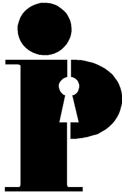

ORDER MO-1368

Appeal MA-000141-1

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 information relating to tenders for school bus services on Manitoulin Island which had been submitted for the 1999/2000 school year.

The Board denied access to all responsive records on the basis that they qualified for exemption under the following sections of the *Act*:

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

The requester, now the appellant, appealed the Board's decision.

As a result of mediation, the scope of the appeal was reduced to the following information:

> All bottom line bids by all bidders, by name, for each route, and the price awarded for each route.

The Board prepared a chart containing this information, and it is the sole record remaining at issue in this appeal.

During mediation, the appellant also raised the possible application of section 16 of the *Act*, the public interest override.

I sent a Notice of Inquiry initially to the Board and the nineteen individuals and organizations who had submitted bids for school bus services (the affected parties). I received representations from the Board and three affected parties, two of whom consented to disclosure of their information. I have determined that it is not necessary for me to solicit representations from the appellant before reaching my decisions in this appeal.

RECORDS:

The record is a chart prepared by the Board which contains the route numbers, the names of each bidder and bid price for each route, and the name of the bidder who was awarded a contract for each route.

DISCUSSION:

Third Party Information

For a record to qualify for exemption under sections 10(1)(a) or (b) of the *Act*, the parties resisting disclosure (in this case the Board and/or the one affected party who did not consent) 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 my 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: Type of information

The Board submits that the record contains commercial information. I concur. The record contains information directly relating to the selling of school bus services by various individuals and organizations, and the buying of these services by the Board. Accordingly, the information satisfies the definition of

“commercial” information as defined in many previous orders (see, for example, Order M-493), and I find that part one of the section 10(1) exemption test has been established.

Part two: Supplied in confidence

It is clear that the information at issue in this appeal was supplied by the various individuals and organizations to the Board in the context of responding to the Board’s tender for school bus services. Accordingly, I find that the “supplied” component of part two has been established.

As far as the “in confidence” component is concerned, the Board and/or the affected party must demonstrate a reasonable expectation of confidentiality on the part of the bidders at the time the bids were submitted. The expectation of confidentiality must be based on reasonable and objective grounds, and can arise either implicitly or explicitly (Order M-169).

In making a determination on the issue of confidentiality, I must consider all the circumstances of the case, including whether the information was:

(1) Communicated to the Board 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 parties 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)

The Board submits that the information was supplied in confidence, as evidenced by the following term included in the tender documents issued by the Board:

> The Board will consider all proposals as confidential, subject to the provisions of and the disclosure requirements of the Freedom of Information and Protection of Privacy Act , R.S.O. 1990, c. F.31. The Board will, however, have the right to make copies of all proposals received for its internal review process.

I accept the Board's evidence on this issue. I find that there was an explicit understanding between the Board and the affected parties that proposal information provided to the Board would be kept confidential; the information was treated in a confidential manner by the Board; it is not to my knowledge available from other sources; and the bids were prepared by the various suppliers for a purpose which did not otherwise entail disclosure.

Therefore, I find that part two of the section 10(1) exemption test has been established.

Part three: Reasonable expectation of harm

To discharge the burden of proof under the third part of the test, the Board and/or the affected party 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).

The words "could reasonably be expected to" appear in the preamble of section 10(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 10(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party 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.), as well as Orders PO-1745 and PO-1747).

The Board's submissions on this part of the test consist of the following:

> Relating to sections 10(1)(a) and (b) of the *Act* the Board notes that because the low number of bids on many of the school bus transportation routes, as shown in the enclosed chart of Request for Proposals (R.F.P.) 1999/2000, disclosure could prejudice the competitive positions of those sending proposals in future school years. Disclosure could, in fact, result in some transportation companies not submitting proposals in subsequent years.

The one affected party resisting disclosure submits:

> There are pros and cons to the tendering process. Every person who tenders an individual contract is given information pertaining to it. If a person is not successful with the tender, he/she accepts the decision.

> If every person who tenders has his/her individual tender publicized, I feel it would be detrimental to the case and cause hard feelings.
>
> If individual tendered amounts are made public, what is the issue of a tender? ... In bus tenders, I'm not against the final bid being publicized or who it was awarded to.

I find that the evidence and argument provided by the Board and the affected party are not sufficiently "detailed and convincing" to establish a reasonable expectation of probable harm if the information contained in the record is disclosed. None of the representations deal with the issue of competitive harm under section 10(1)(a), and in fact two of the affected parties consented to disclosure of their bid information. As far as section 10(1)(b) is concerned, there is no evidence to suggest that the bidders will no longer participate in the school bus proposal process. In fact, one of the affected parties who provided representations made the following statement in support of disclosure:

> This letter will further consent to the records of [named organization] being open to public viewing. It is our belief that since these tenders are funded with public funds that the public has a right to view such records.

This statement suggests to me that, at least as far as this affected party is concerned, it would continue to submit proposals in future, despite the possibility that the bid amount could be disclosed.

The Board points to Order M-145 in support of the section 10(1) claim. In that case, former Adjudicator Holly Big Canoe upheld this exemption claim in the context of a request for access to agreements between another school board and suppliers of computer equipment. In so doing, she considered representations provided by the school board and two computer suppliers, and found, based on this evidence, that disclosure of certain records could reasonably be expected to prejudice the competitive position of the suppliers. As stated earlier, the determination of harm under section 10(1) is based on the evidence provided by the parties resisting disclosure in a particular appeal. The fact that Adjudicator Big Canoe concluded that the evidence before her in that case was sufficient to establish the required harm does not assist the Board and the affected party in the current appeal, since my determination on the issue is made on the basis of the particular evidence and argument provided by the parties.

I find that the requirements of the harm component of sections 10(1)(a) and (b) have not been established, and that the record does not qualify for exemption under section 10(1) of the *Act*.

Economic and Other Interests

Sections 11(c) and (d) of the *Act* read:

> A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

The words "could reasonably be expected to" appear in both of these sections. As described above in relation to section 10(1), in order to establish one or both of the harms in sections 11(c) and (d), the Board 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.), as well as Orders PO-1745 and PO-1747).

The Board's only submissions on these two exemption claims consist of the following:

> Relating to Sections 11(c) and (d) of the *Act*, the Board contends that proposal bid amounts, or prices, in future school years would increase significantly once the small number of proposals were disclosed. On seven of the Manitoulin Island school bus transportation routes there are only two proposals as shown in the enclosed chart of R.F.P.s 1999/2000. This includes routes 602 and 603, where in each case a third proposal was withdrawn. Specifically relating to Section 11(d), as transportation bid prices increase the Board would be forced to spend more of its limited education tax dollars in the transportation area.

I find that the Board has not provided the necessary detailed and convincing evidence required to support either of these exemption claims.

It is clear that the Board's competitive position could not be prejudiced by disclosure, and this aspect of section 11(c) is not relevant in the circumstances of this appeal.

As far as its" interests" component of section 11(c) and the "financial interests" requirement of section 11(d) are concerned, the Board states that disclosure of the bid prices could result in higher bids in future but, in my view, this statement is at best speculative and not supported by any evidence or argument provided by the Board.

Therefore, I find that the record does not qualify for exemption under sections 11(c) or (d) of the *Act*.

ORDER:

1. I order the Board to provide the appellant with a copy of the record created for the purpose of this inquiry by **January 5, 2001**, but not before **December 30, 2000**.

2. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the record disclosed to the appellant pursuant to Provision 1.

Original signed by: November 28, 2000
Tom Mitchinson
Assistant Commissioner