



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

ORDER MO-1888

Appeal MA-040007-1

Toronto Transit Commission



Tribunal Service Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9188
TTY: 416-325-7538
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the Toronto Transit Commission (TTC) received a request for access to all the tender documents submitted by a specified company for a project on which the specified company was the successful bidder.

After notifying the specified company (the affected party), and receiving their response, the TTC granted access to the requested tender documents with certain information severed. The TTC relied on section 10 of the *Act* (third party information) to withhold the severed information.

The requester (now the appellant) appealed the decision of the TTC denying access to the severed portions of the tender documents.

During mediation, the affected party was not prepared to consent to the disclosure of the information severed from the tender documents and the requester and the TTC did not change their positions. As mediation was unsuccessful, the matter moved to the adjudication stage.

A Notice of Inquiry outlining the issues in the appeal was initially sent to the TTC and the affected party. Both filed representations in response, but after the affected party initially asked that its representations not be shared with the appellant, ultimately agreed that they could. A Notice of Inquiry, along with a copy of the representations of the TTC and the representations of the affected party, without the attachments, was then sent to the appellant who provided representations in response.

As the responding representations of the appellant raised certain factual allegations and what appeared to be a claim for information that was outside the scope of the original request, they were forwarded to the TTC and the affected party for a reply. The reply of the TTC contained certain representations that I determined the appellant should be given an opportunity to address. A letter was sent to the appellant setting out those specific matters, inviting a response. The appellant indicated that he had nothing to add, and did not file any additional representations.

PRELIMINARY ISSUE – SCOPE OF THE REQUEST

Based on the representations of the TTC that the document entitled “Parental Guarantee” was not part of the original submission of tender and that access to that document is part of a new request made by the appellant to the TTC, and having no submissions to the contrary from the appellant, I find that the request for access to this document is outside the scope of this appeal.

RECORD

The record containing the information at issue is a 15-page tender document that the affected party submitted to the TTC. The issue in this appeal is the denial of access to the following information:

Page 2	Unit price and total extended price for seven items (the total tender price was disclosed).
Page 5	Unit price for one item of extra work.
Pages 9 to 11	Name and identifying information of surety on bid bond.
Page 12	Document 00422, List of similar Contracts Completed (Within Last 5 Years) being details of similar contracts completed by the affected party in the last five years, including contract value, name of owner, contact name, description of project, in two places the name of the architect/engineer and the date of completion of the project.
Page 13	Product suppliers in product suppliers list.
Page 14	Amounts of price changes for specified options, including cost of warranty, maintenance contract and equipment changes.

DISCUSSION:

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, if 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, the TTC 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 TTC 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 1: Type of Information

Commercial and Financial Information

The TTC and the affected party claim that the undisclosed portions of the tender documents include “financial information” and that the references constitute “commercial information” for the purposes of part one. These terms 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].

The severed information is part of the tender package that relates to the selling of services to the TTC by the affected party, specifically the contracting services for a major construction project. All the severances, except a severance listed on page 13 (Product Suppliers List) beside Section 15920 - Silencers, contain data on unit and global prices charged for the project, names of suppliers as well as other contracts performed by the affected party. This is clearly a commercial venture, and the information in the severances is the type of information routinely found to qualify as “commercial information” and/or “financial information” for the purposes of part one of the section 10(1) test. I therefore find that part one of the test has been satisfied.

As a result, I need not express an opinion as to whether this information also qualifies as a trade secret or scientific, technical or labour relations information as asserted by the affected party in their representations.

Part 2: Supplied in Confidence

In order to satisfy part 2 of the test, the TTC and/or the affected party must establish that the information at issue was “supplied” to the TTC in confidence, either implicitly or explicitly.

Supplied

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 [Order PO-2043].

The TTC submits that the information at issue was supplied by the affected party in response to a request for tender to perform the work as specified within the tender documents. This assertion is unchallenged. In keeping with prior orders of this office dealing with tender documents, I find that, even though the affected party may have obtained some of the elements from an outside source that was incorporated into the tender documents, except for the amounts listed as numbers 2 and 3 on page two, the information at issue in this appeal was provided to the TTC in tender documents completed by the affected party. This falls within the definition of “supplied” for the purposes of part one of the test. [Orders M-288, MO-1706 and MO-1783].

