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FINAL ORDER MO-1846- F

Appeal MA-030034-1

Regional Municipality of Peel

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BACKGROUND AND NATURE OF THE APPEAL:

On September 13, 2004, I issued Interim Order MO-1829-I, which relates to Appeal MA-030034-1 and involves the Region of Peel (Peel) and an appellant who had requested access to records relating to the "Clarkson Water Pollution Control Plant Primary Treatment Expansion, Project number 91-2920". Most of the records and issues in Appeal MA-030034-1 were dealt with in Interim Order MO-1829-I. The only outstanding issue, which I will deal with in this final order, is the application of the exemption in section 10(1) of the *Act* (third party commercial information) to a number of identified records.

I made the following comments in Interim Order MO-1829-I on the section 10(1) issue:

> Peel's representations include the following brief statement regarding section 10(1):
>
> > [Peel] objects in full to releasing document numbers 1, 2, 3, 36 and 116 as the contents include unit pricing, percentage of mark-ups the release of which would prejudicially reveal financial information of another company.
>
> It would appear from the content of these records that there are actually two "companies" at issue: company #1 retained by the Ministry of the Environment to provide design and construction supervision services on the Project (Records 1, 36 and 116); and company #2 retained by Peel to provide construction services for the Project (Records 2 and 3).
>
> Neither of the two companies was notified by Peel at the request stage, nor were the companies provided with notice pursuant to section 21(1) of the *Act* that Peel intended to disclose Records 2, 3 and 116, subject to the severance of small portions of these records containing unit prices and "mark-up" figures.
>
> In the circumstances, I have decided to defer my consideration of section 10(1) as it relates to these 5 records, pending notification of company #1 and company #2, who may have an interest in the disclosure of the records. I will be issuing a Supplementary Notice of Inquiry to these two companies, and they will be given an opportunity to provide representations before I make my decisions on Records 1, 2, 3, 36 and 116.

After issuing Interim Order MO-1829-I, I sent a Supplementary Notice of Inquiry to company #1 and company #2, seeking representations on the application of section 10(1) to the relevant records. Both companies provided representations in response. I have determined that it is not necessary for me to seek further representations from the appellant or Peel before making my decisions on the section 10(1) exemption claim.

RECORDS:

The records remaining at issue in this appeal were described in Interim Order MO-1829-I as follows:

Record 1 - 29-page agreement between the Ministry of the Environment and company #1 for design and construction supervision services relating to the Project - section 10(1) for the entire record

Record 2 - 11-page agreement between Peel and a named consulting company (company #2) for construction services associated with a number of identified projects - section 10(1) for unit pricing information only

Record 3 - 17-page agreement between Peel and company #2 for construction services associated with other identified projects - section 10(1) for unit pricing information only

Record 36 - 1-page memorandum from company #1 to Peel relating to an invoice payment - section 10(1) for the entire record

Record 116 - 2-page letter from company #1 to Peel reporting on an aspect of the Project - section 10(1), in part

DISCUSSION:

THIRD PARTY INFORMATION

Company #1

In its response to the Supplementary Notice of Inquiry, company #1 consents to the disclosure of Records 1, 36 and 116. Peel's representations on the application of section 10(1) to these records are restricted to the potential harm to the interests of company #1. Accordingly, on the basis of company #1's consent, I find that the requirements of section 10(1) are not present for Records 1, 36 and 116, and they should be disclosed to the appellant pursuant to section 10(3) of the *Act*.

Company #2

I will restrict my discussion of section 10(1) to Records 2 and 3, which relate to company #2. Peel has agreed to disclose most of Records 2 and 3, and withhold only those portions containing what Peel describes as "unit pricing" information.

General principles

Section 10(1) states, in part:

> 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;

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, Peel and/or company #2 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 Peel 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.

[Orders 36, P-373, M-29 and M-37]

Part 1: type of information

Records 2 and 3 are both agreements entered into by Peel and company #2 for "Professional Consulting Services", specifically engineering services relating to two construction projects undertaken by Peel in the City of Brampton.

The terms "financial information" and "commercial information" have been defined in prior orders as follows:

> *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].

Although the representations from Peel and company #2 do not deal specifically with any of the types of information listed in section 10(1), I find that Records 2 and 3 contain both "financial information" and "commercial information".

The two records are agreements entered into by Peel and company #2 for the purchase and sale of engineering services. These are clearly commercial ventures, and agreements of this nature contain the type of information routinely found to qualify as "commercial information" for the purposes of part 1 of the section 10(1) test **[**Orders PO-2018, MO-1706**]**.

The specific "unit price" information identified by Peel, as well as other pricing details contained in the two records, also qualifies as "financial information". This information is directly related to money and its use and refers to specific data, thereby falling squarely within the definition of "financial information" outlined above.

Part 2: supplied in confidence

The requirement that information be "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].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

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 [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 Peel 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 company #2 prior to being communicated to Peel
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [PO-2043]

Records 2 and 3 are both agreements. As such, consistent with past jurisprudence of this office outlined above, there is a strong presumption that they were negotiated between the parties and would not satisfy the "supplied" component of part 2. It is clear that the agreements comprising Records 2 and 3 were negotiated by Peel and company #2, and unless the parties resisting disclosure can establish particular information in the records was not subject to the actual negotiation process, the records will fail to meet the requirements of part 2 of the section 10(1) test.

Peel's brief representations on section 10(1) deal with harms and do not specifically address the "supplied" component of part 2.

