



Information and Privacy  
Commissioner/Ontario

Commissaire à l'information  
et à la protection de la vie privée/Ontario

# ORDER PO-1794

Appeal PA-990398-1

Ministry of Natural Resources



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## **NATURE OF THE APPEAL:**

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a Ministry tender for the supply of water craft bikes for use in provincial parks. The requester, an unsuccessful bidder, specifically sought access to records relating to the company which was the successful bidder (the company).

The Ministry identified 8 records consisting of 13 pages responsive to the request, which it described as consisting of (i) Purchase Order, Form of Tender, Bid, Invoice etc. and (ii) Correspondence between [the company] and the [Ministry]. The Ministry then notified the company of the request. The company then wrote to the Ministry stating that it did not consent to the disclosure of the responsive records, and provided submissions in support of its position that the records were exempt under section 17 of the Act.

The Ministry later notified the company and the requester that it had decided to grant access to the requested records. The company (now the appellant) appealed the Ministry's decision to this office.

## **THE RECORDS:**

The records at issue in this appeal are described as follows:

Record 1	Comparison of Tender Quotations and Specifications dated June 1999
Record 2	Purchase Order dated June 30, 1999
Record 3	Form of Tender
Record 4	Correspondence to the Ministry from the appellant dated June 23, 1999
Record 5	Correspondence to the Ministry from the appellant dated June 23, 1999
Record 6	Correspondence to the Ministry from the appellant dated June 28, 1999
Record 7	Telephone messages and notes
Record 8	Invoice to the Ministry from the appellant dated July 8, 1999

Record 1 contains information relating to a third bidder, apart from the requester and the appellant. The requester has confirmed that he is not seeking access to any information which relates to this other bidder, and therefore this information in Record 1 is no longer at issue in this appeal.

I sent a Notice of Inquiry setting out the issues in the appeal to the appellant and the Ministry. I received representations from the Ministry only. In the circumstances, I found it unnecessary to seek representations from the requester.

## **ISSUES:**

### **THIRD PARTY INFORMATION**

#### **Introduction**

In its letter to the Ministry, the appellant stated that it objected to disclosure of the records for the following reasons:

As [the appellant] is a privately held company I have absolutely no intention of disclosing any financial information with regards to this particular tender. Disclosing this information would completely jeopardize [the appellant's] ability to compete on future tenders in this area, thus hurting our competitive position.

The appellant made no specific reference to the provisions of section 17. In the circumstances, I will assume that the appellant relies on section 17(1)(a) and (c) of the Act. Those sections read:

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;
- (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 sections 17(1)(a) or (c) of the Act, the party or parties resisting disclosure (in this case the appellant only) must establish 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) or (c) of section 17(1) will occur [Orders 36, P-373].

### **Part One: Type of information**

The appellant's submission to the Ministry suggests that at least some of the information at issue qualifies as "financial information."

The Ministry makes no specific submissions on this part of the three-part test.

This office has defined commercial information as information which relates solely to the buying, selling or exchange of merchandise or services. Previous orders also have stated that the term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [P-493].

Financial information has been defined by this office as information relating to money and its use or distribution, which contains or refers to specific data. Examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order P-493].

It is clear on the face of the records that Records 1, 2, page 2 of Record 3, and Record 8 contain financial information relating to the pricing of the product in question. Further, I find that all of the records contain commercial information, relating to the bid and ultimate purchase and sale of the product.

### **Part Two: Supplied in confidence**

The Ministry takes the position that the records were not supplied in confidence:

Y The Ministry Procedures SM 1-0714 and 1-0712 govern the process and procedures for bids. Procedure SM-10714, which is attached, relates to the disclosure of information. The Ministry through its procedures and dealings with bidders has made it clear that the name and the total price of the bid were to be read out at the public opening of the bid. The principles sustaining this process are that purchasing practices are open to public scrutiny and accessible to the public. The public is also encouraged to attend public openings.

As at every MNR tender opening, and in accordance with MNR Supply Management Directive, the name and total price of each bidder was read out at the opening in the presence of the public and other bidders/competitors. Consequently, there is no objective basis for an expectation of confidentiality with respect to the bidder's information. Further, based on the Ministry procedures, and past Ministry practice, there could be no reasonably held expectation of confidentiality for other records at issue (i.e., comparison of tender quotation and specification, purchase order, form of tender, administrative correspondence

to the Ministry from the appellant that does not include any financial information, telephone messages and notes).

Finally, although the unit price was not read out at the opening, one can extrapolate the unit price as the total number of units is made available on the tender documentation through contacting the Ministry. In other words, the number of units, location, unit price, and delivery charges breaks down the total price of this bid and is publicly available. There is nothing in this record, which relates in any specific way to pricing, delivery charge variations, bid break downs, or would be considered confidential information which would enable a competitor to gain an advantage over the [appellant] by adjusting their bid and underbidding in future business contracts. Therefore, none of the information could be reasonably construed as having been supplied in confidence; therefore the information does not meet the test for the application of Section 17, and is not exempt from disclosure.

Based on the Ministry submissions, and in the absence of submissions from the appellant on this issue, I am unable to conclude that the information in question was supplied in confidence for the purpose of section 17(1). The material before me does not establish a reasonably held expectation of confidence on the part of either the appellant or the Ministry.

Although it is not necessary for me to do so in the circumstances, I will address part three of the three-part test.

### **Part Three: Reasonable expectation of harm**

#### **General**

Past decisions of this office 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 17(1) would occur if the information was disclosed: see, for example, 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.)]

The appellant's submissions to the Ministry state simply that financial information in the records, if disclosed, “would completely jeopardize [the appellant's] ability to compete on future tenders in this area, thus hurting  
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our competitive position.” The Ministry’s submissions set out above express the Ministry’s view that disclosure would not lead to competitive harm.

In Order PO-1791, Adjudicator Sherry Liang stated the following in the context of a request for unit pricing information contained in tender documents:

A number of decisions have considered the application of section 17(1) 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.

In my view, Adjudicator Liang’s comments are applicable here. In the absence of representations from the appellant, I am similarly left without any guidance on the issue of reasonable expectation of harm from disclosure, with respect to the financial information (including the unit pricing information), the commercial information or any other information in the records. Further, unlike in Order PO-1791, the Ministry argues that disclosure could not reasonably be expected to result in harm to the appellant’s competitive position. As a result, I am unable to conclude that the harms described in section 17(1)(a) or (c) could reasonably be expected to result from disclosure of the records at issue. Accordingly, the records at issue are not exempt from disclosure under section 17 of the Act.

**ORDER:**

[IPC Order OP-1794/ June 27,2000]

1. I uphold the Ministry's decision to disclose the records at issue to the requester, with the exception of the information contained in Record 1 which relates to a bidder other than the requester and the appellant.
2. I order the Ministry to disclose the records at issue to the requester, with the exception of the information contained in Record 1 which relates to a bidder other than the requester and the appellant, no later than **August 1, 2000**, but no earlier than **July 25, 2000**.
3. In order to verify compliance with provision 2, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the requester.

Original signed by: \_\_\_\_\_ June 26, 2000  
David Goodis  
Senior Adjudicator