In Confidence

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 TTC 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 party prior to being communicated to the TTC;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [PO-2043].

Representations

The affected party and the TTC submit that the undisclosed information contained in the Tender Documents was "supplied in confidence" for the purposes of part two of the test.

The TTC submits that Section 7 of the TTC's Procurement Policy/Instruction, which is a public document and applies to all TTC related procurement information, provides that all tenders submitted at the request of the TTC are considered confidential documents and the information contained in the tender is not revealed, except under certain circumstances.

The TTC explains:

Section 7.1 "Publicly Opened Tenders" states that at the time of the public opening the TTC only reveals the identity of the tenderers and the total tendered price(s) submitted by each, including specified alternatives where applicable, and retains all other information as confidential. This is also the case of tender information when it is posted to the TTC's website.

Section 7.2 "Informal Tenders" states that the TTC reveals the identity of the successful tenderer and their total price(s), if applicable, upon requests from interested tenderers and only after the contract is awarded.

Section 7.3 "Notifying unsuccessful tenderers" states once the contract for public and formal tenders has been awarded, the total contract award value(s) and name(s) of the successful firm(s) are posted on the website to provide notification to the unsuccessful firms and any other interested party.

In addition, in response to our request for representation the affected party's representative, [name of law firm] letter dated November 17, 2003 states explicitly that its information was submitted in confidence in response to a competitive bid.

The affected party submits:

Further, the tender document is explicit in that it notes that only the "total tender prices" submitted for the tender will be available for viewing on TTC's website.

Had it been the TTC's intention to release the entire tender package, it would have explicitly stated this intention in the tender documents. It did not. Further, had the TTC incorporated a term in its tender document stating that it would release the entire tender package for public consumption, [the affected party] (and indeed, all tenderers) may have taken a very different position as to whether it was going to submit a tender in the first place.

Further, the instructions to tender specifically holds:

A tender submitted to the Commission shall become the property of the Commission and is therefore subject to the provisions of the *Ontario Municipal Freedom of Information and Protection of Privacy Act*. Tenderers are encouraged to familiarize themselves with the provisions of this *Act*.

Given this inclusion and the above noted inclusion with respect to the total tender prices, it was reasonable for [the affected party] to presume that the entire tender packages would not be made available for public review.

Further, it is commonly known in the Ontario Construction Industry that tender submissions are treated with a great degree of secrecy and confidentiality. This principle was confirmed in the Ontario Court of Justice decision of *Gottcon Contractors Ltd. vs. Manzo* where Mr. Justice McRae stated the following:

When a company is invited to tender on a project the practice in the construction Industry is to observe the utmost secrecy with respect to one's bid. Knowledge of a competitor's bid would present a tremendous advantage.

Gottcon Contractors Ltd. vs. Manzo (1992) 40 C.P.R. 498 (*Gottcon Contractors Ltd.*)

The appellant states with respect to the information requested regarding the information on page 12 of the tender entitled Document 00422, List of similar Contracts Completed (Within Last 5 Years), that similar information is generally known and printed in a daily industry newspaper, "Daily Commercial News" under the heading "Bid Results" and that amounts listed as numbers 2 and 3 on page two of the tender were provided by the TTC in the tender document.

Analysis and Findings

The amounts listed as numbers 2 and 3 on page two of the tender were provided by the TTC in the tender document, and were not "supplied" by the affected party. As a result, these amounts are to be disclosed.

Based on the above-noted references contained in the TTC's Procurement Policy/Instruction, the instructions to tender and the tender documents, as well as the understanding of the affected party expressed in its submissions with respect to how the information would be treated, while there can be no dispute that it was always understood the total tender price would be disclosed and therefore could not be said to be supplied "in confidence", I find that the information at issue was supplied in confidence, subject of course to a right of access under the *Act*. As noted by the affected party, this possibility was specifically raised in the invitation to tender and as has been stated by this office (e.g. Order MO-1476), assurances of confidentiality in this context cannot be

absolute. Accordingly, I find that the information at issue was “supplied in confidence” in the context of the TTC’s tender process, thereby satisfying part 2 of the section 10(1) test.

Part 3: Harms

To meet this part of the test, the TTC and/or the affected 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].

