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

ORDER PO-1932

Appeal PA-000198-1

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NATURE OF THE APPEAL:

This is an appeal from a decision of Cabinet Office made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant requested access to a copy of the successful bid to provide services related to quality assessment and planning to the Ontario Public Service (OPS). This bid was in response to a Request for Proposal (RFP) made by Cabinet Office. After consulting the author of the winning bid (the affected party), Cabinet Office agreed to grant access only to (i) the title page, (ii) the table of contents, (iii) page one of the Background section, and (iv) a partial client list. Cabinet Office, relying on section 17 of the *Act*, denied access to the remainder of the proposal on the basis that the exempted portions contained third party information.

The appellant appealed Cabinet Office's decision to deny access.

I sent a Notice of Inquiry setting out the issues in this appeal to Cabinet Office and an affected party. Only the affected party submitted representations in response to the Notice. I then sent a Notice of Inquiry to the appellant together with the non-confidential portions of the affected party's representations. Finally, I sought reply representations from the affected party in relation to certain issues raised in the appellant's submissions.

The appellant later narrowed the scope of her request to exclude the biographies of the consultants that were part of the bid.

RECORD:

The record at issue is all of the denied pages of a "Proposal for Ontario Public Service Quality Service Program" submitted to Cabinet Office by the affected party.

DISCUSSION:

THIRD PARTY INFORMATION

One of the principal purposes of the *Act* is to make transparent the workings of government. However, provisions of the *Act*, such as section 17, restrict access where disclosure of information held by government could reasonably be expected to cause certain harms, including damage to the competitive position of a third party.

Section 17 (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, 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;

(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.

For a record to qualify for exemption under section 17(1), the institution and/or the affected parties 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-373, M-29 and M-37]

Part 1: Type of Information

The affected party submits that the record contains commercial and financial information as well as trade secrets. These terms have been defined in previous orders.

Commercial Information is information that relates solely to the buying, selling or exchange of merchandise or services. [Order P-493]

Financial Information is information relating to money, 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]

Trade Secret means information including but not limited to a formula, pattern, compilation, program, 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]

The record at issue in this appeal is the winning proposal in a competition to provide consulting services to the OPS. In short, the record relates directly to a contract to sell services to the provincial government and, in my view, meets the definition of "commercial information". The bid contains different types of price information such as total cost of the bid and information relating to unit pricing. As previous orders have found that pricing information constitutes financial information, I also find that the record contains financial information. Accordingly, I find that the requirements for Part 1 have been met. Since I have found that the record meets this part of the test, it is unnecessary to further determine whether the record also contains trade secrets.

Part 2: Supplied in Confidence

In order to satisfy the second part of the three-part test, Cabinet Office and/or the affected party must show that the information was "supplied" to Cabinet Office, and that the supply of information was "in confidence". The affected party submitted the record to Cabinet Office; therefore, it is clear that the record was "supplied" to Cabinet Office by the affected party. In order to establish that the records were supplied "in confidence", Cabinet Office and/or the affected party must show 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).

The affected party in its representations submits that:

> It is normal commercial practice to treat competitive proposals as proprietary and confidential. [The affected party] fully expected this of OPS – and would have the same expectation of any responsible organization issuing a competitive RFP.
>
> In addition, the [affected party's] proposal included a special clause reinforcing the highly proprietary nature of the various options proposed - …
>
> As evidence that proposal was supplied in confidence: the RFP required sealed bids and there was no public reading of the proposals; the RFP promised confidentiality of the proposal (unless Cabinet Office were ordered to disclosure (sic) parts of it); and the information in the proposal has not been disclosed in any other way: e.g. on the firm's website or in [a named individual's] books.

The appellant, in that part of her representations entitled, "Regarding Confidentiality" states " All consulting firms supply proposals to OPS on a confidential basis". However, in the section,

"Regarding Prejudice to Competitive Position", she states that " to have [the affected party], an assessment expert, suggest that it expected its proposal to be kept confidential is ludicrous".

In its reply representations, the affected party submits that:

> [The affected party's] original representations set out the specific circumstances of the OPS procurement process. These confirmed [the affected party's] expectation – that the proposal would be kept confidential.
>
> …it should be noted that protecting the confidentiality of proprietary information in proposals is universally considered to be one of the *fundamental ethical responsibilities of procurement professionals* – both in public and private sectors.
>
> As evidence of this: The leading source of education and certification for public sector procurement professionals in North America is the National Institute of Government Purchasing (NGIP), of which the Ontario Public Buyers Association is a chapter. NGIP's Code of Ethics explicitly addresses the issue of confidentiality of bidders' proposals-The following are excerpts from the short form "Guidelines to the NIGP Code of Ethics":
>
> VI. Confidential Information
> Keep bidders' proprietary information confidential
> VII. Relationship With the Supplier
> Adhere to and protect the supplier's business and legal rights to confidentiality for trade secrets, and other proprietary information.

The RFP related to this competition contained a number of standard forms in the appendix that were to be completed by the bidder. Appendix E (Form of Offer) states:

> I/We hereby consent, pursuant to subsection 17(3) of the *Freedom of Information and Protection of Privacy Act*, to the disclosure, on a confidential basis, of this proposal by Cabinet Office to Cabinet Office's consultants retained for the purpose of evaluating or participating in the evaluation of this proposal (emphasis added).

This provision in the RFP allows Cabinet Office, with the consent of the bidder, to disclose the information in the bid "on a confidential basis" to certain consultants for the limited purpose of evaluating the bid. By implication, Cabinet Office has signaled its intention to treat the information in the bid as confidential.

