



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1462

Appeal MA-000278-1

County of Simcoe



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NATURE OF THE APPEAL:

This is an appeal from a decision of the County of Simcoe (the County), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The requester, a union official, had sought access to records pertaining to a Land Ambulance Request for Proposal issued by the County, and the award of the contract for land ambulance services. In its decision, the County granted partial access to the records, denying access to some in reliance on the exemptions found in sections 6, 10(1), 11 and 14 of the *Act*. An appeal was filed from this decision by the requester (now the appellant), after which certain issues were narrowed through the assistance of a mediator from this office. Sections 6 and 14 of the *Act* are no longer in issue.

I sent a Notice of Inquiry to the County and certain affected parties, initially, inviting them to make representations on the issues in dispute. The affected parties are two of the three bidders for the land ambulance service contract whose information is found in the records. The appellant has indicated that he does not seek access to the information of the third bidder.

I received representations from the County and both affected parties. One (an unsuccessful bidder) has consented to the release of its information, and indeed, it appears that it has made its own request to the County for more information about the award of this contract. The other affected party (the successful bidder) sent representations objecting to the release of any of its information. I sent a copy of the County's representations and the representations of the successful bidder (edited for confidentiality reasons) to the appellant, along with a Notice of Inquiry and invited his representations in response. The appellant has not provided any representations.

RECORDS:

The records remaining in issue consist of the following:

1. A videotape containing an oral and visual record of interviews between representatives of the County and representatives of three companies (two of whom are the affected parties) bidding for the contract for land ambulance services.
2. A table showing the comparative operating costs, including start-up costs, as between the two affected parties, and a second table which is marked "Revised".
3. A contract between the County and the successful bidder, attached to which are appendices containing a map, staffing plans, an unexecuted land ambulance vehicle lease agreement, a compulsory preventative maintenance schedule form and accompanying instructions, a cot maintenance form, a detailed annual operating budget for year 2001, a budget for start-up costs, a description of the roles and responsibilities of the principals of the company, and a description of a performance based incentive plan.
4. A form (15 pages in length), describing the criteria on which bidders are to be evaluated, providing instructions on how to score for each criterion, and the range of possible scores.

5. Summary score sheets for three bidders showing their scoring for each category and total scores. As the appellant has stated that he is not seeking access to the information of the third bidder, only the score sheets of the two affected parties are at issue here.

The County has relied on the mandatory exemption in section 10(1) (third party information) and the discretionary exemption in section 11 (economic interests of an institution) to deny access to the above records.

CONCLUSION:

I uphold the County's decision to deny access to Appendix "F" to the contract between the successful bidder and the County, to the videotape and to cost projections of the successful bidder. However, I order disclosure of the remaining records at issue.

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1) of the *Act* provides:

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, if 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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

Section 10(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. In Order PO-1805 Senior Adjudicator David Goodis, discussing the purposes of the provincial equivalent to section 10(1), stated that this provision

was designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions".

Although, as stated in other orders, one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of information which, while in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace.

In applying section 10(1), previous orders have held that in order to support an exemption from disclosure under this section, institutions or affected parties 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), (b) or (c) of subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Part 1: Type of Information

Prior orders have found that commercial information is "information which relates solely to the buying, selling or exchange of merchandise or services": see, for instance, Order P-493. "Financial information" has been found to mean information relating to money and its use or distribution, containing or referring to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs (see Orders P-228, P-295 and P-394).

On my review of the records under consideration and the representations of the parties, I am satisfied that the information in Records 1, 2 and 3 constitutes either commercial or financial information within the meaning of the *Act*, consistent with the above orders.

The information in Record 4 does not qualify as the type of information described in section 10(1).

Other decisions have found scores assigned to competing contractors in an evaluation process to qualify as "commercial" information, in the sense that they relate directly to the awarding of a commercial contract, and thus to the buying, selling or exchange of services. On this basis, I find that the information in Record 5 falls within the type of information described in section 10(1).

Part 2: Supplied in Confidence

The second part of the three-part test under section 10(1) encompasses two components: it must be shown that the information was "supplied" to the institution, and that the supply of the information was "in confidence".

The requirement that it be shown that the information was "supplied" to the institution reflects, once again, the purpose in section 10(1) of protecting the informational assets *of the third party*. As stated in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), which provided the foundation of this *Act*:

. . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that **the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself**. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. **It is the original source of the information that is the critical consideration:** thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind (pp. 312-315) [emphasis added].