Section 10(1)(a): prejudice to competitive position

With respect to section 10(1)(a) of the *Act*, the TTC submits:

The affected party's representative indicated ... that providing its financial information would cause harm to it by compromising the affected party's ability to competitively estimate future projects. Further, reference to other contracts completed by the affected party is sensitive and confidential. Disclosure of the surety information on the bid bond may seriously compromise the affected party's relationship with its bonding company.

The TTC submits that the affected party operates in a competitive marketplace in which it markets its skill and its pricing. The release of its pricing structure would allow for its competitors to have an unfair advantage in bidding on other projects.

The potential prejudice suffered by the affected party if its pricing structure was released would be significant in that its competitors would have an advantage in bidding other similar projects. The affected party's competitors would be better able to bid contracts by knowing the affected party's pricing structure. This would allow competitors to tailor their pricing structure in order to be awarded other contracts.

The TTC explained further in its reply submissions:

... the issue of whether “unit prices” submitted as part of [a] tender meet the test as set out in section 10(1) of MFIPPA has previously been addressed in Order M-602. In that case, the respondent, TTC, denied access to a request for the unit prices submitted by a company on the basis of section 10(1) of the MFIPPA. The Commissioner in upholding the TTC's decision not to disclose the unit pricing

contained in a tender concluded that "unit prices" submitted as part of a tender were: (a) commercial information; (b) were supplied in confidence; and (c) that disclosure of the information could reasonably be expected to compromise significantly the affected party's competitive position.

The purpose of a tendering process is to help ensure that the TTC receives the lowest possible pricing. The Supreme Court of Canada, in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (*M.J.B. Enterprises*) ... stated that the purpose of a tendering system is to replace negotiation with competition. As such, the TTC submits that if the unit prices, financial, contractual and surety information that is submitted by a particular bidder (the affected party) were disclosed to a potential competitor, the competitor would be able to adjust its bid in order to present a more attractive offer. This could reasonably be expected to significantly compromise the affected party's competitive position and cause real harm to the affected party.

Although the requested information relates to a specific contract, the TTC submits that how the affected party prices its bid applies to the general nature of how the affected party operates. If the unit pricing on a specific contract were provided by the affected party to a competitor, the competitor would be aware of how certain items are priced by the affected party (ie. profit margin or whether a specific subcontractor or manufacturer is providing better pricing). This would significantly compromise the affected party's position in the marketplace and have an adverse affect on future job tenders/competitions.

The affected party submits:

Construction is a fiercely competitive industry with razor thin profitability margins and companies spend years and millions of dollars to position themselves to secure large scale construction contracts. In the case at hand, [the affected party] has fostered and developed an extensive, elaborate and sophisticated program to assist it in its estimating and securing of these projects. Indeed, most of [the affected party]'s senior estimating personnel are long standing employees of [the affected party] who are required to sign confidentiality agreements to ensure that the information and knowledge developed by [the affected party] are not distributed freely throughout the industry. This is common practice in the construction industry.

The documentation requested contain the results of a thorough technical and commercial analysis (the development of unit rates) and are not freely available to the construction industry on a whole. Indeed, if the information was freely available to others in the construction industry, there would be no need for the secretive and confidential tender process which forms the very core of the construction industry.

After submitting that the withheld information can be considered a trade secret, scientific, technical, commercial, financial or labour relations information, the affected party made the following submission that specifically addresses the prejudice to the competitive position that the affected party asserts will occur, if the information is released:

Unit Price Information (at page 2 and 5 of the document in question) can only be described as a "trade secret". Unit prices are the compilation of labour, material and margins for profit and overhead which are within the exclusive knowledge of the party submitting a tender. Over its years, [the affected party] has developed specific methods of installation, specific sources and methods of pricing a specific installation and its own calculations with respect to margins that are within its own exclusive knowledge and not generally known in the industry. Further, [the affected party] uses margins and markups that are exclusive to them which assists it in securing and completing contracts.

With respect to the specified standby part lists (at page 6 and 8), this constitutes information that may be exclusive to [the affected party] in terms of the applicability of the standby parts to a specific job and accordingly, may be characterized as a trade secret. Further, the relationship between [the affected party] and the seller of the standby part can be characterized as confidential commercial information and therefore, ought not to be disclosed for this reason.

