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

ORDER MO-1319

Appeal MA-000058-1

Township of Frontenac Islands

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NATURE OF THE APPEAL:

The Township of Frontenac Islands (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for:

1. All reports, memoranda, correspondence or other documents prepared by [certain specified engineering firms] for the Steering Committee and/or the Township in relation to the Class EA study.

2. Minutes of all Steering Committee meetings held to date.

3. The budget for the Class EA study, and contracts between the above-noted consultants and the Township.

The request relates to a study of transportation services for Wolfe Island undertaken by the Township in accordance with the requirements of the Class Environmental Assessment for Municipal Road Projects (the Class EA). The Township located the records responsive to the request and provided the appellant with full access to "all of the documents in this office pertaining to this matter." The appellant responded to the Township by questioning whether its decision included all records held by one of the engineering firms, other Township consultants, and Steering Committee members. The appellant did not receive a response from the Township to his inquiry. However, after reviewing the responsive records at the Township, the appellant was advised that the engineering firm was preparing a list of records responsive to the request which were in its possession.

The appellant appealed the decision of the Township stating that "the Township's decision to limit access to only those documents in the custody of the Township (i.e. "in this office") amounts to a de facto denial of access to the requested records." The appellant maintained that the "records held by the Township's consultants and sub-consultant are clearly under the "control" of the Township for the purposes of section 4(1) of the Act". This office opened Appeal MA-990333-1.

During the mediation stage of that appeal, the Township issued a subsequent decision with respect to the records responsive to the appellant's request which were maintained by the engineering firms on behalf of the Steering Committee. The Township acknowledged that it has control of the responsive records and agreed to make these records available to the appellant, at his request, in the Township's office. Appeal MA-990333-1 was thereby resolved.

In a second decision, the Township disclosed six records in their entirety and granted partial access to the three remaining records, claiming the exemption found in section 10(1) to deny access to the undisclosed portions.

The appellant appealed the Township's decision on the basis that:

- the exemption found in section 10(1) of the Act is not applicable in this case;

- there is a compelling public interest in the disclosure of the records (section 16 of the Act); and

- the Township did not conduct a reasonable search for all responsive records (section 17 of the Act).

This office then opened Appeal MA-000058-1. During the mediation stage of this appeal, the appellant advised that he was satisfied that the Township had conducted a reasonable search for the responsive records. The Township also disclosed the Project Meeting Minutes to the appellant. The remaining records at issue consist of:

- Appendix A to the Project Work Plan dated May 5, 1999, entitled "Detailed Work Plan" (nine pages); and

- Section 5.0 of the Project Proposal dated September 1998, entitled "Resource Assignments, Fees and Disbursements" (one page).

I provided the Township and the two engineering firms which prepared the responsive records (the affected parties) with a Notice of Inquiry soliciting their representations on the application of sections 10(1) and 16 to the records. The Township indicated that it would not be submitting representations. One of the affected parties made submissions, which were shared with the appellant, in their entirety. The appellant's representations to his Notice of Inquiry were similarly shared with the Township and the affected parties, who were then invited to make further submissions by way of reply. I did not receive any reply representations from them.

DISCUSSION:

THIRD PARTY INFORMATION

General Principles

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the institution and/or the affected parties must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 10(1) will occur.

[Order 36. See also Orders 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 One of the Test

The affected party's submissions indicate that, in its view, the records remaining at issue contain information which qualifies as "financial information" within the meaning of section 10(1). The term financial information has been defined in previous orders of this office as:

> The 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]

The appellant submits that:

> it appears that this information is not confined to a mere listing of professional fees and disbursements, and instead provides summary details on the timing and content of the EA planning steps proposed by the affected party.

With respect to the actual dollar values for the professional services of the affected party, the appellant indicates that:

> ... the mere fact that the requested records may include some dollar figures does not necessarily mean that the section 10(1) exemption is applicable. In Order M-258, for example, Adjudicator Fineberg ordered the disclosure of invoices rendered by a forensic accounting firm, even though the invoices contained information on the amounts billed (i.e. fees and disbursements) as well as the number of hours of work performed.
>
> Similarly, in Order M-284, Adjudicator Fineberg ordered the disclosure of municipal budget information, despite the municipality's argument that the records contained a detailed description of the financial affairs of an affected party (i.e. day care centre).
>
> In Order M-185, Adjudicator Seife ordered the disclosure of portions of a business proposal submitted by a private company in response to a municipality's call for proposals:
>
> > In my view, information does not qualify as commercial information under section 10 of the Act merely because it is contained in a business/commercial proposal.
>
> This principle is applicable in the instant case. The mere fact that the EA Project Proposal and EA Workplan may contain some proposed project costs does not necessarily mean that this is commercial information which qualifies for the section 10 exemption. Indeed, there is no commercial value to the non-disclosed information in this case.
>
> To my knowledge, the non-disclosed records do not contain a breakdown of the assets or liabilities of the affected party, nor do they contain financial details on the corporate structure of the affected party. Similarly, the non-disclosed records do not reflect the profit/loss margins of the affected party, nor do they contain information on the affected party's pricing practices, cost accounting method, overhead expenses, or retained operational costs.

I agree with the position taken by the appellant with respect to the majority of the information contained in the records. In my view, only the right column of each record contain information which could reasonably be described as "financial information". This column lists the dollar value of each of the services which the affected party proposes to perform as part of the EA Project. I find that this information may properly be described as referring to the pricing practices of the affected party. This information, though not the remaining information contained in the records, qualifies as "financial information" within the meaning of section 10(1).

