



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2815

Appeal PA07-442

Ontario Realty Corporation



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NATURE OF THE APPEAL:

The Ontario Realty Corporation (ORC) received a request under the *Freedom of Information and Protection of Privacy Act* (the Act) for access to information pertaining to a specific Request for Qualifications (RFQ). The request specifically stated:

We are requesting the following information regarding RFQ # [specific file number]:

- copies of all proposals submitted (winning and competitive proposals), including financials
- copies of all evaluation notes and records
- copies of any minutes or notes taken during the evaluation process

The ORC identified the responsive records related to the request. Before releasing any documents to the requester, the ORC notified several organizations whose interests may be affected by the outcome of the appeal (the affected parties) to obtain their views regarding disclosure of the records.

Two of the affected parties, who were the successful proponents, objected to the disclosure of the records on the basis that the records contain confidential third party and personal information.

After considering the affected parties' representations, the ORC issued a final decision that granted partial disclosure to the requester. The ORC granted access to two records in their entirety. In regard to Record 3 (the Qualification Submissions), the ORC granted partial access, stating in its decision:

Portions of Record 3 containing the following information have been severed pursuant to subsection 17(1) (third party information) of FIPPA:

- Annual values of construction work;
- Banking information;
- Tax compliance information;
- Insurance information;
- Project Management methodology; and
- Fee values and reference information of similar assignments.

Further, portions of Record 3 which include personal information in resumes and detail the employment references of individual employees have been severed pursuant to section 21(1) (personal privacy) of FIPPA.

Before releasing the record the ORC advised the affected parties that they had the opportunity to appeal the ORC's decision to this office.

Two affected parties, now the appellants, appealed the ORC's decision to this office and two files were opened. This order disposes of one of the appeals.

During mediation, the mediator confirmed with the appellant's representative that he was not appealing the ORC's decision to disclose Records 1 and 2. Consequently, the ORC's Final Evaluation Summary and the ORC's Individual Evaluated Information Score Sheet are not at issue.

The mediator also confirmed the specific portions of Record 3 that are actually at issue. This is set out in further detail in the Records section of this order.

The mediator also confirmed with the original requester that he is not seeking access to the names of company personnel, their home address, their email addresses or home or work telephone numbers. The original requester continues to seek access to the job titles and list of job functions, however.

The remaining issues were not resolved at mediation and the file was moved to adjudication, where an adjudicator conducts an inquiry under the *Act*.

I began my inquiry by sending a Notice of Inquiry to the appellant, setting out the facts and issues in the appeal. The appellant sent a letter requesting clarification of the information remaining at issue in the record. I provided this information to him and the appellant provided brief representations.

I then sent a Notice of Inquiry to the ORC and the original requester. I received representations from the ORC only.

I then provided the appellant with an opportunity to reply to the ORC's representations. The appellant did not make reply representations.

RECORDS:

The record at issue is the RFQ submission provided by the appellant, excluding those pages of the record withheld by the ORC from the original requester in its initial decision. Specifically, the following pages of the proposal remain at issue:

- Pages 228 and 229 (everything except the first paragraph)
- Page 230 (names, telephone number and email address)
- Page 236 (names)
- Pages 241 – 243 (all)
- Pages 247 – 248 (all)
- Pages 254 – 256 (all)
- Pages 258 – 260 (names, email address and phone numbers)

- Pages 261 – 266 (all)
- Page 281 (all)
- Pages 287 – 288 (all)
- Page 289 (all)
- Pages 291 – 293 (names)

DISCUSSION:

THIRD PARTY INFORMATION

As a preliminary matter, the original requester has advised that he is not seeking the names of company personnel, their home addresses, email addresses or telephone numbers. This removes page 236 from the information at issue, since only the names on this page remain. To be clear, I will not be addressing the application to section 17(1)(a) to this page as the appellant does not object to the rest of the page being disclosed, without the names. Accordingly, page 236 of the record must be disclosed to the requester, with the names of the individuals severed.

The appellant submits that section 17(1)(a) applies to exempt information in the record in addition to the information already withheld by the ORC. This section states:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(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 17(1) to apply, the appellant 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), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The types of information listed in section 17(1) have been discussed in prior orders:

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].

I adopt this definition for the purposes of this appeal.

The appellant does not directly address this issue in his representations, but submits that the job titles and list of job functions information in the record are the informational assets of his business.

The ORC submits that the remaining information, after the severance described above, does not contain the types of information protected in section 17.

Finding

Based on my review of the information in the record and the representations of the parties, I find that the record at issue contains only commercial information within the meaning of section 17(1). This information is related to the appellant's proposal to provide project management services regarding the project for the ORC [Order MO-2197]. Therefore, part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(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 17(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 or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

Neither the appellant nor the ORC made representations on this issue.