Company #2 submits:

> … [Records 2 and 3] include extracts from our proposal in Schedule A - Schedule of Services. This schedule outlines the services we will provide and how we will deliver them to the client. … The agreement further quotes our fees by task in Schedule B …
>
> We also note that [Records 2 and 3] state our Payroll Burden, expressing our Benefit Costs as a percentage of salary. …

Schedules A and B of Record 3 and the schedule attached to Record 2 would appear to be extracts from proposals submitted by company #2 to Peel in the context of bidding for the consulting work reflected in the agreements that accompany these schedules. The content of the various schedules would appear to have been pulled directly from the proposals themselves. Although the representations on the "supplied" component of part 2 are not detailed, I accept that the specific information withheld by Peel from the two records did not form part of the actual negotiation process, and was therefore "supplied" by company #2.

Other than statements by Peel and company #2 that the withheld financial information was supplied "in confidence", the representations do not address the various parts of the "in confidence" component of part 2 outlined in the Notice of Inquiry. There is nothing on the face of the various schedules to Records 2 and 3 to indicate that the information was supplied in confidence; Peel has provided no evidence to establish that an expectation of confidentiality was conveyed to company #2 at the time it was acquiring engineering services from this company; and company #2 has provided no representations to establish that the financial information contained in its proposals was treated consistently in a manner that indicates a concern for its protection from disclosure by company #2 prior to being communicated to Peel.

The onus rests on the parties resisting disclosure to establish the requirements of part 2. They have failed to do so here, and, with certain limited exceptions, I am not persuaded, based on the representations from Peel and company #2 and my review of the records, that the "in confidence" component of part 2 has been established.

The exceptions relate to specific hourly rates and percentage calculations that appear on pages 6 and 7 of Record 2 and pages 8 and 9 of Record 3. In my view, it is reasonable to assume that specific "unit price" information of this nature was submitted by company #2 with a reasonably-held expectation that it would be treated confidentially by Peel. This assumption does not apply to the other financial information on these pages or to the overall pricing breakdown by work category contained in Schedule B of Record 3.

Part 3: harms

To meet this part of the test, Peel and/or company #2 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].

Peel and company #2 have restricted their discussion of part 3 to the competitive harms outlined in section 10(1)(a).

Peel's representations, quoted earlier in this order, clearly do not meet the "detailed and convincing" evidentiary standard established by the Court of Appeal in *Ontario (Workers' Compensation Board)* as they relate to the information withheld from Records 2 and 3.

As far as company #2 is concerned, it submits that disclosing Schedule A of Record 3 and the schedule attached to Record 2 "will place our firm at a competitive disadvantage as it outlines our approach to the completion of this type of project". As far as the fees contained in Schedule B of Record 3 are concerned, company #2 submits that disclosing this information "places our firm at a competitive disadvantage as it discloses our pricing practices". Finally, company #2 submits:

> We also note that [Records 2 and 3] state our Payroll Burden, expressing our Benefit Costs as a percentage of salary. This is highly confidential information supplied in confidence to our client. Disclosure of such information gives competitors insight into our overhead costs and operating practices.

I have already determined that Schedule A and B of Record 3 and the schedule attached to Record 2 were not "supplied in confidence" for the purposes of part 2 of the test. Even if they were, I do not accept that disclosing them could reasonably be expected to result in competitive harm to company #2, based on the representations provided by this affected party. The parties do not argue that the overall contract figures for services provided under the Record 2 and Record 3 agreements should be withheld. These figures were clearly negotiated, not "supplied" in any event. I am not persuaded that the breakdown of these figure in Schedule B of Record 3 and page 10 of Record 2 could be said to "disclose our pricing practices", as claimed by company #2. These breakdowns are made by broad and general categories of work and, in my view, are specific to the individual projects being bid on, and their disclosure would create little if any risk of exposing pricing practices in the context of future similar work.

As far as Schedule A of Record 3 and the "Schedule of Services" attached to Record 2 are concerned, I find that they contain information specific to the individual engineering projects, and the brief statement by company #2 that disclosing them could result in competitive harm because it would reveal "our approach to the completion of this type of project" is simply not the level of detailed and convincing evidence necessary to establish harm under part 3 of the section 10(1)(a) test.

However, I do accept that disclosing the specific hourly rates and percentage calculations that appear on pages 6 and 7 of Record 2 and pages 8 and 9 of Record 3 could reasonably be expected to result in competitive harm to company #2. This information identifies the pricing strategy used by company #2 in bidding on the two consulting contracts, and I accept that if this information were to be conveyed to others in the highly competitive field of engineering consulting it could reasonable be expected to be used by competitors to the prejudice of company #2 when bidding on comparable future work. I acknowledge that the figures are 4-5 years old at this point, but I accept that they could still be used to accurately estimate current comparable pricing figures.

In summary, I find that specific hourly rates and percentage calculations that appear on pages 6 and 7 of Record 2 and pages 8 and 9 of Record 3 satisfy all three parts of the section 10(1)(a) test. All other parts of Records 2 and 3 fail to satisfy parts 2 and 3 of the test, and therefore do not qualify for exemption under section 10(1) and should be disclosed to the appellant.

FINAL ORDER:

1. I uphold Peel's decision to deny access to the specific hourly rates and percentage calculations that appear on pages 6 and 7 of Record 2 and pages 8 and 9 of Record 3. I have attached a highlighted version of these pages with the copy of this order sent to Peel, which identifies the portions that qualify for exemption and should **not** be disclosed.

2. I order Peel to disclose Records 1, 36 and 116 in their entirety, and all portions of Records 2 and 3 not covered by Provision 1 to the appellant by **November 15, 2004** but not before **November 8 2004**.

3. In order to verify compliance, I reserve the right to require Peel to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, upon request.

Original Signed by: October 6, 2004
Tom Mitchinson
Assistant Commissioner