



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

ORDER P-408

Appeal P-9200696

Ministry of Housing



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ORDER

The Ministry of Housing (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to unit prices of the successful bidders in "Tender Call PT 1/92" for the supply of cleaning and janitorial materials to the Ministry. The Ministry granted access to the names of the three successful bidders and the total contract prices, but refused access to the unit prices of specific items, claiming sections 17(1)(a) and (c) of the Act. The requester appealed the denial of access to the unit price information.

Mediation of the appeal was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry and the three successful bidders (the affected persons). Written representations were received from the Ministry and one of the affected persons.

The sole issue in this appeal is whether the mandatory exemptions provided by sections 17(1)(a) and (c) apply to the unit price information contained in the records. These sections read:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In its representations, the Ministry explained the bidding process as follows:

In March 1992, the Ministry of Housing, on behalf of the Ontario Housing Corporation conducted an invitation to submit sealed tenders for the supply and delivery of janitorial supplies and equipment on an "as and when required basis". The Ministry provided written specifications and general conditions including Tender Submission forms and schedules to be completed and returned to the Ministry. A deadline date and time was specified at which time the tender bids were publicly opened. The names of the suppliers and their total dollar bid prices were announced by the Tender Opening Committee. As well the suppliers in attendance were advised that unit prices will be kept by the Ministry in confidence. In responding to the call for tender, suppliers were required to include unit prices associated with various products.

Subsequently, the Ministry established a contract for the bidders who provided the lowest total price for each schedule. There were a total of nine schedules, one for each of the following

categories of supplies: "Water and Water Receptacles", "Mops, Brooms, Brushes, and Squeegees", "Pads (scrubbing and cleaning)", "Chemicals", "Matting", "Hardware", "Deodorants", "Paper Products", and "Janitorial Equipment and Accessories". These schedules were completed and submitted to the Ministry by the affected persons. These are the records at issue in this appeal.

Examination of the records indicates that they consist of the following information: an itemized list of products within the category covered by the schedule; a description of each item on the list, including its specifications as to trade name and/or the manufacturer of the product; the unit cost of each item on the list; and the name and address of the winning bidder. (The total price for each schedule, which is the sum of all the unit prices of the items listed in the schedule, is recorded on a separate form attached to the schedule, and this information has been disclosed to the appellant.)

For a record to qualify for exemption under section 17(1)(a) or (c), the Ministry and/or the affected persons 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 (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

Part One

The information contained in the records relates to the sale and purchase of goods, and outlines the affected persons' offer to supply the Ministry the janitorial and cleaning products for the unit prices indicated in the records. In my view, this information is "commercial" information and satisfies part one of the test.

Part Two

With respect to part two of the test, the parties objecting to the disclosure of the records must meet two requirements. They must prove that the information was **supplied** to the Ministry and that it was supplied **in confidence**, either explicitly or implicitly.

Having examined the records and the representations of the parties, I am satisfied that the unit price information was supplied to the Ministry by the affected persons and, therefore, the "supplied" aspect of part two of the test has been satisfied.

As to whether the information was supplied in confidence, the Ministry states in its representations that "it has always been the policy and practice of the Ministry to treat unit price quotations as confidential". It indicates that "it is implicitly understood that unit prices are provided and accepted in confidence". With respect to the information at issue in this appeal, the Ministry states that it "provided explicit assurances of confidentiality with respect to unit prices to all suppliers in attendance at the public opening" of the bids.

The affected person who submitted representations indicates that information about unit prices was provided to the Ministry in confidence. It states: "for all the years we deal with the Ministry of Housing, total prices only are announced on the opening day of the tender."

The appellant has not made any representations with respect to this part of the test.

Having reviewed the representations of the parties, I am satisfied that the unit price information in the records was supplied in confidence, and part two of the test has been satisfied.

Part Three

In order to satisfy part three of the test, the Ministry and/or the affected persons must present evidence that is detailed and convincing and must describe a set of facts and circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order 36).

Both the Ministry and the affected person who submitted representations state that disclosure of the unit prices would prejudice significantly the competitive position of the affected persons. The affected person submits that its relationship with its own suppliers could be significantly prejudiced if purchase arrangements which it had made with them were to become public information. The affected person states:

... we manufacture a number of the items while some items we have to purchase from other companies. It is a fact that some companies we negotiated special prices for this contract and as a result, the Ministry obtained the benefit of lower prices. These special prices were provided to us in high confidence, with the agreement that we would not reveal them. We feel we have to protect our suppliers from any problems they may have with other customers if they find out that we get a special treatment.

The affected person goes on to state that "revealing unit prices for items manufactured by our company would relate information to any competitor of how our company operates and with what profits. This is our secret information."

The appellant submits that prices quoted at the time of the invitation to tender would be "irrelevant now" and that since the contract is irrevocable, no reasonable expectation of harm can be expected to the affected parties' competitive position through the release of this information.

The Ministry submits:

In the hands of a competitor, [the unit price] information would present a distinct economic advantage when competing for future business contracts as a competitor would be in a position to adjust their prices or underbid in an effort to present more attractive bid offers. In the competitive market environment for chemical supplies, it is not unreasonable to expect that this practice might occur.

Having reviewed the representations of the parties and the contents of the records, I am satisfied that in the circumstances of this appeal, there is sufficient evidence to indicate that disclosure of the records could reasonably be expected to prejudice significantly the competitive position of the affected persons. Accordingly, I find that part three of the test for exemption under section 17(1) of the Act has been satisfied. Because all three parts of the test have been met, I find that the mandatory exemption provided by section 17(1)(a) applies to the records at issue in this appeal.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Asfaw Seife
Inquiry Officer

February 10, 1993