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

ORDER MO-1364

Appeal MA-000167-1

City of Windsor

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NATURE OF THE APPEAL:

The City of Windsor (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information regarding "Utility Restoration/Pavement Repairs - 1999 Tender Award." In particular, in noting that the bid package for this tender contained estimated quantities, the requester asked for the actual quantities determined to have been supplied and the prices actually paid for this work.

The City notified the company that was awarded the tender of the request pursuant to section 21 of the *Act* and invited it to make submissions regarding disclosure of the requested information. The company objected to disclosure of the tender award. The City subsequently issued a decision indicating that it intends to disclose a copy of the tender purchase order and the cost of the contract for a specific number of square feet.

The company appealed the City's decision on the basis that disclosure of this information would prejudice its competitive position (section 10(1)(a) of the *Act*).

I sent a Notice of Inquiry to the company, initially. The company submitted representations in response. In addition to its submissions, the company requested that I consider all correspondence from it as forming part of its representations. Based on the company's submissions and correspondence and my review of the records, I decided that it was not necessary to seek representations from the City or the requester.

FINDINGS:

Based on the company's representations and correspondence and my review of the record, I find that it has not satisfied the requirements for the application of section 10(1) of the *Act* to the information at issue in the records. In coming to this conclusion, I considered the harms in sections 10(1)(a) and (c) even though the company only claimed section 10(1)(a) as the basis for exempting the records at issue. Because the information is not exempt under section 10(1), it should be disclosed to the requester.

RECORDS:

The record identified as responsive to the request is a City Purchase Order with "Appendix A" attached. The Purchase Order contains a brief description of the work to be done in accordance with the terms of reference for the Proposal. The Purchase Order itself does not contain particulars of the work to be done or the costs associated with the work, but refers to the schedule of unit prices which were included in the company's tender. Appendix A contains a breakdown of all of the work to be done and includes: details of the nature of the work, that is, the type of repair to be done and the depth of the asphalt to be used; the area in square footage for each job; the unit price for each job; and the total price per job. The Appendix also contains the total square footage of all jobs and the total price of the contract (total price of all work done).

The City intends to disclose the Purchase Order in its entirety and only the total amounts of square footage and the total cost of work completed in 1999 from the Appendix.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a) and (c) of the *Act* 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;

In order for a record to qualify for exemption under sections 10(1)(a)or (c) of the *Act*, each part of the following three-part test must be satisfied:

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 10(1) will occur [Orders 36, M-29, M-37, P-373].

To discharge the burden of proof under part three of the test, the party resisting disclosure, in this case, the company, 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 [Orders 36, P-373].

This three-part test and the statement of what is required to discharge the burden of proof under part three of the test have been approved by the Court of Appeal for Ontario. In its decision upholding Order P-373, the court 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.)].

The analysis set out below follows the Commissioner's traditional tests considered and found reasonable by the Court of Appeal for Ontario in *Ontario (Workers' Compensation Board)* cited above.

Part one: type of information

The company states that the tender purchase order is the amount paid to it in satisfaction of the work completed under the tender. It submits that this constitutes financial information.

Financial Information

This 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].

I agree that portions of the Appendix, as a whole, contain financial information in that it contains the unit prices for each part of the tender and the total cost for the work to be performed by the company. With respect to the information at issue, I accept that the total cost of the project qualifies as financial information. The Purchase Order, however, does not contain any specific data relating to costs, and I find that this record does not, in and of itself, contain financial information.

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [P-493]. Commercial information has been found to include such things as price lists, supplier and customer lists, market research surveys, economic feasibility studies, tender proposals, bid bond information and negotiation status reports [Orders 16, 41, 47, 68, 166, P-179, P-228].

I find that a Purchase Order and information pertaining to the work to be done and the cost of that work under the terms of a tender qualify as commercial information as defined above. Therefore, I find that all of the information at issue qualifies as commercial information. Accordingly, the first part of the test has been met.

