



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

ORDER M-602

Appeal M_9500257

Toronto Transit Commission



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/Téléc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant, a contracting company, made a request to the Toronto Transit Commission (the TTC) for access to tender information submitted by another contracting company (the affected party). The requested information pertains to two tenders (identified by number in the request) which relate to the proposed Sheppard and Eglinton West subway lines.

The TTC located two tender packages submitted by the affected party, which contain the requested information. The appellant is listed as a subcontractor in both of these tender packages.

Under section 21 of the Act, the TTC notified the affected party that it had received this request. The affected party opposed disclosure of some of the requested information. On this basis, the TTC granted partial access to the two responsive records, and denied access to the remainder under the "third party information" exemption found in section 10(1) of the Act. The information which was not disclosed consists of unit prices and the names of the affected party's subcontractors.

The appellant filed an appeal from this denial of access with the Commissioner's office. A Notice of Inquiry was sent to the TTC, the appellant and the affected party. Representations were received from the TTC and the appellant only. However, as one of the appendices to its representations, the TTC submitted a copy of the affected party's response to the notification referred to in the preceding paragraph.

The sole issue to be determined is whether the section 10(1) exemption applies to the parts of the records which were not disclosed.

DISCUSSION:

THIRD PARTY INFORMATION

The arguments in this case relate in particular to sections 10(1)(a) and (c). These sections state:

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, if 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.

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

Failure to establish the requirements of any part of this test will render the section 10(1) exemption claim invalid.

Part One

In order to meet part one of the test, the appellant must establish that disclosure of the record would reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

The TTC refers to the definition of “commercial information” in Order P-493, which states as follows:

In my view, commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.

I have reviewed the undisclosed parts of the records. I agree with the TTC’s submission to the effect that this information qualifies as “commercial information” within the meaning of section 10(1). Accordingly, part one of the test has been met.

Part Two

The second part of the test has two elements. First, the information must be **supplied** to the TTC and secondly, it must be supplied **in confidence**, either implicitly or explicitly.

As noted above, the records at issue consist of the unit prices and the subcontractor’s list in two tender packages submitted to the TTC by the affected party. I am satisfied that these records were supplied to the TTC.

I will now consider whether this information was supplied to the TTC in confidence, either implicitly or explicitly.

In this regard, it is not sufficient that the affected party had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis (Order M-169).

In its representations, the TTC indicates that only the names of tenderers and the total prices submitted are read out at the tender opening. The remaining information in tender packages is viewed as confidential and is never given out. This is confirmed in an extract from the TTC's "Financial/Cost Management Procedures" which accompanied the TTC's representations. Accordingly, I am satisfied that the affected party had an expectation of confidentiality, and that this expectation was reasonable, and had an objective basis.

Accordingly, part two of the test has been met.

Part Three

With respect to prejudice to the affected party's competitive position, the TTC submits that "[t]he current recessionary climate places an unparalleled requirement on businesses to ensure their product and pricing is competitive for their corporate survival." The TTC also submits that knowledge of the affected party's unit prices would allow a competitor "... to adjust their prices or under bid in an effort to present a more attractive bid offer to the TTC." For this reason, the TTC submits that disclosure of the unit prices could reasonably be expected to compromise significantly the affected party's competitive position, thus meeting part three of the test.

With respect to the names of the subcontractors, the TTC quotes from the affected party's representations submitted to it at the request stage, as follows:

Often times [the affected party] receives exclusive prices from subcontractors which are treated in strict confidence between the subcontractors and [the affected party]. Disclosure of these names would expose these alliances and possible future alliances to our competition, thereby seriously impairing any competitive edge we may have as a result of these alliances.

In the TTC's view, however, this is not sufficient to establish the third part of the test with respect to the names of the subcontractors.

The appellant submits that, because it is one of the affected party's subcontractors, it is entitled to receive the unit price breakdown and the subcontractor list.

I agree with the TTC's submissions. In my view, disclosure of the unit prices could reasonably be expected to compromise significantly the affected party's competitive position and part three of the test has been met for that information. Since all three parts of the test have been met for this information, it is exempt under section 10(1).

I also agree with the TTC that part three of the test has not been met with regard to the subcontractor's names. In my view, the affected party's submission quoted by the TTC offers additional support for non-disclosure of the unit prices, but does not substantiate a reasonable expectation of the harms in section 10(1)(a) or (c) with respect to the subcontractors' names. Therefore, the subcontractors' names are not exempt under section 10(1) and should be disclosed.

ORDER:

1. I uphold the TTC's decision to deny access to the unit prices.
2. I order the TTC to disclose the subcontractors' list from each of the tender packages at issue to the appellant within thirty-five (35) days but not earlier than the thirtieth (30th) day after the date of this order.
3. To verify compliance with Provision 2 of this order, I reserve the right to require the TTC to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
John Higgins
Inquiry Officer

_____ September 26, 1995