In my view, the affected party's representations about its expectation of confidentiality are more detailed and persuasive than those of the appellant. On the one hand, the appellant concludes that proposals are supplied to OPS on a confidential basis and then contradicts herself by stating that it was ludicrous for the affected party to expect its proposal to be kept confidential. Based on

the evidence and the representations of the parties, I am satisfied that the record was "supplied in confidence" to Cabinet Office.

Part 3: Harms

The words "could reasonably be expected to" appear in the preamble of section 17(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 affected party submits that disclosure of the record is likely to give rise to the harms set out in sections 17(1)(a) and 17(1)(b) of the *Act*. To meet this part of the test, Cabinet Office and/or the affected party must show how the disclosure of the information in the record could reasonably be expected to result in the harms described.

In its representations, the affected party submits:

> Quality assessment is a specialized field of consulting. Many consultants working in this area use techniques that have changed little over the past decade. [The affected party] has constantly pioneered the development of new and more effective assessment techniques. Many of these are trade secrets, and are an important differentiating factor, enabling the firm to win repeat business in a highly competitive marketplace.
>
> Disclosure of the proposal would reveal trade secrets that have enabled [the affected party] to consistently win repeat business in a highly competitive marketplace. Disclosure would enable the appellant (and others) to adjust their methodologies, negating much of [the affected party's] competitive advantage.

In another part of its representations, the affected party continues:

> All of this information is valuable proprietary intellectual property developed by [the affected party], which we believe has earned the firm a well deserved and hard-won competitive advantage. The feedback that [the affected party] received from OPS after its successful bid consistently stressed the value placed by OPS on the 'fresh thinking' that was evident in the proposal.
>
> This FIPPA request, if granted, would effectively place in the public domain this 'fresh thinking' –valuable, proprietary and confidential information which was

> provided in confidence to OPS. Making this information available to competitors would rob [the affected party] of a unique strength that differentiates it from competitors, and significantly disadvantage the firm in future bidding situations.
>
> The harm likely to result from this would be significant: the OPS contracts awarded to date represent the largest single block of assessment work ever put out to tender in Canada. The follow-on assessment work within OPS is likely to be of similar (or greater) magnitude and to continue for a number of years. Other jurisdictions (such as the Federal Government of Canada and some other provinces) are beginning to adopt this same type of methodology, and large contracts for similar work are likely to be tendered by these institutions. The amount of potential business at stake is considerable, especially for the relatively small firms (such as[the affected party] and [the appellant]) that specialize in this type of work.

The appellant in her representations states that:

> Regarding Protection of Materials: ….Nothing is protected from view in consulting. But much can be copyrighted or patented. FIPP must separate matters when considering consultant information under the first clause. There is nothing in [the affected party's] proposal that I don't know about already, and frankly don't care about any of it. I am only interested in the flow and format of the [affected party's] proposal.

In its reply representations, the affected party responds that:

> To claim that 'nothing is protected from view in consulting' is quite misleading. Companies who (sic) produce tangible products often have difficulty protecting trade secrets. – since competitors routinely purchase others' products, to dismantle and to examine microscopically.
>
> However, because consulting is a service, it cannot be examined by a competitor in this way. A competitor can glean *some* information from the participant handouts used in a workshop, for example – if they can get hold of these materials. But these handouts often don't reveal much. The secret of excellent consulting and training lies in what actually takes place between the consultant and the client, or between the trainer and the students. The materials are simply props. Some of [the affected party's] most powerful methods are interactive exercises that don't require *any* special overheads or handouts. A competitor looking at the participant materials would learn nothing about the process used. And there is no 'instructors (sic) guide' that a competitor can obtain – [the affected party's] associates learn these methods by apprenticing with [a named individual] and seeing the process in action.

> Thus, as a consulting firm, [the affected party] has much that is hidden from the view of competitors –these are our trade secrets.
>
> One way for a competitor to obtain a glimpse of these secrets is to obtain a proposal – such as the one for OPS – which explains how our methods differ from traditional approaches, and why they are superior. However, proposals are confidential documents, our clients respect this, and thus our trade secrets remain secret.

The appellant and the affected party are specialists and leading proponents in the field of quality assessment and planning. As such, they are in direct competition for the same business. In fact, the record at issue, the affected party's bid, relates to the third contract in a series for quality assessment services tendered by the government, while the appellant was the successful bidder for the two earlier contracts. Both parties specialize in a similar methodology and compete for many of the same clients. In the circumstances, I am satisfied that disclosure of the record could reasonably be expected to compromise the affected party's competitive position in bidding on future contracts.

I am further satisfied that disclosure of the record would reveal the strategies adopted by the affected party to win the bid, including its use of substantive material, methodology, and pricing.

Previous orders have considered the application of section 17(1) to unit price information contained in bid submissions. Adjudicator Sherry Liang in Order PO-1791 stated tha**t:**

> 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.

The record contains unit price information including the cost breakdown for separate services and the per diem fees chargeable by each consultant. I accept the reasoning in Order PO-1791, and applying it here, I find that the pricing information in the record, if disclosed, may be used to gain a competitive advantage over the affected party. I find that the affected party has provided the kind of detailed and convincing evidence required to establish a reasonable expectation of probable harm. Accordingly, as all three parts of the test have been met for the record at issue, I find that it is properly exempt under section 17(1).

ORDER:

I uphold the decision of Cabinet Office to withhold portions of the record.

Original signed by: July 30, 2001
Dawn Maruno
Adjudicator