Part Two: supplied in confidence

Supplied

In order to satisfy the second requirement, the company must show that the information was supplied to the City, either implicitly or explicitly in confidence. Because the information in a contract is typically the product of a negotiation process between the institution and the third party, the content of contracts will generally not qualify as originally having been "supplied" for the purposes of section 10(1) of the *Act*. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the third party. In addition, information contained in a record would "reveal" information "supplied" by the third party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution. [See, for example, Orders P-36, P-204, P-251 and P-1105]

The company asserts that it supplied the information on its 1999 Tender Award to the City. The Purchase Order is a City generated document. As I indicated above, the only information on the document is a brief description of the work to be done in accordance with the terms of reference for the Proposal and a reference to the company's schedule of unit prices as tendered. In my view, the information in this record was neither supplied by the company nor would its disclosure reveal information supplied by it. As a result, this record fails to satisfy the second requirement for a finding that section 10(1) applies to it.

It is not clear whether the Appendix is a City generated document or whether it was supplied by the company. In my view, the creator of the document is not determinative to my decision on this issue. In this

regard, I note that the Purchase Order refers to the attached list as containing the schedule of unit prices as tendered. Although, as I noted above, the provisions of a contract are typically the product of a negotiation process, I am satisfied that the information at issue pertaining to the "cost" of the work done is the same as that originally provided by the company.

I note that the actual tender was made based on estimated quantities. As a result, the actual amount of the tender made by the company is not the same as the information at issue. However, the amount that is at issue is derived directly from the tendered amount, now determined in light of the actual quantities. In my view, disclosure of the cost of the project would "reveal" information "supplied" by the company as its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the City. Accordingly, I find that the cost of the project is information that was supplied by the company.

With respect to the square footage, however, I note that paragraph two of the terms of reference for the Proposal states:

> There is no guarantee given or implied that the quantities represent the maximum or minimum amount of work. The successful bidder may be called once or any number of times during the duration of the contract to carry out a service ...

In my view, the terms of reference make it very clear that the area (square footage) is to be determined by the City. On this basis, I find that this information was not supplied by the company, and it fails to satisfy the second part of the section 10(1) test.

In Confidence

In order to establish that the records were supplied either explicitly or implicitly in confidence, the company must demonstrate that an expectation of confidentiality existed at the time the records were submitted, and that this expectation was reasonable and had an objective basis (Order M-169). All factors are considered in determining whether an expectation of confidentiality is reasonable including whether the information was:

(1) Communicated to the City 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 City.

(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 company does not address this issue in its representations. However, in responding to the section 21 Notice that was sent to it by the City, the company stated:

> It was the company's understanding that the information contained in the 1999 Tender Award was confidential. Moreover, the tender package supplied to the company by the City did not specify that the information contained in the tender would or could be supplied to outside parties.

With respect to the issue of confidentiality, in Order PO-1816, I commented on the tendering process as it has been considered in previous orders of this office:

> Previous orders of this office have addressed the reasonableness of an expectation of confidentiality on the part of companies submitting bids as part of the tendering process. It is apparent from a review of these orders that institutional approaches to confidentiality during the tender process and the reasonableness of proponents' expectations are quite varied. It cannot be said that there is one generally preferred standard or approach.
>
> In some cases, confidentiality assurances are explicitly given (see Order P-1215, for example). In other cases, an open tendering process is followed by the institution subject only to explicit requests for confidentiality (Order M-845, upheld on Judicial Review January 26, 1998, Doc. 1209/96 (Ont. Div. Ct.)). It is common practice with many institutions that the names of the proponents and the total proposed cost, but not the details of the bids are routinely announced as part of the public tendering process (Orders PO-1697, PO-1794 and MO-1239, for example). Previous orders of this office have, however, acknowledged that given the competitive nature of particular industries, it would be reasonable for an organization submitting specific proprietary information to do so with an expectation of confidentiality (Order P-655, for example). This line of orders has recognized that there is a reasonable expectation of confidentiality with respect to the financial details of bid submissions or information that has a proprietary value to the organization (Order PO-1722).