Because the information in a contract is typically the product of a negotiation process between two parties, the content of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 10(1) of the *Act*. Records of this nature have been the subject of a number of past orders of this office. In general, the conclusions reached in these orders is that for such information to have been "supplied", it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected party: see, for instance, Order PO-1698, dealing with the provincial equivalent of section 10(1).

In the case before me, the County states generally that

"third parties have set out in detail financial information with respect to their costs of providing services to the County. These details include information relating to their staffing costs and supply costs not otherwise disclosed or available from sources to which the public has access...The evaluators for the process undertaken were all advised in writing that the proposals and evaluations would be kept "strictly confidential". The bidders for the provision of land ambulance service were all advised that the interviews were conducted in

confidence. The confidentiality to be maintained by the County was to continue indefinitely.”

The successful bidder asserts that its bid submission was developed using consultants, lawyers, accountants and business planners, all of whom were hired/contracted on a confidential basis. In its bid submission and as part of its contract with the County, it “detailed its cost projections”. Further, it describes some of the information pertaining to labour relations strategy provided to the County’s representatives during the videotaped interview. This affected party states that the details of its proposal were explained to the County’s Proposal Committee under a commitment of confidentiality, during the taped portion of the bidder interview.

I am satisfied that Records 1 and 2 contain information supplied by the affected parties to the County. Record 1 contains detailed information about the companies’ operations and plans, supplied to the County in support of their bids for the land ambulance service contract. Record 2 contains detailed information about the companies’ cost projections. Given the nature of this information, it is a reasonable inference that these companies supplied this information. Although the cost projections appear to have been revised sometime after their submission, I do not have sufficient evidence to suggest that the figures in these tables were the product of negotiation, rather than having been “supplied.”

I conclude, however, that apart from some of the information in the appendices, there is no basis to distinguish Record 3 from other contracts between institutions and third parties that have been found to be the product of negotiation rather than having been supplied by the third party. I have described the orders in this area, which are based on general understandings about the negotiated nature of contracts. For the most part, (see my discussion below) the evidence fails to establish that the terms of Exhibit 3 are a direct reflection of information given by the successful bidder, without contribution by the County. For the most part, Record 3 is precisely what it purports to be, a document reflecting agreements reached through negotiation. It does not therefore meet the requirement that the information in it was “supplied in confidence” by a third party.

The two exceptions to my findings about Record 3 are Appendices “F” and “I”.

I find that Appendix “F” to the contract contains detailed cost projections supplied by the successful bidder. Although the terms of a contract can generally be regarded as the product of negotiation, the same cannot be assumed for budgetary information. In this case, the budget of the successful bidder was incorporated into its contract with the County. Although it is possible that its inclusion in the contract reflects that it was the subject of negotiation between the parties to the contract, I have little evidence other than its mere inclusion to support this. On the other hand, the submissions of the County and of the successful bidder support a conclusion that the source of the information in the budget is the successful bidder. On balance, I am satisfied that the information in Appendix “F” was supplied to the County by the successful bidder. My conclusion is consistent with Order P-1074, which also decided that budgetary information of a third party, found in a contract between an institution and the third party, was “supplied” rather than “negotiated”.

Appendix "I" is a document describing the roles and responsibilities of the principals of the successful bidder in the operation of the land ambulance service. The information in this record appears to have been supplied by the successful bidder, and I find that it meets this component of the test under section 10(1) of the *Act*.

Although Appendix "H" also contains financial information, there are indications on the face of the document which support the conclusion that this information was the product of negotiation. Appendix "H" sets out the start-up costs for the land ambulance service. It appears to be a memo from the successful bidder to a representative of the County, and states at the outset that "we believe these to be the revisions discussed yesterday, please review". On one item, it is stated that the successful bidder "accepts the position of the County that no dollars are required for this item". At the conclusion of the memo, the author states, "as per our discussions, I believe this to be the anticipated startup costs." My conclusion on Appendix "H" is that it does not contain information "supplied" by the successful bidder within the meaning of section 10(1), but instead reflects the product of a process of negotiation between the bidder and the County.

Appendix "A", which is a reference map, states that it is "courtesy of Simcoe County web site". The evidence does not establish that it was "supplied" by a third party.

Appendix "B" is entitled "Regional Approved Staffing Pattern", and consists of charts setting out the County's requirements with respect to staffing for the different regions within the County. As distinct from the financial information in Appendix "F", there is no reason to infer, absent any specific evidence, that the information in these charts was "supplied" by a third party. I find that, as with most of Record 3, the information in this appendix is a product of negotiation between the County and the successful bidder.