The reference to the bid bond (at pages 9 to 11), once again, is a specific reference to confidential commercial information that relates solely to the relationship between [the affected party] and the bonding company. It is and can be of no legitimate interest to any third parties beyond [the affected party], the TTC and the bonding company.

...

The reference to product suppliers (at page 13) is protected by the *Act* from the dual standpoint that the product suppliers can be interpreted as a trade secret and that is referred to as commercial information. [The affected party]'s assembly and submission of a list of product suppliers results from its previous experience in the industry and the relationships that they have developed in the previous 40 years. The release of such information would compromise the commercial relationships and trade secrets that it has developed over this time.

Finally, the amounts of price changes for specified options including warranty costs, maintenance contract and equipment changes (at page 14) are once again, the product of [the affected party]'s cumulative knowledge as developed during its history. The release of this information would seriously compromise [the affected party]'s ability to tender competitive bids on projects.

The appellant's submissions on section 10(1) appear to focus on the appellant's assertion that the severed tender documents that the TTC disclosed in the context of this request, result in the affected party's tender being deficient because the information cannot be verified. Therefore, the appellant says, the TTC awarded the contract on the basis of a non-compliant tender. I am not persuaded by this argument, which has, in any event, no bearing on section 10(1) of the *Act*.

With respect to the specific items of information withheld, the appellant submits:

Page 2: Total Extended Price For Seven Items:

Item No. 2 and 3 are cash allowance items. The amounts are specified in Section 01210 of the specifications and provided by the Owner on page 2 of the Tender Form. There is no trade secret about item no. 1. It is a similar number to the Total Tender Price. It cannot be used for any other projects. Item nos. 4, 5, 6 & 7 are specific to the conditions and parameters specified in the subject tender. They cannot be utilized for any other tenders. There are no intricate Trade Secret, Scientific, Technical, Commercial, Financial, or labour relations information involved. [The appellant] requires the above information to [e]nsure tender compliance...

Page 5: Extra Price For Daily Training Identified In Division 15 Mechanical and Division 16 Electrical:

Daily rate for Additional Training for mechanical and electrical trades, are specific for this contract only, based on the description of the items involved in document 00322. There is no trade secret involved. This item cannot be used for any other project. [The appellant] requires this item to [e]nsure compliance.

Page 6: Details of Recommended Standby Parts List:

[Appellant] requires this information to [e]nsure further non-compliance with completing all the blank spaces of this schedule.

Pages 7 & 8: Details of Specified Standby Parts List:

Required by [appellant] to [e]nsure compliance. These are items mainly supplied by a specific equipment supplier on this project.

Pages 9-11: Name of Surety supplying Bid Bond and Agreement to Bond:

Required by [appellant] to [e]nsure that the Surety Company is licensed to carry out surety business in the Province of Ontario.

Page 12: List of Similar Contracts Completed (Within Last 5 Years):

This information does not prejudice the competitive position nor interfere with future contractual or other negotiations of [the affected party]. It has no "Commercial" value, sensitivity or harm, and cause[s] no undue loss to [the affected party]. Similar information is generally known and printed daily in the industry newspaper, "Daily Commercial News", under "Bid Results" heading.

Page 13: Product Suppliers List:

[Appellant] requires this information to [e]nsure it meets one of the suppliers, specified in the specifications.

Page 14: Specified Options List:

Information required to [e]nsure compliance.

[Appellant] states that the [e]vidence [p]resented by [the affected party] amounts to [s]peculation of [p]ossible [h]arm. The access for information requested presents no significant prejudice to the competitive position of [the affected party], nor interferes with future negotiation[s] of [the affected party].

The affected party submits in reply:

1. Page 2 - Total Extended Price for Seven Items

As noted in [the affected party]'s prior representations, the unit prices as set out in [the affected party]'s tender package are based upon years of experience and developing formulae and methods of installation which assist [the affected party] in successfully attaining and executing contracts. Although the Appellant may suggest that the specific information cannot be used for any other tenders, the work as described in the documentation is not specific to this particular contract and can be used on other projects. [The affected party] would be at a competitive disadvantage if this information was disseminated to its competitor in the industry.