The tender package sent to prospective bidders by the City is silent with respect to the issue of confidentiality of information obtained from the bidders. However, it also contains the following statement:

> A public opening of this proposal will be held at City Hall ...All persons interested in this Proposal are permitted to be present at that time.

...

> The right is reserved to accept or reject any or all proposals. The lowest proposal may not necessarily be accepted.

The City has approached the request in such a way as to recognize that the details of the company's tendered bid, that is, the unit prices, will not be disclosed but that the total price of the contract will be. In my view, this approach is consistent with the practice of a typical public tender opening process. Despite the fact that the actual amount of the contract that is at issue in this appeal and the amount tendered are different, the former was derived directly from the latter and the principle of the open process applies equally to it. Accordingly, I do not accept the company's assertion that it submitted this particular information with any expectation of confidentiality. Accordingly, I find that it has failed to establish the second part of the section 10(1) test with respect to the total cost

Part Three: reasonable expectation of harm

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 or parties 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.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In the present appeal, the company, as the party resisting disclosure, must provide detailed and convincing evidence to establish a reasonable expectation of probable harm, in this case one or more of the harms outlines in sections 10(1)(a) and/or (c) of the *Act*.

Sections 17(1)(a) and/or (c): Competitive position and undue loss or gain

The company states:

> As you are aware, the City of Windsor has decided to disclose two pieces of information ... This information includes: (1) a copy of the tender purchase order, and (2) the cost of the contract for a specific number of square feet. It is the [company's] position that this

> information qualifies for an exemption under section 10(1) of the Act and therefore should not be disclosed.
>
> More specifically, the tender purchase order is the amount paid to the [company] in satisfaction of the work completed under the tender. Accordingly, dividing the purchase order amount by the total amount of square footage the amount tendered per square foot can be determined. The amount tendered per square foot constitutes the pricing practices of the appellant and as such is financial information which should be exempt under section 10(1) of the *Act*.

The company states further that having this information will allow its competitors to know its costs and profit margins which in turn would enable them to undermine its competitive position in other bids for Utility Restoration/Pavement Repairs for the City as well as for other jobs in which it would submit a tender.

I do not accept the company's argument that "dividing the purchase order amount by the total amount of square footage the amount tendered per square foot can be determined." Although that very scenario might be possible in some situations, in the current appeal, the jobs to be performed under the contract are varied; their requirements are different, for example, the depth of the asphalt to be laid is different; the unit prices for each job are different based on the requirements for each job, and the total price per job varies as well. Given these variations, it would be virtually impossible to arrive at the company's unit prices by simple mathematical calculations based on the information at issue.

The focus of the company's submissions are based on the harm it believes would result from an ability to work backwards from the information at issue to calculate the unit prices. Having rejected the reasonableness of that assumption, in my view, the company's representations provide no other basis for a finding that disclosure of any of the information at issue could reasonably be expected to result in prejudice to any party's competitive position or interference with any party's contractual or other negotiations. Nor has it provided any evidence that disclosure of this information could reasonably be expected to result in undue loss or gain to any party.

For these reasons, I find that the company has failed to satisfy the third requirement of the section 10(1) test. Therefore, I find that the records at issue do not qualify for exemption under section 10(1) and they should be disclosed to the requester.

ORDER:

1. I uphold the City's decision to disclose the records at issue.

2. I order the City to provide the requester with a copy of the record at issue by sending him a copy of the Purchase Order and a severed copy of Appendix A by December 21, 2000 but not before December 14, 2000.

3. In order to verify compliance with provision 2, I reserve the right to require the City to provide me with a copy of the material disclosed to the requester.

Original signed by: November 16, 2000
Laurel Cropley
Adjudicator