



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

ORDER M-892

Appeal M_9600245

Town of Meaford



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

NATURE OF THE APPEAL:

In a number of letters addressed to the Town of Meaford (the Town), the appellant company (the company) indicates that it was the “lowest bidder” for a specified project, and notes that the Town awarded the contract to the second lowest bidder. The company advised the Town that it would be seeking damages resulting from the loss of the contract. In this context, and in an attempt to avoid legal proceedings, the company made a request to the Town under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for the following information:

- minutes of all public Committee meetings at which the tenders were discussed;
- the places, dates and particulars of all in camera Committee and all other closed door meetings, formal or informal, at which the tenders were discussed or reviewed, including the names of all individuals present at such meetings;
- any and all reports prepared by the Town’s professional consultants and any and all recommendations prepared by them and any other entities or individuals in respect of the tenders;
- a copy of the Town’s general purchasing by-law and any other relevant by-law or guideline that governs the awarding of contracts generally;
- the name of any person(s) who provided the Town with an unfavourable reference; and
- any other relevant information available to the company.

The Town located records responsive to the request and granted partial access to them. Access was denied to two letters in their entirety on the basis of section 7(1) of the Act (advice and recommendations). In addition, the Town advised that access was denied to copies of any by_laws of the nature requested as such by-laws do not exist.

The company appealed the Town’s decision to deny access to the two letters on the basis of section 7(1). In addition, the company indicated that it believed more records should exist.

This office provided a Notice of Inquiry (the NOI) to the Town and the company. The records appeared to contain information pertaining to the winning bidder and an engineering consulting firm (the affected parties). Accordingly, the Appeals Officer raised the possible application of the mandatory exemption in section 10(1), and provided copies of the NOI to the affected parties. Representations were received from the Town and the company.

During the inquiry stage, I determined that the interests of the Ontario Clean Water Agency (OCWA), which is a Scheduled institution under Regulation 516 of the provincial Act, might be affected by disclosure of the records. Accordingly, this office provided a Supplementary Notice of Inquiry to the parties, including OCWA. The Supplementary Notice raised the possible application of the mandatory exemption in section 9(1) (relations with other governments). The company submitted additional representations in response to the Supplementary Notice of Inquiry. The Town provided additional information regarding its relationship with OCWA and the engineering consulting firm referred to above (the consultants).

The records at issue in this appeal consist of a letter from OCWA to the Town dated March 25, 1996 (Record 1) and a covering letter (Record 2) with attachments (Records 3 and 4) dated March 5, 1996 from the consultants to OCWA, and copied to the Town. Record 3 is a Report on Tenders and Record 4 is a Project Cost Estimate. Both documents were prepared by the consultants and contain an assessment of the tenders received by the Town for the project, with particular emphasis on the two lowest bidders.

DISCUSSION:

RELATIONS WITH OTHER GOVERNMENTS

Section 9(1) of the Act states:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

- (a) the Government of Canada;
- (b) the Government of Ontario or the government of a province or territory in Canada;
- (c) the government of a foreign country or state;
- (d) an agency of a government referred to in clause (a), (b) or (c); or
- (e) an international organization of states or a body of such an organization.

As I indicated above, Record 1 is a letter to the Town from OCWA, which is a Scheduled institution under Regulation 516 of the provincial Act. Because section 9(1) establishes a mandatory exemption against disclosure, the Supplementary Notice of Inquiry raised the possible application of this section to the records at issue. Neither OCWA nor the Town provided representations with respect to this section. In reviewing this record, I find that there is nothing on the face of the record to indicate that it was either sent or received in confidence. I am satisfied, therefore, that section 9(1) has no application in the circumstances of this appeal.

ADVICE OR RECOMMENDATIONS

The Town submits that section 7(1) applies to exempt all of the records from disclosure. This provision states:

A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

It has been established in many previous orders that advice and recommendations for the purpose of section 7(1) must contain more than just information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. Information in records which would reveal the advice or recommendations is also exempt from disclosure under section 7(1) of the Act.

The company submits that OCWA was the recipient of Record 2 (and implicitly Records 3 and 4), and the consultants, therefore, were not providing advice to the Town. Moreover, the company argues that this letter contains research and examination of the tenders used by OCWA in its evaluation process, and although this may form the foundations for the advice, it does not constitute advice within the meaning of the Act.