2. Page 5 - Extra Price for Daily Training Identified in Division 15 Mechanical and Division 16 Electrical

Similarly, the daily rate for additional training for mechanical and electrical trades is information that has been the cumulative effort of years of [the affected party]'s Safety Department. The information contained herein can be universally applicable to almost any other construction project and the dissemination of it would comprise divulgence of confidential trade information and financial information that could be used for [the appellant]'s competitive advantage to [the affected party]'s detriment.

3. Page 6 - Details of Recommended Standby Parts List

The same arguments referred to in No. 1 above apply to this information as well. Further, this information specifically deals with the relationship between [the affected party] and vendors of the standby part which can only be characterized as confidential commercial information and ought not to be disclosed for this reason. [The affected party] and its predecessors have developed a comprehensive and complex network of vendors which puts it in a competitive advantage with respect

to its position in attaining projects. The Appellant's request for this information can only be characterized as an attempt to take advantage of this information for its own use.

4. Pages 7 & 8 - Details of Specified Standby Parts List

The same argument with respect to No. 3 above applies to this representation.

5. Pages 9-11- Name of Surety Supplying Bid Bond and Agreement to Bond

The request for the bid bond information and agreement to bond is a specific reference to confidential commercial information that relates solely to the relationship between [the affected party] and its bonding company. It is of no legitimate interest to any third party beyond [the affected party], TTC and the bonding company.

6. Page 12 - List of Similar Contracts Competed (Within Last 5 Years)

This item deals with the release of information with respect to similar contracts. [The affected party] reiterates its position that the commercial information relating to [the affected party]'s sale of labour and material to other owners and general contractors is confidential information that is solely within the privity of knowledge of the particular owners and [the affected party]. [The affected party] has no authorization to release this information to third parties. Further, this information can be of no value to the Appellant. It is of absolutely no relevance that "similar information" is generally known and printed daily in the industry newspaper "Daily Commercial News".

7. Page 13 - Product Suppliers List

[The affected party] reiterates its position that information from product suppliers can only be interpreted as a trade secret and that it is referred to as confidential commercial information. [The affected party]'s assembly and submission of a list of product suppliers results from its previous experience in the industry and relationships that it has developed in its previous 40 years. Release of such information would compromise the commercial relationship and trade secrets that it has developed over this time.

8. Page 14 - Specified Options List

[The affected party] reiterates its position that the information referred to in the Specified Options List includes warranty costs, maintenance contract and equipment changes and other information that had been developed throughout [the affected party]'s history and are the product of [the affected party]'s

cumulative knowledge and that of its employees. The release of this information would seriously compromise [the affected party]'s ability to tender competitive bids on projects.

Section 10(1)(b): similar information no longer supplied

With respect to section 10(1)(b) the TTC submits:

... that there is a real and substantial possibility that releasing a company's pricing, contractual and surety information may cause that information to no longer be available. Companies are often required as part of the TTC procurement system to provide a detailed price breakdown.

If this information were to become public, the TTC submits that companies may no longer provide this type of information to the TTC as it would allow competitors to know important pricing information.

From a public interest standpoint, the TTC also believes that if a company knew that its price breakdown/structure was to become public, many companies would refuse to bid on contracts for fear that competitors would know detailed financial information. This would defeat the public procurement process in that (a) companies would no longer bid on public contracts; and/or (b) fewer companies would bid on contracts and therefore, prices would increase (which would defeat the purpose of the procurement system - which is to encourage fair competition).

The purpose of a competitive bid process as set out by the Supreme Court of Canada in *M.J.B. Enterprises* was to replace negotiation with competition. This purpose would be defeated if the financial information of the affected party is produced to its competitors.

The affected party submits:

Further, the tender document is explicit in that it notes that only the "total tender prices" submitted for the tender will be available for viewing on TTC's website.

Had it been the TTC's intention to release the entire tender package, it would have explicitly stated this intention in the tender documents. It did not. Further, had the TTC incorporated a term in its tender document stating that it would release the entire tender package for public consumption, [the affected party] (and indeed, all tenderers) may have taken a very different position as to whether it was going to submit a tender in the first place.

Further, the instructions to tender specifically holds:

A tender submitted to the Commission shall become the property of the Commission and is therefore subject to the provisions of the, *Ontario Municipal Freedom of Information and Protection of Privacy Act*. Tenderers are encourage [sic] to familiarize themselves with the provisions of this *Act*.

