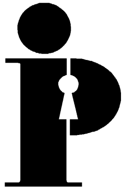

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1783

Appeal MA-030308-2

The Corporation of the Town of Thessalon

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NATURE OF THE APPEAL:

The Town of Thessalon (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following records:

1. Project 200301 – Relocation of Existing Docks – copies of tender packages submitted by contractors
2. Project 200302 – Provision of New Docks – copies of tender packages submitted by contractors
3. Recent tender package and submissions from contractors for repairs to the main dock
4. Copy of point system that was used to evaluate contractors for project 200301
5. Copy of the application to Heritage for the funding for the above tenders
6. Copies of the signed contracts for the relocation of existing docks and provision of new docks
7. Copies of the letters sent to contractors eliminating the 2% penalty on contract 200301 and 200302
8. Copy of contract between the town and [a named individual], Project Manager
9. Copy of proof of insurance and WSIB submitted by [the named individual]
10. Copy of Diving Authorization submitted to Department of Labour for diving in your marina.

Following the resolution of a time extension decision and subsequent appeal, the Town located documents responsive to the requests and issued a decision granting partial access to those records relating to parts one and two of the request. The Town indicated that there were no records relating to points three, six, seven, eight, nine and ten. The Town also denied access to the records responsive to points four and five. The requester, now the appellant, appealed this decision and the current appeal, MA-030308-2, was opened.

During the mediation stage of the appeal, the appellant requested clarification to the response relating to points three, six, seven, eight, nine and ten. Following the receipt of additional information from the Town, the appellant agreed to withdraw these items from the appeal. The appellant also agreed to remove from the scope of the appeal those records relating to one particular company in project 200302. No further mediation was possible, and the appeal was moved to the adjudication stage.

I decided to seek the representations of the Town, as well as six companies and one individual (the Project Manager) who may have an interest in the disclosure of the information contained in the records (the affected parties). I received representations from the Town and the Project Manager. In its representations, the Town raised the possible application of the discretionary exemptions in sections 11(d) and 12 to the records.

I then provided the appellant with a Notice of Inquiry and the complete representations of the Town and the Project Manager. I also asked the appellant to address the issue of whether the Town ought to be entitled to rely on the application of the discretionary exemptions in sections 11(d) and 12. The appellant submitted representations, which were then shared with the Town and the Project Manager. I also invited the Town and the Project Manager to make additional representations by way of reply. I received further submissions only from the Town.

RECORDS:

The records remaining at issue consist of the undisclosed portions of certain tender documents, a complete copy of the point system ranking devised by the Project Manager, and the complete Northern Ontario Heritage Fund Corporation grant application submitted by the Town for a marina construction project.

DISCUSSION:

THIRD PARTY INFORMATION

General principles

Sections 10(1)(a), (b) and (c) 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) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although 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 confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third 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 paragraph (a), (b) and/or (c) of section 10(1) will occur.

Part one: types of information

The Town submits that the undisclosed portions of the tender documents and the funding application contain information that qualifies as confidential trade secrets, commercial and financial information belonging to the affected parties. The Project Manager argues that the grant application contains technical information relating to the specifications for the construction of the marina project, as well as commercial information relating to the costs and services required for its completion. This individual also indicates that the tender documents at issue contain "bidder-specific information designed and included to foster a better image of their submissions".

The Town also submits that the point ranking document at issue contains "information of a technical nature" belonging to the professional engineer who was engaged as the Project Manager for the marina construction project. The Project Manager is of the view that the point ranking document contains "labour relations information" as it addresses "forthcoming relationships between employers (the Town of Thessalon) and employees (the prospective contractors being evaluated)."

The appellant argues that the point ranking document does not include any information that qualifies as technical information for the purposes of section 10(1).

Analysis

The types of information listed in section 10(1) have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, 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 PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Labour relations information is information concerning the collective relationship between an employer and its employees [Order P-653].

In my view, the point ranking document does not contain information which qualifies as either technical or labour relations information for the purposes of section 10(1). The information in this document simply lists the Project Manager's evaluation of two of the bidders on various criteria that he devised. I find that this information is not sufficiently detailed to qualify as "technical information" for the purposes of this section. I further find that the point ranking document relates only to an evaluation of potential contractors with the Town. I find that it has no bearing and is not related in any way to the collective relationship between the Town and its employees and that it does not, accordingly, qualify as labour relations information. I find that the point ranking document does not contain any of the types of information which fall within the ambit of the section 10(1) exemption. Accordingly, I find that the exemption has no application to this document.

I find that both the tender documents and the grant application contain information that qualifies as technical, commercial and financial information. These records include information about the proposed costs of the products and services to be provided to the Town by each bidder, details of the construction work to be undertaken by them, as well as various suggested improvements to

the project, along with the bidders' guarantees and warranties of their work. In my view, all of this information satisfies the requirements of the first part of the test under section 10(1) as it is technical, commercial or financial information.

