



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1559

Appeal MA-010395-1

The City of Hamilton



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The City of Hamilton (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

- a) a "copy of the awarded (winning) bid on RFP# C6-1-01 (desktop computer equipment supply)";

and

- b) a "copy of bid review criteria and evaluation results/scoring for RFP# C6-1-01".

The City relied on the exemptions at sections 10(1)(a) and 10(1)(c) of the *Act* to deny access to the records in their entirety.

The requester (now the appellant) appealed the City's decision to deny access. He also raised the possible application of the public interest override provision at section 16 of the *Act*.

During mediation, the appellant removed the record responding to part b) of the request from the scope of his appeal, and also withdrew his reliance on section 16 of the *Act*. Accordingly, only the unresolved issues relating to the record responsive to part a) of the appellant's request were transferred to the adjudication stage.

I sent a Notice of Inquiry to the City and the affected party, initially, and received representations from the City only. I then sent the Notice to the appellant, together a copy of the City's representations, and received representations in response. After reviewing the appellant's representations, I decided that they raised issues that the City should have an opportunity to address, so I sent a reply Notice to the City, along with a copy of the appellant's representations. The City did not respond with any additional representations.

RECORDS:

The record at issue is a copy of the winning bid on RFP# C6-1-01 (the bid).

DISCUSSION:

Third Party Business Information

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the institution and/or the affected party 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]

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 1: Type of Information

The City claims that the bid contains commercial, financial and technical information. These three terms have been defined in past orders as follows:

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. [Order P-493]

financial information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include 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]

technical information

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 10(1)(a) of the *Act*. [Order P-454]

The City submits that the bid contains information relating to the buying and selling of merchandise, specifically hardware, software, desktop and portable computer products offered for purchase by the affected party and its manufacturers, as well as the “help desk” and maintenance support services to be provided by the affected party.

The City also submits that the bid contains the affected party’s pricing on products and services, as well as that of its manufacturers.

In the City’s view, the bid also contains technical details regarding environmental, physical and regulatory specifications of software and hardware proposed to be provided by the affected party and its manufacturers.

The appellant accepts the City’s position that the record “contains information on the pricing of products and services requested under the RFP, and that this information is to be considered Commercial and Financial to that extent.” He also appears to acknowledge that some portions of the record contain technical information, but points out that this information is publicly available directly from the manufacturers, either electronically on their Web sites or from hardcopy materials such as manuals, brochures and regulatory filings.

Having reviewed the contents of the record, I find that the bid consists of an offer by the affected party to sell merchandise and services to the City, under the terms outlined in the City’s RFP, and as such falls within the scope of the definition of “commercial” information. I also find that some portions contain both “financial” and “technical” information. Although the public availability of technical information may be relevant to Parts 2 and 3 of the section 10(1) exemption test, it has no bearing on my finding regarding the type of information contained in the record.

Part 2: Supplied in Confidence

Supplied

The City and the appellant appear to agree that the bid was provided to the City by the affected party in the context of the RFP process initiated by the City. I find that these circumstances are sufficient to establish that the bid was “supplied” for the purposes of Part 2 of the section 10(1) test.

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the affected party at the time the information was provided. It is not sufficient that the affected party had an expectation of confidentiality with respect to the bid. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly. [Order M-169]

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the institution 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 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 City points out that the RFP it issued included a statement that the City would “make every effort to safeguard the confidentiality” of any proposals submitted by various suppliers. It also makes reference to its policy of providing bid amounts (i.e. unit prices) to only those companies that submitted a bid, upon written request, and points out that the appellant was not a bidder on this purchase. The City relies on these two facts as sufficient evidence of its “intent to maintain the confidentiality of the bid submissions and to limit the disclosure of the information contained in the submissions”.

The appellant acknowledges that he was not a bidder on this purchase, but submits that this has no bearing on his right of access to the record under the *Act*. He also points to the City's policy of providing bid amounts to unsuccessful bidders as evidence that the requirements of the test for confidentiality in Order P-561 are not present. He states:

I've emphasized [the third requirement of Order P-561], which is the term specifically triggered by the City's policy of sending out the bid amounts to any other bidder that requests them. Since these other bidders are not bound by a confidentiality agreement or non-disclosure contract, they are free to publish or redistribute the bid pricing information they receive from the City. In effect, the bid prices then become available to the public.

The appellant also points out that the reseller product and pricing lists used by the affected party and others bidding on the RFP are publicly accessible, through the purchase of a "PST Resale Licence", and attaches a copy of sample reseller pricing for one of the manufacturers, which he obtained over the internet.

Although it was provided with a copy of the appellant's representations, the City declined to provide any representations in reply. Also, as stated earlier, the affected party did not submit any representations in response to my Notice of Inquiry.

The contents of the bid can be divided into two parts: (1) 20 pages of charts listing various computer product codes and descriptions relating primarily to one manufacturer's product line, together with two columns of pricing figures which appear to identify some sort of "list price" and a bid price submitted by the affected party; and (2) a detailed series of manufacturer's product specifications for the various products included in the bid.

In my view, the second part of the bid was clearly not supplied by the affected party to the City on a confidential basis. As the appellant points out, specifications for various manufactured computer products are widely available from various public sources, and it would be illogical to conclude that product details, which form the basis of differentiating among competing similar products, would be treated confidentially by either manufacturers or suppliers. Similarly, I find that the portions of the charts listing the various product codes and descriptions, as well as the "list price" for each product, were not supplied in confidence by the affected party to the City, for the same reasons.

As far as the bid price is concerned, I find that the requirements of a reasonably-held expectation of confidentiality outlined in Order P-561 have not been established.

There is no indication on the record itself that it was submitted with any explicit expectation of confidentiality on the part of the affected party. Also, in the absence of representations from the affected party, I am not persuaded that any implicit expectations of confidentiality were present at the time the record was "communicated" to the City, as reflected in the first listed consideration in Order P-561. Absent evidence or argument from the affected party, I am also not convinced that the bid pricing information was "treated consistently in a manner that

indicates a concern for its protection from disclosure by the affected person”, as outlined in the second listed consideration.

Although I have no evidence to suggest that the affected party’s bid prices are “otherwise disclosed or available from sources to which the public has access” (third consideration), in my view, the City’s policy of disclosing all bid amounts to unsuccessful bidders, which is apparently made known to bidders prior to the submission of proposals, is inconsistent with any reasonable conclusion that the bid was “prepared for a purpose which would not entail disclosure”, as described in the fourth listed consideration in Order P-561. As the appellant points out, there is nothing to suggest that unsuccessful bids disclosed to various bidders in accordance with the City’s policy are subject to a requirement of confidentiality and, in my view, the appellant’s suggestion that this information could become broadly known, while not relevant to the third consideration identified in Order P-561, is a reasonable conclusion, and supports the position that the requirements of the fourth item on the list are not present.

Therefore, I find that the bid submitted by the affected party was not supplied in confidence for the purposes of section 10(1), and Part 2 of the test for exemption has not been established.

Because all three parts of the test must be established in order for a record to qualify for exemption under section 10(1) of the *Act*, it is not necessary for me to consider Part 3 of the test before finding that the exemption has not been established.

ORDER:

1. I order the City to disclose the records to the appellant no later than **August 30, 2002** but not before **August 25, 2002**.
2. In order to verify compliance with the terms of Provision 1 above, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant.

Original signed by:
Tom Mitchinson
Assistant Commissioner

July 26, 2002