Appendix "C" consists of a land ambulance vehicle lease agreement showing the County as the lessor. Elsewhere in Record 3, the County and the successful bidder have agreed that the vehicles and equipment required to provide the land ambulance service under Record 3 shall be leased by the County to the successful bidder under the terms specified in Appendix "C". Again, applying the same principles I have described above, I am satisfied that the information in Appendix "C" is the product of negotiation rather than having been "supplied".

Appendix "D" and Appendix "E" consist of standard form maintenance charts for ambulances and cots, on the letterhead of the Ministry of Health. The evidence does not establish that they were "supplied" by a third party.

There is no Appendix "G".

Appendix "J" describes a performance based incentive plan under which the County has agreed to compensate the successful bidder. I am also satisfied that it is the product of negotiation rather than a reflection of information as originally supplied by the successful bidder.

As Record 4 appears to be the evaluation form used by the County's evaluators in assessing the bids for the contract, it was not "supplied" by a third party within the meaning of section 10(1).

Record 5 also fails to qualify as information supplied by a third party, since it records scores given by evaluators to the companies bidding for the contract.

In conclusion, I find that Records 1 and 2 meet the requirement of information "supplied" by a third party. Appendices "F" and "I" of Record 3 also meet this requirement. It has not been established that the balance of Record 3, or Records 4 and 5, contain information "supplied" within the meaning of section 10(1).

I also find, on the basis of the representations, that the information in Records 1 and 2 and Appendices "F" and "I" in Record 3 was supplied under explicit and implicit assurances of confidentiality. Although the unsuccessful bidder has given its consent to the release of its own information in the records, I am satisfied that this consent amounts to a waiver of confidentiality after the fact, rather than evidence that no confidentiality assurances existed.

Part 3:Harms

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, 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.), 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.) and Orders PO-1745 and PO-1747.

The County submits that if the detailed financial information with respect to the costs of providing services to the County were released, including information relating to the bidders' staffing costs and supply costs, these parties' competitive positions may be compromised. They may be impaired in their ability to negotiate contracts with their own employees and their suppliers resulting in undue loss, as their budget projections will be public knowledge.

The successful bidder submits that release of the information contained in its bid and in the contract would harm its competitive position in current and future bids. Of particular importance is information such as cost projections which may affect collective agreement negotiations. Also of importance is some of the information given in the bidder interview which relates to labour relations strategy and the stability of service provision should collective bargaining be unsuccessful.

The unsuccessful bidder has submitted its consent to the release of its information. Since there is no information about this affected party in Record 3 (the contract between the County and the successful bidder), and since I have found that Records 4 and 5 do not qualify for exemption under section 10(1), this consent only applies to Records 1 and 2, and may be relevant to the issue of harm.

On my review of the representations of the parties and the material before me, I am satisfied that the parties have established that disclosure of the information in Records 1 and 2 and Appendix "F" of Record 3 could reasonably be expected to interfere significantly with pending collective agreement negotiations involving the successful bidder. I accept that the details of cost projections and labour relations strategy found in these records is not otherwise publicly known, and its disclosure could alter the relative positions of the participants in those negotiations. I find that the consent of the unsuccessful bidder to release of its information does not contradict the assertions of harm by the successful bidder, since these two affected parties have clearly different interests at stake.

I conclude, however, that the parties have not established harm within the meaning of section 10(1) in relation to the information found in Appendix "I" of Record 3. Appendix "I" describes the intended roles of the principals of the successful bidder in the operation of the land ambulance service. The representations of the parties do not specifically address the harm that could be caused by the disclosure of this information, and on balance, I am not persuaded that it has been shown.

My conclusion with respect to the application of section 10(1) of the Act is that it applies to exempt the information in Records 1 and 2 and Appendix "F" of Record 3 from disclosure. Since all of the components of the three-part test under section 10(1) have not been met with respect to the balance of Record 3 and Records 4 and 5, they do not qualify for exemption under section 10(1).

Since one of the parties whose information is found in the records has consented to the release of its information, I have considered whether it is feasible to release the information of the consenting affected party without disclosing other exempted information. I have concluded that this may be readily accomplished with respect to Record 2. I will therefore order the information in Record 2 to be disclosed, with the exception of the information of the successful bidder.

As I have found the information in Records 1 and 2 and Appendix "F" of Record 3 exempt from disclosure under section 10(1), it is unnecessary to consider whether they may also be exempt under the provisions of section 11.

ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

The only specific part of section 11 referred to by the County in its representations is section 11(a), which states:

A head may refuse to disclose a record that contains,

trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

The County relies on the above with respect to Record 3 only.

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c), (d) and (g) all take into consideration the **consequences** which would result to an institution if a record was released. They may be contrasted with sections 11(a) and (e) which are concerned with the **type** of the record, rather than the consequences of disclosure (see Order MO-1199-F).

I am satisfied that the information in Record 3 qualifies as “commercial information” within the meaning of section 11(a).

Belongs To

In Order PO-1763, Senior Adjudicator David Goodis, after reviewing Orders P-1281 and P-1114, states in reference to the phrase “belongs to”:

With reference to the meaning of the phrase “belongs to”, Assistant Commissioner Tom Mitchinson stated in Order P-1281:

The Ministry submits that the database, the data elements, and the selection and arrangement of the data in the database belong to the Government of Ontario or an institution. The Ministry argues that the term “belongs to” in section 18(1)(a) denotes a standard less than ownership or copyright, but does not clearly articulate what the standard is or how it is applicable here. If these words do mean “ownership”, the Ministry argues that, quite apart from any consideration of copyright, it has ownership by virtue of its right to possess, use and dispose of the data as outlined in the various statutes authorizing its collection, retention and use under the [Ontario Business Information System (ONBIS)] system, as well as by virtue of its physical possession of the database and its control of the access and use of the ONBIS system.

I do not accept these submissions. In my view, the fact that a government body has authority to collect and use information, and can, as a practical matter control physical access to information, does not necessarily mean that this information “belongs to” the government within the meaning of section 18(1)(a). While the government may own the physical paper, computer disk or other record on which information is stored, the Act is specifically designed to create a right of public access to this information unless a specific exemption applies. The public has a right to use any information obtained from the government under the Act, within the limits of the law, such as laws relating to libel and slander, passing off and copyright, as discussed below.

If the Ministry's reasoning applied, all information held by the government would "belong to" it and, presumably, the rights to use information belonging to government could be restricted for this reason alone...

Similarly, in his earlier Order P-1114, the Assistant Commissioner stated:

Individuals, businesses and other entities may be required by statute, regulation, by-law or custom to provide information about themselves to various government bodies in order to access services or meet civic obligations. However, it does not necessarily follow that government bodies acquire legal ownership of this information, in the sense of having copyright, trade mark or other proprietary interest in it. Rather, the government merely acts as a repository of information supplied by these external sources for regulatory purposes.

The Assistant Commissioner has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. [See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. 4th 14 (S.C.C.), and the cases discussed therein].

Monetary Value

In Order M-654, Adjudicator Holly Big Canoe stated:

The use of the term “**monetary value**” in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information...

Applying the above principles to the facts of this appeal, I find that the information in Record 3 does not qualify either as information having “monetary value”, or the type of information which has been found to “belong to” an institution. The representations of the County describe what it believes would be the harmful consequences of releasing this information, but do not establish that the information has inherent value, resulting for instance from the expenditure of money or the application of skill and effort to develop the information.

I conclude, therefore, that Record 3 does not qualify for exemption under section 11(a) of the *Act*.

The County made no representations as to the application of section 11 to Records 4 and 5, and I find no basis for the application of this exemption to these records.

In conclusion, I have found Records 1 and 2 and Appendix “F” of Record 3 exempt from disclosure under the provisions of section 10(1) of the *Act*, with the exception of information in Record 2 for which an affected party has provided consent to disclosure. The balance of Record 3 and Records 4 and 5 are not exempt under either section 10(1) or section 11.

ORDER:

1. I order the County to disclose Record 3, with the exception of Appendix “F”. I also order the County to disclose Records 4 and 5. With respect to Record 5, only the summary score sheets for the two affected parties are to be disclosed, and not for the third bidder. Further, the County is to disclose the information in Record 2, with the exception of the information relating to the successful bidder. For greater certainty, I have provided the County with a copy of Record 2 highlighting the information which is **not** to be disclosed.
2. I uphold the County’s decision to deny access to Appendix “F” of Record 3 and Record 1.

3. I order disclosure to be made by sending the appellant a copy of the records ordered to be disclosed, by no later than September 24, 2001, but not before September 17, 2001.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the County to provide me with a copy of the records which it provided to the appellant.

Sherry Liang
Adjudicator

August 24, 2001