# ORDER MO-1773

## Appeal MA-030020-1

## Toronto Public Library Board

## NATURE OF THE APPEAL:

This appeal concerns a decision of the Toronto Public Library Board (the Board) made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

By way of background, the Board issued a "Request for Proposal for Janitorial Services" (the RFP) for branch library locations in the "West Region" of Toronto. A named company (the affected party) submitted a proposal (the Proposal) and was the successful bidder. Subsequently, the Board and the affected party entered into a contract for the delivery of janitorial services by the affected party to the Board in the West Region.

The requester (now the appellant) had sought access to information relating to the "tender" submitted by the affected party for this cleaning contract. In particular, the appellant sought access to the number of hours the affected party indicated cleaning staff would spend at each branch in the West Region (part one) and the security logs for a six-month period for the West Region libraries (part two).

The Board denied access to information responsive to part two of the request, citing the exemptions at sections 8 (law enforcement) and 13 (danger to safety or health). The Board also indicated that it would notify the affected party and seek representations regarding part one of the appellant's request.

Subsequently, after providing third party notification and receiving a response, the Board issued a second decision letter in which it provided partial access to records responsive to part one of the appellant's request. The Board withheld portions of the records on the basis of the section 10 third party information exemption.

The appellant appealed the Board's decision.

During the mediation stage, the Board offered to release the security logs for two two-week periods. The appellant accepted this offer on the understanding that if it required additional security logs in the future the Board would release them. The Board agreed to do so. The Board then released these records to the appellant and part two of the appellant's request was removed from the appeal.

Further mediation was not possible and the file was transferred to the inquiry stage of the appeal process.

I first sought and received representations from the Board and the affected party. I shared the non-confidential portions of their representations with the appellant and invited the appellant to submit representations. The appellant declined to do so.

## RECORD:

One record remains at issue, portions of the "Price Detail Form" for the "West Region".

## ISSUES:

### Central issue

Do the severed parts of the record qualify for exemption under section 10(1)(a), (b) or (c)?

### Related issues

In order to address the central issue the following related issues must be explored:

- Do the severed parts of the record contain "commercial information" or "trade secrets"?
- Was the record at issue "supplied" by the affected party to the Board "in confidence"?
- Would disclosure of the severed portions of the record result in any of the "harms" set out in section 10(1)(a), (b) or (c)?

## CONCLUSION:

The severed information in the record qualifies for exemption under section 10(1)(a) of the *Act*.

## DISCUSSION:

### Part one: type of information

Both the Board and the affected party submit that the information at issue consists of commercial information and is a trade secret.

This office has defined the terms commercial information and trade secret as follows:

> ***Commercial information***
>
> Commercial information is information that 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).
>
> ***Trade secret***
>
> "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 M-29)

I adopt these definitions for the purpose of this appeal.

The Board states that the record at issue contains commercial information but defers to the affected party regarding part one of the test under section 10(1).

With respect to the trade secret category, the affected party states that the staffing information contained in Price Detail Form constitutes a "trade secret" since it represents a "method" of determining cleaning staffing levels. It views this information as the intellectual property of the affected party.

The affected party indicates that it applied for a Canadian patent for this method on November 28, 2002.

With over ten years of experience cleaning library facilities and with knowledge of branch sizes and general cleaning specifications, the affected party indicates that it developed a method to determine quickly and continuously the optimal cleaning staffing levels at a branch facility. The affected party asserts that the method is not widely known – only to a small number of its own management staff – and is the subject of efforts to maintain its secrecy. The affected party views this "smart" methodology as providing a competitive advantage. Therefore, it has value from not being generally known.

With regard to the commercial information category, the affected party states that staffing information is always considered to be highly sensitive commercial information since it operates in a labour intensive industry. How it conducts its service offerings to its clients and how it is priced against costs is confidential corporate information.

According to the affected party, the staffing information supplied serves as a "baseline to derive the line item estimates" for "price/year" for each branch location. It is the means by which the affected party arrives at a bid price to perform janitorial services.

On my review of the record, I am satisfied that the severed information constitutes commercial information since it pertains to the proposed terms of a contractual relationship between the affected party and the Board for the delivery of janitorial services. Specifically, the information

at issue consists of staffing arrangements for the delivery of these services at a specified price. Accordingly, part one of the three-part test has been met.

**Part two: supplied in confidence**

***Introduction***

In order to satisfy part 2 of the test, the affected party and/or the Board must show that the information was "supplied" to the Board "in confidence", either implicitly or explicitly.

***"Supplied"***

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. The following passage, from *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), addresses this purpose:

> . . . [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 signalling 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]

To meet the "supplied" aspect of part two of the test, it must first be established that the information in the record was actually supplied to the Board, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Board (Orders P-203, P-388 and P-393).

