



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

ORDER MO-1312

Appeal MA-000080-1

Rainbow District School Board



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NATURE OF THE APPEAL:

The Rainbow District School Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the proposals received by the Board in response to a Request for Proposals for the provision of engineering services for mechanical and electrical retrofits of Board properties. The Board located the records responsive to the request and denied access to them, in their entirety, claiming the application of the following exemptions contained in the Act:

- third party information - sections 10(1)(a) and (b)
- economic and other interests - sections 11(c) and (d)

The Board did not notify the bidders who submitted Proposals of the request under section 21 of the Act.

The appellant appealed the Board's decision to deny access to the records. During the mediation stage of the appeal, the appellant agreed to limit the scope of his appeal to include only certain portions of the successful bidder's proposal. Specifically, the appellant is seeking access to the complete pages entitled "Proposal Requirements" and "Scope of Engineering Services" from the successful bidder's proposal. The remaining portions of the successful bidder's proposal, and those of the unsuccessful bidders are, accordingly, no longer at issue in this appeal.

I decided to seek the representations of the Board and the successful bidder (the affected party), who are resisting disclosure, initially. I received representations from the affected party while the Board advised by telephone that it would not be making submissions in response to the Notice of Inquiry. Because of the manner in which I have addressed the application of the exemptions claimed below, it was not necessary for me to seek the representations of the appellant in this case.

The record at issue consists of two pages from the affected party's proposal dated August 26, 1999, which are entitled "Proposal Requirements" and "Scope of Engineering Services".

DISCUSSION:

THIRD PARTY INFORMATION

The Application of the Section 10 Exemption Generally

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the parties resisting disclosure, in this case the Board 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 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.

[Orders 36, P-363, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373 stated:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words “**detailed and convincing**” do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

Part One: Types of Information

The affected party submits that the portions of the proposal sought by the appellant in this appeal contain “financial” and “trade” information within the meaning of section 10(1) of the Act. By referring to the term “trade”, I assume that the affected party is taking the position that the information contained in the record may be considered to be a “trade secret”.

The term “trade secret” has been considered in previous orders of the Commissioner's office where it was defined as follows:

“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.

[Order M-29]

I have reviewed those portions of the record remaining at issue and find that they do not contain information which qualifies as a “trade secret” within the meaning of section 10(1). In addition, I have not been provided with sufficient evidence to enable me to make such a finding beyond the simple assertion that the information relates to trade.

The term “financial information” has also been defined in previous orders as:

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include 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]

Based on my review of the record and the submissions of the affected party, I find that paragraph 2.3 of the “Proposal Requirements” page, which refers specifically to fees, relates to the affected party’s pricing practices, thereby qualifying as “financial information” within the meaning of section 10(1).

I cannot agree, however, that any of the remaining portions of the pages entitled “Proposal Requirements” or “Scope of Engineering Services” contain information which could properly be characterized as “financial information” as that term has been defined in previous decisions.

Part Two: Supplied in Confidence

It is clear on the face of the record itself that the information contained therein was prepared by the affected party and supplied by it to the Board. As noted above, the record is the proposal submitted by the affected party in response to a Request for Proposals from the Board. Accordingly, I am satisfied that the information contained at paragraph 2.3 of the record was “supplied” to the Board by the affected party within the meaning of section 10(1).

Previous orders dealing with the application of section 10(1) have required the demonstration of a “reasonable expectation of confidentiality” on the part of the supplier of the information, at the time it was provided. In Order M-169, some factors which were considered in determining whether an expectation of confidentiality is reasonable are whether the information was:

- (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

I agree with the above approach and will apply these principles in making a determination as to whether the information at issue was supplied with an expectation of confidence.

Neither the Board nor the affected party have made any submissions on this issue. Accordingly, I am unable to determine whether there existed an implicit understanding between the Board and the affected party that the information was intended to be treated confidentially. I note that the Proposal document itself is silent as to the issue of confidentiality, though the Request for Proposals which is attached to the Proposal states that “The Board reserves the right to distribute any or all questions and answers to all other Respondents.”