With respect to Record 1, the company submits that the letter simply contains the factual foundation upon which the ultimate decision by the Town was made.

In any event, the company asserts that if any of the records do contain advice or recommendations, this information can and should be severed from the “research, examination of facts, opinions or comments on the merits of the bids”, and that the remainder of these records be disclosed.

The Town submits that the two letters contain advice and recommendations which the Town used to make a decision regarding the tendering process for the project. In referring to the content of these letters, the Town has included the attachments as being part of one of the letters and thus, by connection, as falling within the exemption. Accordingly, I will examine Records 3 and 4 in light of their attachment to Record 2.

The Town states that it has an on-going agreement with the consultants and an agreement with OCWA regarding the project in question. The Town indicates that these agreements were established by By-laws 8-95 (dated February 27, 1995) and 15-94 (dated June 10, 1994), respectively. On this basis, I am satisfied that OCWA is acting as a consultant to the Town with respect to the project, and that both OCWA and the consultants were retained by the Town to provide analysis and recommendations with respect to the tenders received by the Town and/or OCWA pertaining to the project.

I am satisfied upon a review of the records, that Record 2 and the parts of Record 1 which I have highlighted in yellow contain advice and recommendations within the meaning of section 7(1) and thus qualify for exemption under this provision.

I find that the following parts of Record 3 contain information which qualifies as advice or recommendations under section 7(1), or which would reveal the recommendations provided in Records 1 and 2:

- (1) The parts of pages 3, 4, 5 and 6 which I have highlighted in yellow.
- (2) The list of recommendations found on page 6 which is also highlighted in yellow.

I further find that the non-highlighted parts of Records 1 and 3, which consist of factual information, discussions of the analysis of the tenders and financial implications, do not constitute advice or recommendations for the purpose of the Act.

Similarly, Record 4 consists of charts which break down the costed elements of the tenders, check sheets for the consulting engineer to be used in checking and analysing the tenders and preparing his report, and the tenders submitted by the two lowest bidders. In my view, none of the information in this record contains advice or recommendations, nor would disclosure of this information reveal the advice or recommendations in the other records at issue.

As a result of my analysis above, I find that the exemption in section 7(1) does not apply to the non-highlighted parts of Records 1 and 3 or to Record 4.

Accordingly, I find that only Record 2 and the portions of Records 1 and 3 which I have highlighted in yellow qualify for exemption under section 7(1).

EXCEPTIONS TO THE ADVICE OR RECOMMENDATIONS EXEMPTION

I must now consider whether any of the mandatory exceptions contained in section 7(2) of the Act apply to the parts of the records which I have previously characterized as advice or recommendations.

In its representations, the company submits that the exceptions in sections 7(2)(a), (f), (j) and (k) apply to the information contained in the records. These sections state:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;
- (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;
- (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
- (k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

The company asserts that the records likely contain factual material about the company's qualifications with respect to the project's requirements. In the discussion under section 7(1)

above, I found that the exemption did not apply to factual material except where this information was of such a nature as to reveal the advice or recommendations which were exempt under section 7(1). Accordingly, I find that the exception in section 7(2)(a) does not apply.

Sections 7(2)(f) and (j) are unusual in the context of the Act in that they constitute mandatory exceptions to the application of an exemption for discrete types of documents, namely reports and feasibility or technical studies. Even if the report or study contains advice or recommendations for the purposes of section 7(1), the Town must still disclose the **entire** document if the record falls into one of these section 7(2) categories.

The company submits that the records are either a feasibility or other technical study. In this regard, the company states that a feasibility study should not be restricted to an examination of whether or not a project should be commenced, but should include a comparative study of various alternatives. In the alternative, the company argues that the records qualify as technical studies in that they evaluate the merits of various studies.

The Concise Oxford Dictionary (8th edition) (the dictionary) defines the term “feasibility study” as a study of the practicability of a proposed project. The dictionary defines the term “study”, in part, as: “the devotion of time and attention to acquiring information or knowledge, esp. from books; the pursuit of academic knowledge; make a study of; investigate or examine (a subject)”.

The records at issue relate to a technical evaluation of the tenders submitted to the Town for the purposes of determining which tender best meets the requirements of the project and the Town. In my view, this type of evaluative or assessment activity does not contain the same depth, nor is it performed for the same purpose as that contemplated by section 7(2)(f). Accordingly, I find that this section does not apply.

