adequate to address any public interest concerns regarding the tendering process used by the Region in this instance. Although the appellant identifies himself in his letter of appeal as a Regional Councillor, this status does not, in itself, evidence a compelling public interest under section 16. In my view, the appellant has no greater inherent right under the Act to require disclosure of this information than any other member of the public.

Therefore, I find that section 16 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the decision of the Region **not** to disclose any unit price information contained in the records. This information can be found in item (c) of Records 8 and 9, the undisclosed portions of Records 3 and 4, and the highlighted portions of the copies of Records 5 and 7 which I have sent to the Region's Freedom of Information and Privacy Co-ordinator along with a copy of this order.

2. I order the Region to disclose Records 1, 2, 6, those portions of Records 5, 7, 8 and 9 not covered by Provision 1, Record 10 with the banking information on the cheque severed, and the following letters from Company #1 to the Region which Company #1 consented to disclose during the course of this inquiry: July 10, 1998 letter re documentation, October 22, 1998 letter re final quantities, October 22, 1998 letter re curb work, December 22, 1998 certificate of completion of the contract, and December 29, 1998 letter re contract completion. All disclosures under this Provision must be made by the Region to the appellant by **November 15, 1999** but not before **November 8, 1999**. I have attached a highlighted version of Record 10 with the copy of this order sent to the Region's Freedom of Information and Privacy Co-ordinator which indicates the portions that should **not** be disclosed.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Region to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: October 7, 1999
Tom Mitchinson
Assistant Commissioner