



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

ORDER M-759

Appeal M_9500767

City of Toronto



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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 City of Toronto (the City) received a request for copies of the proposals submitted by three named companies in response to a request for proposals (the RFP) issued by the City in August, 1995. The access request was made by a company who submitted a proposal in response to the RFP.

The City located the three proposals and denied access to them in full, relying on the exemption in section 10(1) of the Act (third party information).

The requester appealed the City's decision to deny access to the requested records.

A Notice of Inquiry was sent to the City, the requester (now the appellant) and the three companies who submitted the proposals (the affected parties). Representations were received from the City and all three affected parties. The appellant indicated that its letter of appeal would serve as its representations.

In its representations, one of the affected parties indicates that although it would prefer that its entire proposal be withheld, there are parts which may be released as disclosure would not result in any of the harms in section 10(1). Accordingly, section 10(1) is not applicable and I will order the City to provide copies of these parts of the proposal to the appellant. They will not be considered further in this order.

For ease of reference, I will refer to this proposal as Record 1. I have attached copies of the parts of Record 1 which are to be disclosed to the appellant to the copy of this order which I have provided to the City's Freedom of Information and Privacy Co-ordinator. Where the affected party has indicated that only a portion of a page can be disclosed, I have highlighted the portion of that page which should **not** be disclosed.

During the Inquiry stage, the appellant advised the Appeals Officer that he had already received the total bid amounts from each company, and this information is not at issue in this appeal. Accordingly, I will not consider the total bid amounts further in this order.

The records at issue consist of the remaining portions of Record 1 and the other two proposals which were submitted by the three named companies in response to the City's RFP.

DISCUSSION:

THIRD PARTY INFORMATION

The sole issue in this appeal is whether the three records at issue qualify for exemption under sections 10(1)(a) and/or (c) of the Act, which read as follows:

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.

In this case, the City and/or the affected parties share the burden of proving that each element of this section has been met.

Type of Information

The City and the affected parties indicate that the records contain specific information on each company's method of providing the required services, including technical and price details. Therefore, they submit that the records contain financial, technical and commercial information. One of the affected parties submits that its proposal also contains trade secrets.

The proposals submitted in response to the RFP are for consulting services for a trunked radio communications system. In reviewing the records, I note that each proposal contains details of the proposed methodology, including technical and experiential information. In my view, all of this information, combined, serves as the basis for the companies' bids in response to the RFP. Each of the proposals also contains detailed pricing information pertaining to the proposed services. Accordingly, I find that the records, in their totality, contain financial, technical and/or commercial information.

Although one of the affected parties has indicated that the records pertaining to its proposal contain trade secrets, it has provided no information regarding the nature of this particular information. Accordingly, I find that the affected party has not satisfied the burden regarding this type of information.

Supplied in Confidence

The City and the affected parties must demonstrate that the records were supplied to the City and that they were supplied in confidence, either explicitly or implicitly.

As I indicated above, the records are proposals which were submitted by the affected parties in response to an RFP. Accordingly, I am satisfied that they were supplied to the City by the affected parties.

The appellant submits that, as one of the companies bidding for the work outlined in the RFP, it did so with a clear understanding that all submitted materials would be open to the public. This

understanding came from a notice attached to the RFP regarding the manner in which tender documents would be treated by the City. This notice reads as follows:

All tender and quotation documents shall be available to the public unless the party submitting the tender or quotation indicates that the tender or quotation is submitted in confidence, that the documents submitted contain a trade secret or scientific, technical, commercial, financial or labour relations information, and that disclosure of the documents could reasonably be expected to result in harm as specified in S. 124A.(1) of the City of Toronto By-Law 976-88, as amended.

If you do not want your documents to be made available please indicate that they are submitted in confidence, what the nature of the documents is and what harm will result from their release. (Emphasis added)

Be aware that name and price shall always be made public.

All tender, quotations and proposals are subject to the Municipal Freedom of Information and Protection of Privacy Act and may be subject to release pursuant to that Act notwithstanding the request of those submitting tenders, quotations or proposals to keep them confidential.

The City also refers to this notice in its representations, and indicates that it treated all the proposals and communications received in response to the RFP “in confidence”. The City’s description of its practice as stated in its representations is not consistent with the wording of the notice. In my view, the notice advises bidders that tender information will be made available to the public, subject to a clear expression to the contrary by individuals or companies providing tender information, and subject to the provisions of the Act.

Therefore, in order for the City and the affected parties to demonstrate that the information contained in the records was supplied “in confidence”, they must establish that the affected parties provided some indication that the records were submitted with an expectation that they should be maintained in confidence.

One of the affected parties included a confidentiality notice in its proposal, and I find that this party has explicitly indicated to the City that its proposal was submitted in confidence.

The City and the other two affected parties indicate that while an express statement to the effect that the proposals were submitted in confidence was not included with the proposals, the affected parties communicated their expectations of confidentiality to the City. Accordingly, I am satisfied that these two affected parties submitted their proposals implicitly in confidence.

Harms

All three affected parties detail how disclosure of the information contained in their proposals would result in competitive and financial harm. They state that, in the consulting industry, the product which is being sold is knowledge and experience. This type of information is intertwined with the technical requirements of the proposal and forms the basis, along with the

price, of an evaluation of the capabilities of the company to meet the objectives of, in this case, the City.

The affected parties all indicate that disclosure of this knowledge and experience base, which they have worked to develop over a number of years, would give their competitors unfair access to their knowledge base. This, as well as disclosure of the technical and pricing details in their proposals could reasonably be expected to prejudice their competitive positions.

In reviewing the records and the representations of the parties, I am satisfied that the harms envisioned by sections 10(1)(a) and (c) could reasonably be expected to occur should the information contained in the records at issue be disclosed. Accordingly, I find that the records at issue are properly exempt under section 10(1) of the Act.

ORDER:

1. I order the City to disclose the parts of Record 1 which I have attached to the copy of this order, by sending a copy of these parts to the appellant by **May 30, 1996** and not before **May 27, 1996**. I have highlighted on the attached copies, the portions of the records which are **not** to be disclosed to the appellant.
2. I uphold the City's decision to withhold the remaining records.
3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the parts of Record 1 which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ April 25, 1996