Given this inclusion and the above noted inclusion with respect to the total tender prices, it was reasonable for [the affected party] to presume that the entire tender packages would not be made available for public review.

Section 10(1)(c): undue loss or gain

With respect to section 10(1)(c) the TTC submits that undue loss to a person may be experienced in that the competitive position of the person may be harmed by the disclosure of detailed financial, contractual and surety information contained in the tender submission.

The affected party submits:

There can be no doubt that disclosure of the information will result in undue loss to [the affected party] and an undue gain to the requester. In short, [the affected party] will have lost a competitive advantage by disclosing its sensitive pricing information to a competitor in the construction industry. Similarly, if the information is granted to the requester, the requester will have received an undue gain by having access to the cumulative product of 40 years of [the affected party]'s efforts and expense.

This is why Canadian Courts have long held that bid information, prices and other documentation supplied to an owner and a tender submission are confidential between the contractor and the owner and disclosure of the information constitutes a misuse of confidential information.

ANALYSIS AND FINDINGS

Many orders of this office, among them Orders M-288, M-602, MO-1706, MO-1783, P-166 and P-367 address the issue of information that is contained in tender documents. Based on the evidence and submissions made in each of those appeals some conclusions on whether certain types of information in a tender document may be disclosed may differ, but there is one unifying theme: the decision whether to disclose information contained in a tender document must be approached in a careful way, applying the tests as developed over time by this office while appreciating the commercial realities of the tendering process and the nature of the industry in which the tender takes place.

Based on the submissions and evidence provided by the TTC and the affected party, and there being no substantive submissions from the appellant to counter the positions of the TTC and the affected party, I am satisfied that, except for the information listed on page 13 (Product Suppliers List) beside Section 15920 – Silencers and the amounts listed as numbers 2 and 3 on page two, the undisclosed information at pages 2, 5, 9 to 11, 13 and 14 could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party. Accordingly, this information should not be disclosed in accordance with section 10(1) (a) of the *Act*. As a result, it is not necessary to address the application of sections 10(1)(b) or (c).

I am not of the same opinion with respect to the severed information at page 12, being details of similar contracts completed by the affected party in the last five years, including contract value, name of owner, contact name, description of project, in two places the name of the architect/engineer and the date of completion of the project.

This is because I am not satisfied that the TTC or the affected party have provided me with detailed and convincing evidence to establish a reasonable expectation of the harms listed in section 10(1) of the *Act*. Construction companies doing business with public institutions such as the TTC understand that past work experience on similar scale projects is often an important part of a competitive selection process, and it is simply not credible to argue that the TTC would be provided with less information of this nature in future (section 10(1)(b)), nor has sufficient evidence been led that the release of this information would cause the other types of harms set out in section 10(1)(a) or (c). Similarly, the information listed on page 13 (Product Suppliers List) beside Section 15920 - Silencers does not merit the protection of section 10(1). Accordingly, this information should be released.

FINAL MATTER

In their reply representations, the affected party also asserts under section 4(1)(b) of the *Act* that the request is frivolous and vexatious. Under section 4(1)(b) of the *Act*, the TTC would be the party to make such an assertion. I am not satisfied that even if the affected party were somehow permitted or able to raise such an allegation at as late a stage as they did, or at all, they have established that access to the information that I have ordered disclosed be denied pursuant to section 4(1)(b) of the *Act*.

ORDER

1. I uphold the TTC's decision to deny access to all the requested information except the amounts listed as numbers 2 and 3 on page two of the tender, the severance listed on page 13 (Product Suppliers List) beside Section 15920 – Silencers, and the information on page 12 of the tender entitled Document 00422, List of similar Contracts Completed (Within Last 5 Years).

2. I order the TTC to disclose the amounts listed as numbers 2 and 3 on page two of the tender, the information on page 12 of the tender entitled Document 00422, List of similar Contracts Completed (Within Last 5 Years) and the information listed on page 13 (Product Suppliers List) beside Section 15920 - Silencers, in its entirety and without severances, to the appellant by **January 31, 2005** but not before **January 24, 2005**.
3. In order to verify compliance, I reserve the right to require the TTC to provide me with a copy of the information disclosed to the appellant pursuant to Provision 2, upon request.

Original Signed by: _____
Steven Faughnan
Adjudicator

December 21, 2004