Part Two of the Test

On the face of the records themselves, it is clear that they were supplied by the affected party to the Township. I will now address the question of whether they were supplied by the affected party to the Township with an expectation, either implicit or explicit, that they would be treated confidentially.

The affected party has not made any submissions with respect to the issue of confidentiality beyond its assertion that "this information is considered to be confidential financial information".

I have reviewed the complete versions of the Work Plan dated May 5, 1999 and the Proposal dated September 1998 and find that they do not contain any explicit statement indicating that they are to be treated in a confidential manner by the Township. I have not been provided with any other evidence which would demonstrate that there existed an explicit expectation of confidentiality on the part of the affected party.

With reference to the issue of confidentiality of the information supplied to the Township by the affected party, the appellant submits that:

> ... the Township's original request for proposals does not specify that the information submitted by the affected party - or any other bidder - will be held in confidence, or that the information will not be made available to the public. Accordingly, there was no assurance of confidentiality provided by the Township when the affected party (and other bidders) submitted information during the RFP process.
>
> Similarly, the requested records themselves do not do not claim confidentiality, nor do they request that the submitted information be withheld from the public.

The appellant concludes his submissions on this issue as follows:

> In these circumstances, it is unrealistic for the affected party to now claim confidentiality, particularly since the affected party had full knowledge that:
>
> - it was submitting the information to a public entity engaged in a public RFP process:
>
> - no assurance of confidentiality was provided by the Township nor requested bythe affected party when the information was submitted;
>
> - the information related to a public sector undertaking (i.e. transportation services), which was being planned and paid for with public funds; and
>
> - at all material times, the public sector undertaking was to be planned in full consultation with members of the public, pursuant to the public notice/comment provisions prescribed by the Municipal Roads Class EA and under the EA Act.

> Accordingly, any suggestion that the affected party's involvement in the EA planning exercise was a purely private initiative, or that the affected party's detailed workplan for meeting EA Act obligations was intended to be kept secret, cannot be sustained on the evidence.

I agree with the position outlined by the appellant. I find that I have not been provided with sufficient evidence to determine that the affected party supplied the information contained in the records to the Township with an expectation, explicit or implicit, of confidentiality. Neither the submissions of the affected party nor the records themselves indicate any such expectation or that an assurance of confidentiality was made by the Township to the affected party. Accordingly, I find that the second part of the section 10(1) test has not been satisfied. As all three parts of the test must be met in order for a record to qualify for exemption under section 10(1), I find that these documents are not exempt and will order that they be disclosed.

Part Three of the Test

If I am in error with respect to my findings under part two of the section 10(1) test, I will also evaluate whether the affected party has established that it has satisfied the third part of the test for the information which I have found to be financial information in my discussion of part one.

As noted above, the affected party is obliged to provide me with "detailed and convincing evidence" that the disclosure of the information contained in the records could reasonably be expected to result in one or more of the harms described in sections 10(1)(a), (b) or (c). The affected party simply asserts that the disclosure of the information contained in the records "could affect our competitive position".

In Order MO-1312, I addressed a similar situation where an affected party failed to provide me with the kind of detailed and convincing evidence required to establish the harm alleged. I also reviewed the comments of Adjudicator Sherry Liang with respect to this question and made the following findings:

> With respect to the issue of harm to its competitive position, the affected party simply asserts that "Our mutual and economical interests should be protected and could be harmed."
>
> In Order PO-1791, Adjudicator Liang made the following findings in a similar situation where there was a paucity of evidence on the issue of harm to an affected party's competitive position:
>
> > A number of decisions have considered the application of section 17(1) [the equivalent provision to section 10(1) in the provincial Act] to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records:

> Orders P-166, P-610 and M-250. Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.
>
> In general, therefore, there are many cases where the exemption described in section 17(1)(a) has been applied to information which is similar to that at issue here. The difficulty with the case before me, however, lies with the scarcity of evidence on the specifics of this affected party's circumstances. I am left without any guidance, for example, as to whether unit pricing information is viewed as commercially-valuable information in the particular industry in which this affected party operates. As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.
>
> In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

Similarly, in the present appeal, I find that I have not been provided with the kind of "detailed and convincing" evidence required for me to make a finding that the information relating to fees is exempt under section 10(1)(a). The affected party has failed to explain in a detailed and convincing manner how the disclosure of the information relating to its fees could reasonably be expected to result in the harm alleged to its competitive position. As a result, I find that the information contained in paragraph 2.3 of the Proposal relating to the fees to be charged by the affected party is not subject to the exemption in section 10(1)(a).

In my view, the evidence tendered by the affected party similarly falls short of the kind of detailed and convincing evidence which is required to satisfy the third part of the section 10(1) test. The affected party has failed to describe in any meaningful way how the harm alleged is reasonably likely to result from the disclosure of the records or how its competitive position would be adversely affected by the disclosure. In conclusion, I find that the affected party has not met its evidentiary burden under section 10(1) and that the records are not exempt from disclosure under that section.

ORDER:

1. I order the Township to disclose the records at issue to the appellant by providing him with a copy by **August 15, 2000** but not before **August 10, 2000**.

2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Township to provide me with a copy of the material disclosed to the appellant.

Original signed by: July 11, 2000
Donald Hale
Adjudicator