With respect to section 7(2)(j), I find that neither the consultants or OCWA are “bodies that are attached to an institution”. Rather, the consultants were retained by the Town to assist in assessing the merits of the tenders. OCWA is essentially involved in a joint venture with the Town and shares an interest in the choice of company to perform the work on the project. On this basis, I find that section 7(2)(j) does not apply.

Finally, although the records contain information which may have assisted the Town in making its decision regarding the awarding of the contract, they do not contain the reasons for a final decision with respect to the Town’s decision. Therefore, I find that section 7(2)(k) is not applicable.

Accordingly, I find that Record 2 and the portions of Records 1 and 3 which I have highlighted in yellow are properly exempt under section 7(1).

THIRD PARTY INFORMATION

I have found that Record 2 and the highlighted portions of Records 1 and 3 already qualify for exemption. Accordingly, I will only consider the information which remains at issue in the following discussion.

Sections 10(1)(a), (b) and (c) of the Act provide 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;
- (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.

In order for the exemption to apply, the Town and/or the affected parties must provide evidence that each of these elements is present in the report. As I indicated above, none of the affected parties submitted representations in response to the Notice of Inquiry.

TYPE OF INFORMATION

The Town submits that the records contain technical, commercial and financial information. In reviewing the records I find that they contain cost estimates, tender amounts and specific pricing information, as well as information pertaining to the technical requirements of the project (which is located in the tender documents submitted by the company and the winning bidder). I am satisfied that the records contain technical, commercial and/or financial information.

SUPPLIED IN CONFIDENCE

In order to satisfy this element of the exemption, the Town and/or the affected parties must show that the information was **supplied** to the Town, either implicitly or explicitly **in confidence**. The Town indicates that the information was provided to it by its consultants in confidence.

The consultants were hired by the Town to evaluate the tenders and provide the results of their assessment to the Town. In this regard, the consultants were acting on behalf of the Town, and the records, therefore, were not supplied to the Town in the sense contemplated by this section. Even if I were to find that the records were supplied by the consultants, there is nothing on the face of the records to indicate that they were provided in confidence or that the consultants had any expectation that they would be maintained in confidence.

The records also contain copies of the tender documents pertaining to the project which were submitted to the Town by the company and the winning bidder. I am satisfied that the tender documents were submitted to the Town by the bidders. I am also satisfied that disclosure of the

evaluation of the tenders would reveal information which was supplied to the Town in these tender documents.

The Town has provided no evidence on the confidentiality or lack thereof of in its tendering process, and the winning bidder did not provide representations to this office. On this basis, I find that neither the Town nor the affected parties have established that these records were supplied to the Town **in confidence**.

One part of Record 3 contains information obtained from references for both the company and the winning bidder (contained in pages 3, 4, 5 and 6). None of the parties have specifically addressed this information. However, I find sufficient evidence, on the face of the records, that the information was provided by the referees to the consultants as agents of the Town, implicitly in confidence. I have highlighted this information in blue on the copies of the records being sent to the Town with a copy of this order.

In summary, I find that only the information in the highlighted portions of Record 3 has been supplied to the Town in confidence. It is necessary to satisfy **all three elements** of section 10(1) in order for the exemption to apply. Accordingly, I find that the remaining information in the records is not exempt under section 10(1).

HARMS

As I have found that only the highlighted portions of Record 3 meet the first two requirements, I will only consider these portions of the records in the following discussion.

In order to meet part three of the section 10(1) requirement, the Town 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 Town and the affected parties. As I indicated above, none of the affected parties has made any submissions on this part.

The Town states that the fact that the company has commenced litigation against the Town is evidence that disclosure of the records could reasonably be expected to result in one of the harms enumerated in this section.

The Town submits further:

[T]hat if the consultants were not allowed to provide such confidential information it would impede the Town's position in terms of the tendering process. The consultants would be fearful of providing any information that could expose them to some litigation. In my respectful view it is not in the public interest to have similar type information available for review by the public. The consultants would be fearful of providing open and frank details regarding potential bids on various projects if they felt they might be open to such litigation. This could significantly prejudice the Town's competitive position in the bidding process.

