



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

ORDER M-789

Appeal M_9500644

Metropolitan Toronto Police Services Board



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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 all the proposals submitted in response to a Request for Proposals (the RFP) issued by the City for the provision of Collision Reporting Centre Facilities for the Metropolitan Toronto Police Services Board (the Police). The City transferred the request under section 18 of the Act to the Police as the latter had a greater interest in the records.

The Police located records responsive to the request and determined that the interests of third parties could be affected by disclosure of the information. Pursuant to section 21 of the Act, the Police notified the companies which submitted proposals in response to the RFP, and invited their comments on disclosure of the records pertaining to them. Some parties had no objection to the disclosure of the information in the records which related to them, and this information was disclosed. The Police denied access to the remaining records on the basis of sections 10(1)(a) and 10(1)(c) of the Act. The requester appealed the denial of access.

During the course of this appeal, the requester (now the appellant) narrowed the scope of the records at issue in this appeal to one document from each of two proposals submitted by the successful bidder. In addition, the appellant claimed that there exists a compelling public interest in disclosure of the records (section 16).

RECORDS:

The records at issue in this appeal are:

“Schedule ‘C’/Proposal Summary Sheet” included in the successful bidder’s proposal for a Collision Reporting Centre Facility in the Toronto East area (1 page), and

“Schedule ‘C’/Proposal Summary Sheet” included in the successful bidder’s proposal for a Collision Reporting Centre Facility in the Southwest Toronto area (1 page).

The two pages are identical forms which are to be completed by the bidders as part of the first stage of a two-stage proposal process. The Proposal Summary Sheet contains the following information: Police area covered by proposal (the information in this part refers to the locations identified in the RFP); Corporate name of Company submitting proposal; Corporate address; Contact persons; Contact telephone number; Contact FAX number; and Location of proposed Centre(s). In addition, each page contains a “Note” at the bottom. This section contains additional information provided by the successful bidder regarding the locations of proposed Centre(s).

A Notice of Inquiry was sent to the Police, the appellant and the successful bidder. As I noted above, the appellant raised the possible application of section 16 to the records. This issue was inadvertently omitted in the initial Notice of Inquiry. Therefore, a supplementary Notice of Inquiry was sent to the parties. Representations were received from the appellant and the successful bidder. The Police advised this office that they have no objection to disclosure of the records at issue. In its representations, the successful bidder indicates that it objects to disclosure of the records at issue on the basis of sections 10(1)(a), (b) and (c).

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a), (b) and (c) of the Act provide:

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;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

As I indicated above, the Police have no objection to disclosure of the two pages at issue in this appeal. Therefore, in this case, the burden is on the successful bidder to prove that each element of this section has been met. Failure to satisfy the requirements of any element will render the section 10(1) claim invalid.

Type of information

The successful bidder submits that the records contain trade secrets, commercial and technical information. Further, the successful bidder points out that copyright notices appear throughout the proposals, and are specifically found on the copies of the records at issue in this appeal. The terms "trade secrets" and "technical information" have been addressed in previous orders of the Commissioner's office as follows.

In Order M-29, Commissioner Tom Wright considered the various definitions of "trade secret" contained in dictionaries, legislation enacted in Canada and the United States, court cases and various scholarly reports. Following this review, Commissioner Wright adopted the following

definition proposed by the Institute of Law Research and Reform in Edmonton, Alberta and by a Federal-Provincial Working Party:

“trade secret” means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

“Technical information” is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing (Order P-454).

I agree with these definitions, and adopt them for the purposes of this appeal. In reviewing the two pages at issue I find that none of the information contained in them qualifies as trade secrets or technical information as defined above. Moreover, in my view, the fact that copyright is claimed for a product is not evidence in and of itself that the records contain “trade secrets”.

With respect to the issue of copyright generally, Commissioner Wright also found in Order M-29 that:

... providing **access** to information under the Municipal Freedom of Information and Protection of Privacy Act does not constitute an infringement of copyright. Specifically, sections 27(2)(i) and (j) of the Copyright Act provide that disclosure of information pursuant to the federal Access to Information Act or any like Act of the legislature of a province does not constitute an infringement of copyright.

I agree with this finding and, in my view, it is similarly applicable to the information at issue in this appeal.

As I indicated above, the successful bidder also claims that the records contain commercial information. It has been established in a number of previous orders that the term “commercial information” relates solely to the buying, selling or exchange of merchandise and services (Orders 47 and M_29). I accept that the information relates directly to the requirements of the RFP and is an integral part of the services to be provided by the successful bidder. Accordingly, I find that the information contained in the two records qualifies as commercial information within the meaning of this section.

Supplied in confidence

The successful bidder must demonstrate that the records were supplied to the institution and that they were supplied in confidence, either explicitly or implicitly.

As I indicated above, the records are schedules to proposals which were submitted by the successful bidder in response to an RFP. Accordingly, I am satisfied that they were supplied to the Police.

