



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

ORDER M-511

Appeal M-9500007

Toronto Transit Commission



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The Toronto Transit Commission (the TTC) received a request for access to copies of the tenders submitted by the two companies which successfully bid for contracts with the TTC. After notifying the two companies (the affected parties), the TTC granted substantial access to the two tenders. The TTC withheld certain information in each tender, relying upon the following exemptions in the Act:

- third party information - section 10(1)
- invasion of privacy - section 14(1)

The requester appealed this decision.

During mediation, the appellant indicated that he no longer seeks access to the information to which the invasion of privacy exemption had been applied. Accordingly, section 14(1) is not at issue in this appeal.

A Notice of Inquiry was provided to the appellant, the TTC and the affected parties. Representations were received from all parties. In his submissions, the appellant indicates that he has further limited the scope of the appeal to the unit prices for certain work to be performed.

This information is contained on pages 7 through 10 in Division 3 of both successful tenders.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 10(1)(a), (b) or (c) the TTC and/or the two affected parties 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 10(1) will occur.

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Part One of the Test

The information at issue consists of unit prices for specific work to be performed, provided in the context of tender bids for the provision of testing services to the TTC. I am satisfied that this represents financial and commercial information, which meets part one of the test.

Part Two of the Test

The second part of the test has two elements. First, the TTC and the affected parties must establish that the information was **supplied** to the TTC and second, that it was supplied **in confidence**, either implicitly or explicitly.

The tender documents were submitted to the TTC by the affected parties. Accordingly, I am satisfied that the information was supplied to the TTC. I must now determine whether this information was supplied to the TTC in confidence, either implicitly or explicitly.

The TTC submits that the tenders were submitted in confidence. The TTC explains that sealed tenders were provided by eleven bidders. These sealed bids were opened at a public tender opening, where only the company names and the unit price extension totals were read aloud. The extension totals represent the sum of the unit prices as applied to the estimated quantity of the services required. Further disclosure concerning the tender was provided in a TTC report tabled at a subsequent Commission meeting, listing the companies submitting tenders and the totals which each had bid. No details of the unit prices were disclosed.

As part of its representations, the TTC has provided a copy of its tender policy for publicly opened bids. The policy indicates that only the identity of the tenderers and the "(total) tendered prices(s) submitted by each" are to be revealed. All other information is retained as confidential.

One of the affected parties submits that the "Instructions to Bidders" section of the tender documents contains a statement to the effect that only the total tendered prices would be revealed at the public opening of the bids.

The appellant maintains the tenders were not provided in confidence to the TTC. In support of this position, he refers to paragraph 0.13 of the tender document which provides:

A Tender submitted to the Commission shall become the property of the Commission and is therefore subject to the provisions of the Municipal Freedom of Information and Protection of Privacy Act, 1989. Tenderers are encouraged to familiarize themselves with the provisions of the Act.

The appellant submits that this means that it was known to the bidders that the information would be available for access to the public pursuant to the provisions of the Act.

Based on the wording of this provision and the submissions of the TTC, I cannot accept this interpretation. In my view, this paragraph simply means that because the tender documents become the property of the TTC, they are records within the custody or control of the institution within the meaning of section 4(1) and are thus subject to a request under the Act. This does not mean that they will automatically be disclosed.

Based on the evidence before me, I am satisfied that the unit prices were supplied to the TTC implicitly in

confidence. Thus, part two of the section 10(1) test has been met.

Part Three of the Test

To satisfy part three of the test, detailed and convincing evidence must be provided, which describes a set of facts and circumstances that would lead to a reasonable expectation that one of the harms described in section 10(1) (a), (b) and/or (c) would occur if the information were disclosed.

Both affected parties and the TTC maintain that disclosure of the unit prices would prejudice significantly the competitive position of the affected parties and result in their experiencing undue losses (sections 10(1)(a) and (c)). In addition, one of the affected parties claims that it would no longer supply the unit prices to the TTC in the future, making it impossible for the TTC to evaluate the tenders. This submission relates to the harm described in section 10(1)(b).

The affected parties argue that this has always been a very competitive tender. One party advises that it is generally tendered annually and that each tender is basically for the same services with only the quantities changing. The unit prices represent the amount the affected parties will charge the TTC to perform various quality assessment tests on masonry, asphalt, concrete, etc. Should the unit prices be disclosed, the affected parties maintain that this will allow their competition to undercut their prices to secure the contracts when competing for future quality assurance business. The TTC itself notes that the current recessionary climate "places an unparalleled requirement on business to ensure their product and pricing is competitive for their corporate survival".

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 unit prices could reasonably be expected to prejudice significantly the competitive position of the affected parties. Accordingly, I find that part three of the section 10(1) test has been satisfied.

Because all three parts of the test have been met, I find that the mandatory exemption provided by section 10(1)(a) applies to the information at issue in this appeal.

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that there is a public interest in disclosure of the unit prices. The "public interest override", contained in section 16 of the Act provides that:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The appellant states:

... Of particular concern in any unit price contract is whether or not a **balanced tender** has

been submitted or whether a tender has made an unbalanced tender based upon an unreasonable or unjustifiable exaggeration or minimization of the unit prices with respect to any given item contained in the bid.

Such an unbalanced bid can be indicative of a particular bidder having unfair access to information as to what items will in fact be called on for completion under the contract and the extent to which what items will be called upon for completion. As unbalanced tender is also indicative of whether or not the unit prices fairly represent proper compensation for various items of work done and whether the bidder is competent to properly estimate and undertake the work. An unbalanced tender might well be indicative of errors or inconsistencies in a particular tender.

In its representations, the TTC indicates that it considered whether section 16 of the Act applied. It states that:

... While TTC holds that it is in the public interest of the taxpayers of Metropolitan Toronto that Commission tenders be awarded to the lowest qualified bidder, this can be achieved without full disclosure to the public of the proprietary pricing information, which would be prejudicial to companies competing for business in the marketplace.

I agree. Having considered the information at issue and the submissions of the parties, I find that the public interest has been satisfied by the extensive disclosure which has already taken place in this case. Moreover, the appellant has provided no evidence to support his concerns about unbalanced tenders.

ORDER:

I uphold the decision of the TTC.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ April 21, 1995