



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

ORDER M-545

Appeal M-9500204

Town of Penetanguishene



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Town of Penetanguishene (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a tender call for Phase I of the restoration of the Penetanguishene Centennial Museum. The Town identified a number of records as responsive to the request. Certain of these records were made available to the appellant at the Town's Municipal Office, while access was denied to others under exemptions found in the Act. The requester appealed this decision.

As a result of mediation, the scope of the appeal has been narrowed to three seven-page records, each entitled "Form of Tender". The Town claims the following exemption in support of withholding access to these records:

- third party information - section 10(1)(a) and (b)

A Notice of Inquiry was sent to the Town, the appellant and the three companies which submitted the records. Representations were received from the Town, the appellant and one company.

PRELIMINARY MATTERS:

In its representations, the Town indicates that pages 1, 2, 6 and 7 of each "Form of Tender" should be disclosed to the appellant. This order serves to notify each of the companies that the Town has decided to disclose this part of each record and, in accordance with section 21(8) of the Act, each of the companies is hereby informed that they may appeal this aspect of the Town's decision to the Commissioner within 30 days after the date of this order. Unless such an appeal is commenced within 30 days after the date of this order, the appellant shall be given access to this part of each record.

In its representations, one of the companies indicates that it does not object to the disclosure of pages 1-6 of the "Form of Tender", and these pages should, therefore, be disclosed to the appellant. The name of this company has been provided to the Town in the covering letter accompanying this order.

DISCUSSION:

The sole issue to be determined in this appeal is whether the exemptions in sections 10(1)(a) and (b) of the Act apply to pages 3, 4 and 5 of the two remaining records. These pages contain the labour, overhead and profit fees, prices for alternative work, unit prices and separate prices.

Each part of the following three-part test must be satisfied in order for a record to be exempt from disclosure under section 10(1)(a) or (b) of the Act:

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 types of harm specified in (a) or (b) of section 10(1) will occur.

[Orders 36 and M-10]

Having reviewed the records and the representations, I am satisfied that they contain commercial information and the first part of the test has been met.

The Town submits that the tenders were opened in an open public meeting, but maintains that confidentiality still exists within the tendering process. When the tenders were opened the tender amount was announced to the audience, as well as whether a bid bond was received, completion in weeks, and whether a certified cheque was enclosed. The Town indicates that at no time during this public opening were any of the details of any bid provided to those in attendance.

I find that the information contained on each Form of Tender was supplied to the Town by each of the two companies. Based on the details of the tendering process in place at the Town, I am satisfied that the information contained on pages 3, 4 and 5 of each Form of Tender was supplied implicitly in confidence and the second part of the test has been met.

In support of the application of section 10(1)(a), the Town indicates that the present economic climate has increased the degree of competition in the construction industry. The Town submits that the detailed information found on the Form of Tender would greatly assist another contractor to determine the bidder's strengths and weaknesses, and would provide valuable insight into how a competitor bids on projects.

In my view, the Town has established that disclosure of pages 3, 4 and 5 of the two Forms of Tender could reasonably be expected to prejudice significantly the competitive position of the two companies. Accordingly, I find the third part of the test has been met, and section 10(1)(a) of the Act applies to exempt them from disclosure.

ORDER:

1. I order the Town to disclose pages 1-6 of the Form of Tender submitted by the company which has consented to disclosure of these pages.
2. I uphold the Town's decision not to disclose pages 3, 4 and 5 of the two other Forms of Tender.
3. Unless an appeal is commenced within 30 days after the date of this order, I order the Town to disclose pages 1, 2, 6 and 7 of the two Forms of Tender to the appellant.

Original signed by: _____

Holly Big Canoe
Inquiry Officer

_____ June 7, 1995