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

ORDER M-904

Appeal M_9600354

York Region Roman Catholic Separate School Board

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NATURE OF THE APPEAL:

The York Region Roman Catholic Separate School Board (the Board) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to proposals submitted in response to a Request for Proposals for the provision of legal services to the Board. Initially, the Board denied access to the responsive records, claiming that under section 52(3)3, they fell outside the jurisdiction of the Act. The requester, now the appellant, appealed the Board's decision.

During the mediation of the appeal, the Board withdrew its reliance on section 52(3)3 and issued a new decision letter in which it denied access to the 20 proposals which comprise the records at issue, based on the following exemptions contained in the Act:

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

A Notice of Inquiry was provided to the appellant, the Board and to the 20 law firms who submitted proposals in response to the Board's Request for Proposals (the affected parties). Representations were received from the appellant, the Board and 11 of the affected parties. During the inquiry stage of the appeal, one of the affected parties consented to the disclosure of its proposal to the appellant. The Board has since disclosed this record to the appellant, in accordance with section 10(2) of the Act.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 10(1), the Board and/or the affected parties who are resisting disclosure 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 Board 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 section 10(1) will occur.

Part One of the Test

The Board and the affected parties submit that the records contain commercial information. I have reviewed a representative sample of the proposals which form the subject matter of this

appeal and find that they contain specific information concerning hourly rates to be charged. In addition, present and former clients of the law firms are also described, along with detailed information relating to the proposals to provide certain legal services to the Board. I am satisfied that the records contain information which qualifies as "commercial information" for the purposes of section 10(1).

Part Two of the Test

In order to meet this element of the exemption, the Board and the affected parties must demonstrate that the information contained in the proposals was **supplied** to the Board, either implicitly or explicitly, **in confidence**.

Several affected parties submit that explicit language was used in their proposals to indicate to the Board an expectation that the proposals were to be treated with the strictest confidence. The affected parties' proposals contain the names of former and present clients. Accordingly, they submit that this information is subject to the common law solicitor-client privilege and that the Rules of Conduct which govern them as members of the Law Society of Upper Canada require that this information be treated in a confidential manner. The Board submits that the proposals were requested to be sealed and that Article 10.5 of the Request for Proposals specifically stated that they were "subject to the Municipal Freedom of Information and Protection of Privacy Act".

The appellant argues that because the Request for Proposals contained this reference to the Act, the affected parties should have appreciated that their proposals may be the subject of a request and that their expectation of confidentiality was not, therefore, reasonably held.

I have no difficulty in reaching the conclusion that the records were supplied by the affected parties to the Board. I find that the affected parties have provided me with sufficient evidence to conclude that the records were supplied to the Board with a reasonably held expectation of confidentiality, either explicitly stated in the proposals which were submitted; or implicitly, taking into account the circumstances surrounding the tendering process. I find, accordingly, that the second part of the section 10(1) test has been met.

Part Three of the Test

In order to meet part three of the section 10(1) test, the Board and/or the affected parties must demonstrate that one of the harms enumerated in sections 10(1)(a), (b) or (c) could reasonably be expected to result from disclosure of the information. The onus or burden of proof lies on the parties resisting disclosure of the record, in this case, the Board and the affected parties.

The Board submits that the disclosure of the records would result in similar information not being made available to it in the future. It argues that many of the affected parties have advised that they would not have responded to the Request for Proposals with the kind of detailed information which was supplied had they been aware that it may be made available to their competitors in response to a request under the Act. The Board further submits that under section 10(1)(b), it is in the public interest that it continue to be supplied with similar information from these and other affected parties from whom it receives proposals in the future.

The affected parties argue that their competitive position will be prejudiced significantly should the information be disclosed. They indicate that information relating to hourly rates and possible discounted fees is not publicly known to their competitors and clients. Accordingly, they submit that the disclosure of this information would result in significant harm to their competitive position under section 10(1)(a).

The affected parties also submit that they would be extremely reluctant to share information of this sort with the Board in the future if it may be disclosed to their competitors. They further argue that the continued provision of this type of information to the Board is in the public interest, under section 10(1)(b).

In addition, the affected parties have provided me with evidence as to how their proposals were drafted, with each part of the proposal tailored to meet the specific requirements of the Board's Request for Proposals. They submit that the disclosure of this information to a competitor would result in undue gain by the competitor, with a concomitant undue loss to themselves, under section 10(1)(c). They argue that an unfair commercial advantage would be gained by the appellant in future tendering situations should this information be disclosed.

The appellant submits that most law firms make publicly available certain promotional material containing similar information to that which is included in the proposals. For this reason, he argues that it is unlikely that the disclosure of this information would result in any harm to the law firms' competitive position. The appellant further submits that it is unlikely that the affected parties would be less inclined to submit detailed proposals in response to future Requests for Proposals as to do so would damage their chances of being selected by the party who invited the tender call.

I agree with the position taken by the appellant with respect to section 10(1)(b). I find that it is not reasonably likely that the harm envisioned in section 10(1)(b) will occur should the information contained in the proposals be disclosed. In light of the competitive climate surrounding the tendering processes for such legal work, I find that it is not realistic to expect that law firms would be reluctant to supply to institutions all of the information which is necessary to be the selected tenderer following a Request for Proposals. I am not satisfied that this harm is reasonably likely to occur should the information be disclosed.

I am satisfied, however, that harm to the competitive position of the affected parties under section 10(1)(a) is reasonably likely to occur should the proposals be disclosed. Each proposal which I reviewed was very carefully tailored to meet the criteria set forth by the Board in its' Request for Proposals. The format used and the information concerning the fees to be charged and the services to be performed in each proposal are unique. In my view, their disclosure could reasonably be expected to significantly prejudice the competitive position of the affected parties in the legal services marketplace within the meaning of section 10(1)(a). Therefore, I find that the affected parties have satisfied the third part of the section 10(1) test.

As all three parts of the test have been met, I find that the records qualify for exemption under section 10(1). Because of the manner in which I have addressed the application of section 10(1) to the records, it is not necessary for me to address the possible application of section 14(1)

ORDER:

I uphold the Board's decision and dismiss the appeal.

Original signed by: February 24, 1997
Donald Hale
Inquiry Officer