Both the Board and affected party submit that the affected party supplied the information at issue to the Board as part of a "tendering" process for the delivery of janitorial cleaning services. The Board adds that while the contract price of the successful bid is information that is in the public domain and available to the appellant, the "unit costs upon which the contract price is based" (the severed information) was supplied in this process.

In my view, it is clear that the information at issue was supplied by the affected party to the Board in response to the Board's RFP for the delivery of janitorial cleaning services. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution (see Orders MO-1368, MO-1504 and MO-1706).

Based on the evidence before me and my review of the record, I find that the withheld information meets the "supplied" element of part two of the test under section 10(1).

***"In confidence"***

In order to satisfy the "in confidence" component of part two of the test, 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 (Order 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 Board's position is that "…information provided in a tendering process [is] requested and supplied in confidence out of a concern for the commercial interests of the bidders in a bid competition." In support of this position, the Board cites the "Confidentiality and Security" section of the Board's RFP, a copy of which it includes with its representations. This section of the RFP states that proposals are subject to the *Act* with their contents subject to release pursuant to the *Act*. In the section, the Board cautions bidders to identify in their proposal "…any specific scientific, technical, commercial, proprietary or similar confidential information, the disclosure of which would cause them injury."

Also citing the "Confidentiality and Security" section of the RFP, the affected party states that the information at issue is the subject of a "mutually expressed" understanding that confidentiality is to be maintained by the Board and bidders in respect of staffing information supplied in a proposal of this nature. The affected party further states that, historically, this

information has been maintained in confidence by various library boards in the Toronto region in past RFP processes. The affected party also indicates that the information at issue has not been disclosed or made available to the public.

In my view, the evidence of both the Board and the affected party supports a finding that there was a shared understanding and expectation that the information contained in the Proposal was being supplied by the affected party to the Board in confidence. I also find that the information was not disclosed or otherwise made available to the public.

Accordingly, I find that the withheld information meets the "in confidence" element of part two of the three-part test under section 10(1).

Therefore, part two of the test under section 10(1) has been met with respect to this information.

**Part three: harms**

***Introduction***

To discharge the burden of proof under part three of the test, the parties opposing disclosure must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the parties 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 affected party's representations focus on section 10(1)(a) (prejudice to competitive position/interference with contractual negotiations) while the Board's submissions address both section 10(1)(a) and section 10(1)(b) (similar information no longer being supplied).

***Prejudice to competitive position/interference with contractual negotiations***

The affected party submits that disclosure of the information at issue would remove its competitive advantage in a small and highly competitive cleaning service industry. Disclosure would involve releasing its "staffing strategy method expertise" to its competitors that it has developed at a significant cost. The affected party's competitors would be able to use or adapt this methodology in bidding for future contracts at no additional cost to them. Conversely, the affected party factors in the costs of developing this methodology into its proposals for cleaning contracts. The affected party fears that this knowledge would allow competitors to undercut its pricing structures, thus providing competitors with an unfair advantage in the industry.

In addition, the affected party states that disclosure would likely provide competitors with insight into the cost of labour, which is the predominant cost component of the Price Detail Form. Knowledge of the withheld staffing information combined with information that is publicly available (the wage schedule for custodial cleaners which is available through the City of

Toronto Fair Wage Policy and the contract amount for the West Region contract) would allow competitors to determine the affected party's profit margin.

Finally, armed with knowledge of this staffing information, the affected party asserts that competitors would likely be able to draw accurate inferences regarding the determination of staffing levels for other regions for which it has contracts, thus providing competitors with its overall staffing strategy in its business relationship with the Board.

I am persuaded that disclosure of the severed staffing information could reasonably be expected to prejudice the affected party's competitive position in the highly competitive cleaning industry. I make this finding based on the affected party's representations, my review of the affected party's "methodology", as set out in its patent application, and the record itself.

In my view, the affected party has raised a reasonable expectation of harm if the severed information is disclosed. The severed information, along with the information already disclosed in the Price Detail Form, in the hands of a competitor would allow that competitor to determine the method and strategy that the affected party utilizes to price its services. Competitors would then be able to use or adapt the affected party's methodology in bidding for future contracts and undercut its prices. The affected party's competitive advantage would be adversely impacted. It would lose the advantage of its methodology in pricing cleaning service proposals and it would risk being undercut on the proposals on which it bid. I can appreciate that this information has special value to the affected party in providing it with a competitive advantage in bidding for cleaning service contracts.

In conclusion, I am satisfied that the harm described in section 10(1)(a) could reasonably be expected to occur if the severed portions of the Price Detail Form are released to the appellant. Accordingly, I find that part three of the test under section 10(1) has been met and, therefore, the information at issue is exempt under section 10(1)(a).

In light of my finding under section 10(1)(a) I do not need to consider the application of sections 10(1)(b) or (c).

## ORDER:

I uphold the Board's decision to deny access to the information at issue.

Original signed by: March 31, 2004
Bernard Morrow
Adjudicator