With respect to whether or not the records were supplied in confidence, the successful bidder notes that in most cases at a tender opening, the name, address and tender price are read aloud. In the tender opening for this RFP, only the name and address of the bidder were read out. Therefore, the successful bidder indicates that the information was supplied implicitly in confidence.

Moreover, the successful bidder states that its proposal contained the following confidentiality declaration:

This information and documentation for phase 2 of the bid process forms part of stage 1 tender documents. Any and all information or materials contained therein of both phases of the bid process shall not be released, or viewed by any other bidder or any other persons due to the extreme confidentiality and private nature of the information that is contained herein.

At the request of the Appeals Officer, the City provided a copy of the RFP to this office. I note that, with the exception of one form (Schedule D/Corporate Officers and Directors), it is silent with respect to the manner in which tender documents would be treated by the Police. Schedule D refers to the Act with respect to personal information which is collected on that form, and is not relevant to the issues in this appeal.

In the circumstances of this appeal, I am satisfied that the successful bidder supplied its proposals in response to the RFP explicitly in confidence. Moreover, I find that this expectation of confidentiality was reasonable in view of the successful bidder's stated intentions on the proposals which were not contradicted by the Police, the City, the appellant or the RFP.

Harms

The successful bidder states that it developed the information contained in its proposal at great expense in both time and money, and that much of its experience and expertise was obtained only through trial and error. The successful bidder suggests that a competitor could use the information contained in the part of the record entitled "Location of Proposed Centre(s)" and through a backwards analysis determine the factors involved in determining how and why particular sites were selected by it to be included in the proposal. This argument relates to the harms in section 10(1)(a).

The successful bidder also indicates that the information contained in its proposals has been successfully used by it in other proposals and is currently being used in current negotiations. The successful bidder submits that disclosure of this information would give its competitors the

benefit of its experience and knowledge at no cost to them, and would result in the loss of its competitive edge in future bids (section 10(1)(c)).

Finally, the successful bidder claims that should any of the information in the proposals be released, anyone else engaged in a similar tendering program in the future will not include many of the types of details which were included in these Proposals. The successful bidder submits that this would result in less informed decisions being made as a result of the tendering process (section 10(1)(b)).

The appellant states that his interest in obtaining the records is as a concerned citizen and respected business person. He claims that he was advised of the possibility that there were unfair business procedures involved in awarding this contract. The appellant indicates that he attended at the Purchasing and Material Supply Department at Toronto's City Hall with regard to these allegations. At that time he was shown a copy of the records at issue in this appeal, but was told that to obtain copies of any documents he would have to go through the City's legal department.

I have not been provided with any City or Police policies regarding disclosure of tender information. Nor have I been given any explanation regarding the manner in which the City dealt with the records in this case. In my view, the fact that the City may have correctly or incorrectly shown the records to the appellant is not determinative of the issues in this appeal.

In reviewing the representations of the parties and the records themselves, I find that the successful bidder has not met the burden placed upon it. Firstly, the information contained in the first six parts of each form (that is: Police area covered by proposal; Corporate name of Company submitting proposal; Corporate address; Contact persons; contact telephone number; and Contact Fax number) is information which is already available to the appellant. The successful bidder acknowledges that the names and addresses of the bidders were read out at the tender opening. The other corporate information in these two records would be easily obtainable from this information. As I indicated above, the information contained in the first part of the form refers to the locations identified in the RFP for which the particular proposal is directed.

Secondly, the focus of the successful bidder's representations relates primarily to the locations of proposed sites. I note that this portion of the record does not contain actual address locations, but rather refers to a more general location. Further, two of the locations referred to in the records have been approved and facilities have been developed in those locations and are up and running. In my view, a competitor only need examine those locations to perform the type of analysis referred to by the successful bidder.

Finally, the "Note" at the bottom of the forms, while an addition made by the successful bidder, is merely a summary statement made with the intention of promoting the locations referred to in the last part of each form. In my view, it does not contain, nor would it reveal any details of the successful bidder's proposals.

Accordingly, I find that the successful bidder's expectations that disclosure of any of the information in the two records at issue could result in the harms described in sections 10(1)(a) and (c) are not reasonable.

With respect to section 10(1)(b), I note that the other companies which submitted proposals for this project consented to disclosure of their tender information to the appellant. I also note that the RFP provides, on page 5 under the heading "Supporting Documentation", that as much supporting documentation as possible should be included in the proposals to show the ability of the proposal to meet the requirements of the RFP. Further, the RFP states that greater consideration may be given to proposals which contain more comprehensive information. In my view, when submitting bids it is in the companies' own interests to provide as much information as possible. In the circumstances, I find that an expectation that disclosure of the records at issue could result in similar information no longer being supplied to the institution where it is in the public interest that it be so supplied is not reasonable.

As I have found that disclosure of the records at issue in this appeal could not reasonably be expected to result in any of the harms in section 10(1), they do not qualify for exemption under this section. As no other exemptions have been claimed for them, both records should be disclosed to the appellant.

ORDER:

1. I order the Police to disclose the two records at issue in this appeal by sending copies of them to the appellant by **July 23, 1996** and not before **July 18, 1996**.
2. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ June 18, 1996