Part two: supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- 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

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [PO-2043]

The Town submits that the information contained in the tender documents and portions of the grant application were supplied to it by the bidders in the competition with a reasonably-held expectation that it would be treated confidentially. It notes that the final bid prices are made public but the specific details of each bid are not disclosed publicly. The Town also states that in the tender packages made available to the bidders, they were advised that their bids would be sealed.

Examining the circumstances surrounding the submission of the tenders and the contents of both the undisclosed portions of the tender documents and those portions of the grant application relating to the work to be performed by each affected party, I find that these records were supplied to the Town with a reasonably-held expectation that they would be treated

confidentially. Accordingly, I find that the technical, commercial and financial information contained in the tender documents and the grant application *that was supplied by the affected parties to the Town* meet the requirements of the second part of the test under section 10(1). [my emphasis]

However, the grant application also contains information created by the Town which did not form part of the proposals submitted by the affected parties. In my view, section 10(1) has no application to that information which originated with the Town, as opposed to the affected parties. I reiterate that the purpose of the section 10 exemption is to protect the informational assets of third parties and not those of institutions. Accordingly, I find that only those portions of the grant application that were provided directly by the affected parties or would reveal information provided by the affected parties meet the requirements of the second part of the test under section 10(1). The remaining portions of the grant application do not satisfy the second part of the section 10(1) test and this information cannot, therefore, be exempt under this section.

Part three: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

In the present appeal, I received representations only from the Town, the appellant and the Project Manager. While not obliged to make submissions, it would have been very useful to receive the other affected parties' representations on the issue of how the disclosure of the records could reasonably be expected to result in harm to their competitive position or undue loss to them under sections 10(1)(a) or (c).

The Town submits that the disclosure to the appellant of the affected parties' tender documents and those portions of the grant application that were provided by the affected parties could reasonably be expected to result in the appellant and other competitors of the bidders gaining "a competitive advantage" in the future. It states that the disclosure of the tender documents would:

> . . . reveal particular methods of tendering, costs and work techniques that could be used by competitors to out bid the affected party in future tender or request for proposal. It is conceivable that the appellant and other competitors could copy other contractor's tendering methods and implement cost and warranty structures and work techniques that are the same or better than other contractors, thereby providing that contractor with a competitive advantage in the marketplace.

The Town goes on to add that:

> . . . the disclosure of tender documents could hinder the effectiveness of future tenders by the Town, as future bidders may adjust their bidding methods to avoid disclosing certain information, thereby reducing the quality of the information used by the Town in selecting a successful bid.

The appellant takes the position that the information in the records is "simple" and that its disclosure could not reasonably be expected to result in harm to the competitive position of the affected parties.

I have reviewed the contents of the tender documents and the grant application and make the following findings:

- the information in the second paragraph of the first page of Record 6-4 describes certain additional work to be undertaken by one of the affected parties that is included in the quoted price. I find that the disclosure of this information could reasonably be expected to result in prejudice to the competitive position of one of the affected parties. The disclosure of the "extra" described in the record could reasonably be expected to prejudice this affected party's competitive position. The remaining information in the first page of Record 6-4 does not meet the requirements of the third part of the test under section 10(1);

- the disclosure of the FAX cover page which comprises the first page of Records 6-5 and 6-7 could not reasonably be expected to result in any of the harms contemplated by section 10(1);

- the disclosure of Schedule A to Record 6-6, a statement of a warranty offered by this affected party to the Town, could reasonably be expected to result in significant prejudice to its competitive position. This information could be used by its competitors to undermine the affected party's position with respect to future tender situations;

- the disclosure of the unreleased portions of Record 6-8 (pages 1, 5 to 8 and 10) could also reasonably be expected to result in harm to the competitive position of this affected party. The information bears directly on certain additional work proposed to be performed by the affected party in addition to the work called for in the tender. The disclosure of this information to competitors could reasonably be expected to harm this affected party's competitive position;

- the disclosure of Schedules 3, 4 and 5 to the grant application (Record 6-3) could reasonably be expected to result in prejudice to the competitive positions of the affected parties whose information is included therein. The information relates to

the work to be performed and includes detailed calculations of the projected costs for each affected party; and

- the release of the remaining undisclosed information contained in the records could not reasonably be expected to result in any of the harms contemplated by section 10(1). Neither the affected party nor the Town has provided me with evidence which is sufficiently detailed and convincing to allow me to make such a finding with respect to the remaining information.

