



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

ORDER MO-1669

Appeal MA-020405-1

Regional Municipality of Durham



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Regional Municipality of Durham (the Region), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) submitted a request for access to “the price and the 3 top tenders or companies that quoted” on Quotation No. Q-344-2002.

The Region denied access to the information, referring to the mandatory exemption from disclosure in section 10(1) of the *Act* (third party information). As a result, the appellant filed this appeal.

The issues in the appeal have been narrowed. The appellant only seeks access to the amount of the winning bid. The winning bidder (the affected party) was notified of this appeal, and objects to disclosure of this information.

I sent a Notice of Inquiry to the Region and to the affected party, initially, inviting their representations on the facts and issues raised by the appeal. I did not receive any representations from the Region in writing, although by telephone message, its representative indicated that the Region does not object to the release of this information. I also did not receive any representations from the affected party.

I have decided that it is not necessary to ask for representations from the appellant.

RECORD:

The information at issue is found on page D-3 of a quotation. The amount of the bid is expressed as a dollar amount per ton, multiplied by a total number of estimated tons to arrive at a total dollar amount.

CONCLUSION:

The information is not exempt from disclosure under section 10(1). I accordingly order it to be disclosed.

DISCUSSION:

INTRODUCTION

Section 42 of the *Act* states that where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this *Act* lies upon the head. Affected parties who rely on the exemption provided by section 10 of the *Act* to resist disclosure of certain parts of a record share with the institution the onus of proving that this exemption applies (Order P-228).

THIRD PARTY INFORMATION

The relevant portions of section 10(1) of the *Act* state:

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

Section 10(1) has been the subject of much comment in prior cases. Previous decisions have established that for a record to qualify for exemption under section 10(1)(a), (b) or (c) the parties opposing disclosure 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, M-29, M-37, P-373]

I agree with the above approach and will apply it here.

Part One: Type of Information

Commercial Information

As to the first part of the test, prior decisions have stated that 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). Since

the amount of the winning bid relates to the purchase of services by the Region from the affected party, I am satisfied that it qualifies as commercial information.

Part Two: Supplied in Confidence

Supplied

The second part of the test requires an analysis of the meanings of “supplied” and “in confidence”. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the affected party. Because the information in a contract is typically the product of negotiation between an institution and another party, the content of contracts will generally not qualify as originally having been “supplied” for the purposes of section 10(1) of the *Act*. Even where there is little or no negotiation, the terms of a contract are ordinarily considered a product of mutual agreement: see, for instance, Order PO-2018, dealing with the provincial equivalent to section 10(1).

In this case, there appears to be good reason to treat the amount of the winning bid as part of a contract. Although it may have been supplied by the affected party originally, once accepted by the Region, it can likely be viewed as a mutually agreed upon term of the contract between the Region and the affected party. In view of my findings below, however, it is unnecessary to come to a conclusion on whether this information was “supplied” within the meaning of section 10(1).

In Confidence

Previous orders dealing with the application of section 10(1) have required the demonstration of a “reasonable expectation of confidentiality” on the part of the supplier of the information, at the time it was provided: see, for instance, Order M-169. In this appeal, I find I have insufficient evidence of any expectations of confidentiality with respect to the information at issue.

In sum, Part Two of the three-part test has not been established.

Part Three: Harms

Past decisions have stated that in order to discharge the burden of proof under the third part of the test, the parties 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: see, for example, Order P-373.

In the case before me, I have no representations on the issue of harm. Further, there is nothing in the record itself or in the surrounding circumstances that provide any assistance on this issue. The affected party has chosen, as is its right, not to make representations. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 10(1)(a)(b) and (c), from the party which is in the best position to offer it.

In the circumstances, there is no evidence to support the conclusion that the harms described in sections 10(1)(a), (b) or (c) can reasonably be expected to result from the disclosure of the information. Part Three of the three-part test has accordingly not been met.

In conclusion, the Region and the affected party have failed to establish the applicability of the exemption in section 10(1) of the *Act*.

ORDER:

1. I order the Region to disclose the information at issue to the appellant.
2. I order disclosure to be made by sending the appellant a copy of the information by no later than **August 6, 2003** but not before **July 30, 2003**.
3. In order to verify compliance with the terms of these provisions, I reserve the right to require the Region to provide me with a copy of the material which it discloses to the appellant.

Original signed by
Sherry Liang
Adjudicator

July 9, 2003