



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

ORDER P-1356

Appeal P_9600231
[Reconsideration]

Ontario Clean Water Agency



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BACKGROUND:

On December 20, 1996, Inquiry Officer Holly Big Canoe issued Order P-1322. This order was the result of a request by one of the parties for a reconsideration of Order P-1266, which had been issued on September 26, 1996. As was stated in the decision, Order P-1322 superseded Order P-1266 though both orders upheld the decision of the Ontario Clean Water Agency (the Agency) to disclose portions of the records which had been requested pursuant to the Freedom of Information and Protection of Privacy Act (the Act).

In Order P-1322, Inquiry Officer Big Canoe made a finding that the appellant, a construction firm which was resisting disclosure, had not provided sufficient evidence to establish a reasonable expectation of confidentiality respecting the records which it had supplied to the Agency. Accordingly, it was found that the second part of the section 17(1) test had not been satisfied and the records were not exempt from disclosure under that exemption.

The Inquiry Officer also made reference in the order to certain evidence presented by the requester to the effect that the Agency had made the requested information available to it over the telephone. Following the issuance of Order P-1322, the construction firm indicated that a further reconsideration of Order P-1322 was required on the basis that a fundamental defect in the adjudication process occurred when the Inquiry Officer relied upon evidence of an earlier disclosure of the requested information by the Agency to the requester. It argued that by not being afforded the opportunity to “assist” the Inquiry Officer with respect to these facts, the inquiry process was fundamentally flawed and the order ought not to stand.

By letter dated January 23, 1997, Inquiry Officer Big Canoe invited the original requester, the construction firm and the Agency to make submissions as to whether she should reconsider the order, which would entail conducting another inquiry and issuing a new order to supersede Order P-1322. Following the receipt of submissions from the construction company and the requester, I decided to grant the request for reconsideration. By letter dated February 7, 1997, I invited the parties to make submissions on the substantive issue of the application of part two of the test which has been adopted by the Office of the Information and Privacy Commissioner/Ontario with respect to section 17(1) of the Act. In response, I received representations from the original requester, the construction firm and the Agency.

Because I have decided to grant the request for reconsideration, this order will, accordingly, supersede both Orders P-1266 and P-1322.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the construction firm 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 Agency 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 17(1) will occur.

All three parts of the above test must be met in order for the exemption to apply. I agree with the finding of Inquiry Officer Big Canoe in Order P-1322 in which she determined that the information contained in the records qualifies as commercial and/or financial information. I further agree with the finding in Order P-1322 that the information does not satisfy the definition of a "trade secret" within the meaning of section 17(1).

The Agency has provided information with respect to its tendering practices and emphasizes that the advertisement which initiates the tendering process, and the tender documents themselves, do not state that the information received from tenderers will be treated as confidential. It goes on to state, however, that only the successful tenderer's name, bid price and time for substantial completion are normally disclosed to the public or other tenderers.

The requester maintains that the information contained in the records was provided to it over the telephone by Agency staff. For this reason, the requester argues that any expectation of confidentiality which was maintained by the construction firm was not reasonably held, as is required by part two of the section 17(1) test.

The construction firm submits that because the Agency required the requester to submit a request under the Act for the information sought, the Agency clearly treats the information which it receives from tenderers as "personal and confidential". In addition, the construction firm argues that the tender process itself would be compromised as tenderers would be reluctant to provide the type of detailed information which is presently the case if such information could be disclosed through a request under the Act. The construction firm has not addressed the question of whether the Agency's disclosure of the information requested by the requester over the telephone is evidence that the Agency did not regard the information as having been supplied in confidence, which was the basis upon which it made this reconsideration request.

Finally, the construction firm relies upon the decision of the Divisional Court in Re Workers' Compensation Board and Mitchinson, Assistant Information and Privacy Commissioner (1995), 23 O.R. (3d) 31 at page 38. It submits that the Court found that "circumstances which give a person an assurance that they can be free and open with information supplied is sufficient to create a confidence".

In the case cited above, the information at issue was contained on a form which was marked "all information is strictly confidential". For this reason, the Court found that there existed an explicit expectation of confidentiality on the part of those who supplied the information. In the present appeal, no such assurances of confidentiality were included either in the advertisement or the tender documents circulated by the Agency to potential tenderers. For this reason, I find that

the principles expressed by the Divisional Court in the Workers' Compensation Board case with respect to part two of the section 17(1) test have no application to the present situation.

The fact that the requester in this matter was required to submit a request under the Act for access to the information at issue is not, in my view, determinative of the issue of confidentiality. Rather, I find that by requiring a requester to make a request under the Act, the Agency viewed tender documents which it receives as falling within the categories of information which are accessible under the Act.

In my view, the fact that the Agency is prepared to disclose the information requested is evidence of the fact that it does not regard information which it receives from tenderers as having been "supplied in confidence". The disclosure of the information to the requester over the telephone is further evidence in support of this finding. In addition, I have not been provided with any evidence indicating that an expectation of confidentiality on the part of the construction firm existed at the time the firm supplied the information to the Agency. As a result, I find that in the absence of any written indication of confidentiality on the tender documents submitted by the construction firm, any expectation of confidentiality on its part was not reasonably held.

I have, accordingly, come to the same conclusion as that reached by Inquiry Officer Big Canoe in Order P-1322. The construction firm has not provided sufficient evidence to establish a reasonable expectation of confidentiality with respect to the records held by the Agency. The second part of the section 17(1) test has not, therefore, been met.

Similarly, I adopt the findings of the Inquiry Officer in Order P-1322 with respect to part three of the section 17(1) test in which she found that the construction firm had not established a reasonable expectation of harm with respect to the disclosure of the records.

In conclusion, I find that the information contained in the records is not exempt under section 17(1) of the Act.

ORDER:

1. I uphold the Agency's decision to disclose the records to the requester.
2. I order the Agency to disclose the records to the requester by sending a copy by **April 9, 1997**, but not earlier than **April 4, 1997**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Agency to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 2.

Original signed by: _____

March 5, 1997

Donald Hale
Inquiry Officer