

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3113

Appeal PA12-130

Ontario Infrastructure and Lands Corporation

September 27, 2012

Summary: The appellant is a company that appealed Ontario Infrastructure and Lands Corporation's decision to release the fee component of its response to a RFP. The appellant claims that this information is exempt from disclosure under the third party information exemption in sections 17(1)(a) and/or (c) of the *Act*. This decision concludes that this information is not exempt under those sections, and orders disclosure of the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17(1) (a) and (c).

BACKGROUND:

[1] Ontario Infrastructure and Lands Corporation (Infrastructure Ontario or IO) received an access request under the *Freedom of Information and Protection of Privacy Act (the Act)* for records relating to a particular Request for Proposal (RFP). The RFP sought a project management service provider for a new student residence building at W. Ross Macdonald School in Brantford, Ontario. Eleven companies responded to the RFP.

[2] The request was for access to copies of the winning submission, and all scorecards, minutes of meetings, evaluation notes, interview notes, etc. pertaining to the award of this project.

[3] Infrastructure Ontario (IO) notified the eleven companies of the access request in accordance with section 28 of the *Act*, seeking their views regarding disclosure of the responsive records. Following this, IO decided to grant full access to the evaluation records and partial access to the winning submission. The records were not immediately released to allow 30 days for the affected parties to appeal the decision, in accordance with section 50(1) of the *Act*.

[4] One of the eleven companies, an unsuccessful bidder (now the appellant), appealed the IO decision to grant full access to the evaluation records. Specifically, the appellant objects to disclosure of the fee component of its proposal, as found in the evaluation scoresheet. The appellant takes the position that section 17(1) of the *Act* applies to the information at issue.

[5] No other appeal was received and the only information at issue is therefore the appellant's fee proposal.

[6] As mediation did not result in a resolution of the issues, the matter moved to the adjudication stage of the process. I have requested and received submissions from the appellant, IO and the requester.

[7] Based on those submissions and my review of the material before me, I have decided that the third party information exemption under section 17(1) of the *Act* does not apply to the information at issue, and I therefore uphold Infrastructure Ontario's decision to release the evaluation scoresheet in its entirety.

RECORDS:

[8] The information at issue in this appeal is the fee component (total dollar amount) of the financial submissions of the appellant. The two figures are the fixed fee and the fixed fee excluding HST. The figures, which are identical, are part of the evaluation scoresheet created by IO.

THIRD PARTY INFORMATION:

[9] The sole issue in this appeal is the application of the mandatory third party exemption in section 17(1) of the *Act*.

[10] Section 17(1) 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,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[11] Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions¹. 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 marketplace².

Representations:

[12] The appellant submits that the record reveals commercial and financial information and that this information was submitted in confidence to Infrastructure Ontario.

[13] The appellant states that its expectation of confidence has an objective basis, in that the RFP requires proponents to consent to disclosure of their submissions to the institution’s consultants, for the purpose of evaluating proposals. It submits that it has not consented to the release of this information to any other parties. However, it also makes reference to section 6.5 of the RFP which states that

[i]nformation obtained by ORC³ from the Proponent in connection with this RFP and/or the Services may be subject to disclosure under the [Act]...Proponents should identify any proprietary or confidential information in their Proposal and should state that this information has

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.)

² Orders PO-1805, PO-2018, PO-2184, MO-1706

³ Ontario Realty Corporation, merged with Infrastructure Ontario effective June 6, 2011 to create Ontario Infrastructure and Lands Ontario

been supplied in confidence. However, any such information shall be subject to the provisions of FIPPA.

[14] The appellant acknowledges that its proposal did not specifically state that the information at issue was supplied in confidence; however, it submits that in the circumstances, there was an implicit expectation of confidentiality.

[15] The appellant states that it operates in an extremely competitive market and that the release of the fee component in dispute could provide information and insight regarding the appellant's pricing model and strategic approach that could be used against the appellant in future RFP opportunities. The appellant submits that section 17(1)(a) therefore applies to this information.

[16] The appellant also submits that, for the same reasons, section 17(1)(c) also applies. Again, its concern is that its competitors could gain insight into its competitive pricing strategy from the release of this information.

[17] The requester submits that for the entire process to be fair, transparent and efficient, all of the records at issue should be disclosed.

[18] IO states that while the information can be considered commercial and/or financial information and may have been supplied in confidence, the record does not meet the harms part of the three part test required under section 17(1). Specifically, IO submits that neither they nor the appellant could demonstrate or prove any harm to the appellant resulting from the release of the figures at issue.

[19] IO also states that as a matter of practice they usually treat the majority of information contained in proposals received in response to RFP's in a way that is consistent with its obligations under the *Act*, which is to operate in an open, transparent and accountable matter.

[20] The appellant was invited to but did not submit any reply representations.

Analysis:

[21] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[22] Even assuming or accepting that the information at issue qualifies as commercial and/or financial information, and that it was supplied by the appellant to IO under a reasonable expectation of confidentiality, I find the appellant has failed to meet the “harms” part of the test for exemption under section 17(1).

General principles

[23] 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 sufficient⁴.

[24] 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].

[25] In Order MO-2786 I found elements of a similar proposal exempt from disclosure under the municipal equivalent to section 17(1). Among other things, and based on the evidence and submissions before me in that appeal, I concluded that disclosure of the “detailed pricing” solution contained in a response to a RFP could reasonably be expected to prejudice significantly the competitive position of an unsuccessful proponent. In Order MO-2786 I referred to Order MO-2141, which described similar exempt information as

... the specific detail contained in those portions of the proposal that identify the specific information relating to the affected party’s proposed approach to the project. In my view, the unique information contained in those small portions of the proposal discloses a particular approach to the project taken by the affected party.

[26] Turning to the information at issue in this appeal, I do not find that disclosure of a single figure representing the fixed fee component of a response to a RFP could reasonably be expected to result in the harms described in section 17(1). Unlike the detailed pricing information at issue Order MO-2786, here, there is only one total figure.

⁴ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)

[27] Although the appellant states that disclosure of this single figure could reveal its "pricing model and strategic approach", I do not find this submission convincing. Without any other details about how the appellant derived its proposed fee, and the components that comprise the total fee, I am unable to accept that disclosure of the total figure could provide the appellant's competitors with such insight. In addition, the fact that none of the other proponents whose fee proposals IO decided to disclose as a result of this request have appealed IO's decision to disclose that information undercuts the appellant's submission that this information is inherently sensitive in this market.

[28] In conclusion, I find that I have not been provided with sufficient evidence to satisfy me that disclosure of the fee component of the appellant's proposal could reasonably be expected to lead to the harms in section 17(1(a) or (c). This information is therefore not exempt from disclosure under section 17(1).

ORDER:

1. I uphold IO's decision to disclose the information at issue.
2. I order IO to disclose the information to the requester no later than November 2, 2012, but not before October 26, 2012.

Original signed by: _____
Sherry Liang
Senior Adjudicator

September 27, 2012