Based on my review of the information, I find that the information was supplied by the appellant to the ORC in response to the ORC’s RFQ for the particular project.

In confidence

In order to satisfy the “in confidence” component of part two, the third party appellant who is resisting disclosure must establish that the supplier of the information 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 [Order PO-2043]

The appellant did not directly address this issue but submits that the information related to the employees’ job titles and job functions are “confidential informational assets.”

The ORC made no submissions on this issue.

Based on my review of the information at issue and the representations of the appellant, I find that the appellant had a reasonable expectation that the record would remain confidential when it supplied the information to the ORC. I note that the proposal is marked “private and

confidential” and I accept that the appellant had both an implicit and explicit expectation that the information provided to the ORC would remain confidential.

Accordingly, I find that all of the information at issue in this appeal was “supplied in confidence” in the context of the ORC’s RFQ process, thereby satisfying part 2 of the section 17(1) test.

Part 3: 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].

The appellant argues that section 17(1)(a) applies.

Section 17(1)(a): prejudice to competitive position

The appellant submits that releasing the job title and job function of the employees will cause his firm serious competitive damage. He states:

...in the industry we are in, project management services, senior resources are extremely hard to come by. Many firms hire head hunters to raid other competing companies. Information on personnel may be gained via the Freedom of Information route, as this is clearly the case. Releasing such information would jeopardize our company and prejudice significantly our competitive position. We deem this to be confidential “information assets” of our business.

The ORC submits that the appellant has not proven the actual and resulting harm that exists if the remaining information at issue is disclosed. The ORC states:

...the hypothetical harm referenced by the Appellant falls short of sufficient clear and convincing evidence necessary in this case to exempt information under section 17(1). ORC acknowledges the current competitive climate in the real estate industry and particularly in the area of project management; however, ORC remains unclear as to how disclosure of the information remaining at issue or the form and structure of the Appellant’s proposal would result in prejudice.

Based on my review of the information remaining at issue and the representations from the parties, I find that disclosure of the information which the appellant seeks to have withheld could not reasonably be expected to prejudice significantly its competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization.

The appellant's primary concern appears to be the employee information that is found throughout the record. The appellant argues that disclosure of this information will result in its employees being hired away by competitors thereby prejudicing his competitive position. Like the ORC, I find that I am not persuaded by the appellant's argument.

The original requester has removed from the scope of his request, the names and other contact information from the records. The only employee information that remains is business and professional information about the appellant's employees consisting of title and corporate structure information, team organization, and descriptions of the various employees' roles. I adopt the reasoning taken by Adjudicator Catherine Corban in Order PO-2637:

Clearly, while a recruitment firm or competitor may use a list of names and positions of specialists on an RFP to recruit candidates it is certainly not the only manner in which to gather contact and background information about the affected party's employees. In my view, contact information about key industry players can also be obtained by internet research, networking, advertising and other such methods...

Secondly, in my view the argument that disclosure of this type of information would result in the affected party losing staff to recruitment firms is speculative at best. The affected party has not provided any evidence to demonstrate that it is definitive that were any of these individuals contacted by a recruitment agency or competitor, as a result of the disclosure of the specific information at issue, they would choose to leave their current position. If the affected party is a competitive employer in the industry, an employee's decision to leave is more complicated than simply for the reason that he or she has been contacted by a recruitment agency or competitor. In my view, losing staff to competitors is a risk of doing business in a competitive industry.

Even without the names, I expect that it would not be difficult for the appellant's competitors, clients, and other interested individuals to find out the names and other business information of its various employees. In the present appeal, the appellant has not provided me with the detailed and convincing evidence of the alleged harm; nor is it apparent from the information at issue in the record. Accordingly, I find that section 17(1)(a) does not apply to this information in the record.

As section 17(1) is a mandatory exemption, I also reviewed the non-employee-related commercial information in the record in order to determine whether section 17(1)(a) applies to

exempt it from disclosure. The other commercial information in the record consists of the appellant's business plan of how it intends to provide its services to the ORC including brief discussions of its methodology, tool set, technology, and its project management resources. I find that this commercial information represents only a generalized discussion of the appellant's various business components and does not include sufficient detail required to convince me that disclosure of this information could reasonably result in the harm anticipated in section 17(1)(a). Accordingly, I find that this commercial information also does not qualify for exemption under section 17(1)(a).

As a result of my findings, the decision of the ORC is upheld and the information which it decided to disclose may be released to the original requester.

ORDER:

I uphold the ORC's decision and dismiss the appeal.

Stephanie Haly
Adjudicator

August 13, 2009