In summary, all three parts of the test described above have been satisfied with respect to the second paragraph of the first page of Record 6-4, Schedule A to Record 6-6, pages 1, 5 to 8 and 10 of Record 6-8 and Schedules 3, 4 and 5 to the grant application which comprises Record 6-3. Accordingly, I find that this information qualifies for exemption under section 10(1). The remaining information in the records is not, however, exempt under section 10(1) as it fails to satisfy one or more parts of the test under that section.

ECONOMIC INTERESTS OF AN INSTITUTION

The Town submits that the disclosure of the grant application that comprises Record 6-3 could reasonably be expected to "be financially injurious to the Town". While not specifically referring to it, I assume that the Town wishes to apply the discretionary exemption in section 11(d) to this record. Because of the manner in which I will address the application of the section 11 exemption to the grant application below, I need not consider whether the Town is entitled to apply this exemption at the inquiry stage of the appeal process.

In his representations, the Project Manager refers to significant prejudice to the economic interests of the Town, which mirrors the language used in section 11(c).

Sections 11(c) and (d) state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

The Town goes on to add that:

> The NOHFC application contains financial and commercial information about the Port of Thessalon Marina including detailed financial statements and projections for future earnings and costs for the Marina. The Town submits this financial information was produced for the sole purpose of this particular grant and it is in

> the interest of the Town to keep the information confidential as it might be interpreted incorrectly or inaccurately by the public. Should the information be disclosed without the opportunity for the Town to explain its context, it could mislead the public and could reasonably jeopardize future grants with NOHFC and other potential funders as well as hinder the Town's ability to acquire the necessary funding.

The Project Manager submit that:

> Disclosure of the whole or any part of this submission that was prepared for the NOHFC could reasonably be expected to prejudice significantly the competitive position of the Town of Thessalon for a further expansion of the marina, and interfere significantly with the contractual negotiations and arrangements between the Town and the Heritage Corporation for this planned expansion. Accordingly, there is a reasonable expectation of harm should this grant application be disclosed in whole or in part.

The appellant submits that the disclosure of the information in the current grant application will not in any way prejudice or limit the likelihood of success should the Town decide to proceed with another application in the future. The appellant points out that the Ministry to whom the application was submitted often circulates successful grant applications to other applicants in order to assist them in the formulation of their own submissions.

Although the Project Manager and the Town submit that the harms contemplated by sections 11(c) and (d) could reasonably be expected to follow the disclosure of the information in the grant application, neither has provided me with detailed evidence as to how and why this harm to the Town's economic or financial interests might reasonably be expected to occur. Without more cogent evidence of such harm, I cannot agree with the position taken by the Town and the Project Manager that the prejudice and injury described in sections 11(c) and (d) could reasonably be expected to occur should the information in the application be disclosed.

Accordingly, I find that sections 11(c) and (d) have no application to the remaining portions of the grant application that comprises Record 6-3.

SOLICITOR-CLIENT PRIVILEGE

At the inquiry stage of the processing of this appeal, the Town first submitted that the Solicitor's Certificate of Title, which accompanied the grant application at Schedule "I" is exempt from disclosure under the solicitor-client communication privilege component of the solicitor-client privilege exemption at section 12. This section states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The Town argues that this document "contains information and an opinion by the Town's solicitors therefore it is solicitor-client privileged as per section 12". In its reply submissions, the Town submits that the document:

> . . . contains an opinion by the Town's solicitor with respect to title to the Marina lands. The purpose of this opinion was to provide the Town with legal advice surrounding the proposed Marina Re-development Project and in order to meet the funding requirements of NOHFC.

I have reviewed the contents of the Solicitor's Certificate of Title and find that it was prepared not for the purpose of providing legal advice to the Town but rather for the purpose of certifying *to the Ministry* that the Town is the registered owner of the property in question. [my emphasis] In my view, it cannot be said that this record represents a confidential communication between a solicitor and his or her client. As a result, it does not fall within the ambit of the solicitor-client communication aspect of section 12. As the document was not prepared as part of any litigation, I also find that it does not fall within the litigation privilege component of section 12.

In conclusion, I find that section 12 has no application to Schedule "I" to the grant application. I need not, accordingly, consider whether the Town ought not to be allowed to rely on this exemption having raised it only at the inquiry stage of the process.

ORDER:

1. I uphold the Town's decision to deny access to the second paragraph of the first page of Record 6-4, Schedule A to Record 6-6, pages 1, 5 to 8 and 10 of Record 6-8 and Schedules 3, 4 and 5 to the grant application which comprises Record 6-3.

2. I order the Town to disclose the remaining portions of the records at issue to the appellant by providing him with a copy by **May 31, 2004** but not before **May 26, 2004**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the Town to provide me with copies of the documents disclosed to the appellant.

Original signed by: April 23, 2004
Donald Hale
Adjudicator