In Order PO-1791, Adjudicator Sherry Liang addressed the question of the confidentiality of “unit pricing” information generally. In my view, the following principles also govern information relating to fees which may be contained in a proposal submitted in response to a Request for Proposals from an institution:

... the decisions [of the Commissioner’s office] in this area have focussed on determining the expectations of the **supplier** of the information. In this case, the affected party has not made any submissions, and I do not therefore have evidence as to what its actual expectations were at the time that it provided its pricing to MBS. On balance, I have decided that I may infer a reasonable expectation of confidentiality, even in the absence of evidence from the affected party, on the basis of the information supplied by MBS as to its practice. I am satisfied that the practice of treating unit price quotations as confidential, and restricting knowledge of this information to a limited circle of employees of MBS, would give rise to a general and reasonable expectation of confidentiality on the part of contractors providing such information to MBS. My conclusion is consistent with those decisions which have accepted the general proposition that bidders have a reasonably held expectation of confidentiality with respect to the financial details of their bid submissions, such as unit prices and other “proprietary” information: see Order PO-1722.

In the present appeal, the affected party, while not specifically addressing the question of the confidentiality of its Proposal, indicates that it “has special form developed in our office for several years as a successful bidding document” and takes the position that “information included in our proposal shall not be disclosed to

third party.” In keeping with the principles outlined above by Adjudicator Liang, I find that it is reasonable to conclude that the financial aspects of the affected party’s proposal to the Board were submitted with a reasonably-held expectation that they would be treated in a confidential manner. Accordingly, I find that the information in paragraph 2.3 of the Proposal Requirements page which relates to fees was submitted to the Board by the affected party in confidence. Part two of the test has, therefore, been satisfied with respect to this information.

I am not, however, able to extend this finding to the other information in the Proposal Requirements page or the Scope of Engineering Services portion of the Proposal. These parts of the Proposal do not address financial matters and more generally describe the services which the affected party proposes to perform for the Board. There is insufficient evidence before me upon which to base a finding that this information was provided with the same expectation of confidentiality as the paragraph relating to the affected party’s fees.

Part Three: Harms

Generally

Past decisions have stated that in order 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 10(1) would occur if the information was disclosed [Order P-373]. Recently, the Court of Appeal for Ontario accepted the requirement for “detailed and convincing” evidence, stating, among other things that:

[s]imilar 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.

[Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 (C.A.)]

In this case, in the absence of representations from the Board, I must look to the submissions of the affected party in order to determine whether there is detailed and convincing evidence to support the conclusion that the disclosure of the information relating to the affected party’s fees could reasonably lead to one or more of the harms described in section 10(1).

Section 10(1)(a): Prejudice to Competitive Position

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).

Section 10(1)(b): Information No Longer Supplied

Again, owing to the lack of "detailed and convincing evidence" from either the Board or the affected party as to the reasonableness of this expectation of harm, I am unable to find that information relating to the affected party's fees would no longer be supplied to the Board if it were to be disclosed in the present appeal or that it is in the public interest that similar information continue to be so supplied. Under section

10(1)(b), it is usually necessary to hear from the institution as well as the affected party because, in effect, section 10(1)(b) addresses both the interests of the institution and the affected party.

I find that the exemption in section 10(1)(b) has no application in this case. Accordingly, I find that all of the information contained in the pages entitled "Proposal Requirements" and "Scope of Engineering Services" is not exempt under either sections 10(1)(a) or (b).

ECONOMIC AND OTHER INTERESTS

I have received no representations from either the affected party or the Board regarding the application of the discretionary exemptions in sections 11(c) and (d) of the Act to the information at issue in this appeal. However, based solely upon my review of the record, I find that these exemptions do not apply in the circumstances. Specifically, I find that I have not been provided with sufficient evidence to conclude that the disclosure of the information contained in the pages at issue could reasonably be expected to prejudice the economic interests or the competitive position of the Board. In addition, I find that there is not sufficient evidence before me to find that the disclosure of this information could reasonably be expected to be injurious to the financial interests of the Board.

ORDER:

1. I order the Board to disclose to the appellant those pages entitled "Proposal Requirements" and "Scope of Engineering Services" which are contained in the affected party's Proposal dated August 26, 1999 by providing him with a copy by **July 21, 2000** but not before **July 14, 2000**.
2. In order to verify compliance with the terms of Provision 1 above, I reserve the right to require the Board to provide me with a copy of the material sent to the appellant.

Original signed by: _____

June 15, 2000

Donald Hale
Adjudicator