The Town argues that disclosure of the records to tenderers could result in a loss to the Town and could also prevent other contractors from bidding on Town projects.

It is apparent from its representations that the Town is concerned, in part, about its own competitive position. The scheme of the Act contemplates that harm to the competitive or financial position of an institution should be addressed in a claim for exemption under section 11 of the Act, not section 10 (Orders P-218 and P-323). Accordingly, section 10(1) is not applicable with respect to the Town's interests.

I find that the Town's submissions, that disclosure of this information could also prevent other contractors from bidding on projects, are speculative and not sufficient to establish an exemption claim under section 10(1).

Finally, I find it difficult to accept the Town's arguments regarding the harm contemplated under section 10(1)(b) as it relates to the consultants. If, as the Town submits, release of the highlighted information in Record 3 could result in information no longer being supplied to it by the consultants, I would have expected to receive representations from the consultants to that effect. However, despite being afforded the opportunity to do so, the consultants did not make representations, nor did they indicate that they were relying on the Town's representations. In these circumstances, the arguments about harm to the consultants are, in my view, speculative.

After careful consideration of the Town's representations and the information contained in the highlighted portions of Record 3, however, I find that disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the Town or its agents. I also find that it is in the public interest that an institution be able to fully assess the merits of tenders submitted to it for projects which will be funded by the taxpayers. This includes the ability of the Town (or its agents) to contact and receive information in confidence from references regarding past work performed by the bidders.

Accordingly, I find that the harm specified in section 10(1)(b) has been established for the highlighted portions of Record 3. As all three parts of the test have been met for this information, it is exempt under section 10(1).

PUBLIC INTEREST IN DISCLOSURE

Section 16 of the Act provides:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In order for section 16 of the Act to apply to a record, two requirements must be met. First, there must be a **compelling** public interest in the disclosure of the record, and second, this interest must **clearly** outweigh the **purpose** of the exemption which otherwise applies to the record.

The company asserts that because the integrity of the tendering process is in issue, there is a compelling public interest in the disclosure of all documentation relating to the submission,

analysis and selection of the tenders. In this regard, the company argues that the evaluation and decision-making process regarding the allocation of public funds for construction projects must be transparent, otherwise public confidence in the integrity of these processes is undermined.

I have reviewed the information which I have found to be exempt under sections 7 and 10 carefully. I find that the company's arguments are not sufficiently compelling to outweigh the purpose of the exemptions I have found to apply. Moreover, I find that the company's interest in the records is essentially a private one, that is, to assist it in pursuing its claim against the Town. Accordingly, I find that there is no compelling public interest in disclosure of the highlighted portions of the records, and section 16 of the Act is not applicable.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which it is seeking and the Town indicates that further records do not exist, it my responsibility to ensure that the Town has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Town to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Town must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

In its representations, the company states that it believes that the following records exist:

- committee and subcommittee meeting minutes
- notes of telephone calls made by the committee and subcommittee members
- written evaluations of all tenders
- records of all investigations into the company's construction and litigation experience
- records relating to the investigations into the experience of other bidders
- correspondence by and between the Town, OCWA and the consultants which include the terms of the engagements of OCWA and the consultants.

The Town provided an affidavit sworn by the Clerk, who indicates that he was responsible for conducting the search for records responsive to the request. He indicates that no other employee has the requested information. The Clerk affirms that the Town has never had a purchasing by law and that this record does not exist. He also affirms that there have been no other public meetings held other than those already identified to the company. The Clerk states that although there were two in camera meetings of the Town's Environment Committee (held on March 8 and May 6, 1996), no minutes were kept of those meetings.

The Clerk does not provide any information regarding the steps taken to search for responsive records, such as where they are located, or how they are maintained. Nor does the Town provide any other background to this appeal which would assist in disposing of this issue. I have reviewed the Town's decision letter along with its index of records. I note that the decision letter

makes no reference to in camera meetings although the Clerk has identified such meetings in his affidavit.

In considering the particularity of the request and the lack of detail provided by the Clerk, I am not satisfied that the Town's search for records responsive to the request was reasonable. Accordingly, I will order the Town to conduct a further search for records responsive to the request as I have identified it above, and with particular attention to the clarification provided by the company in its representations (which I have also referred to above).

ORDER:

1. I uphold the Town's decision to withhold the information which is highlighted in yellow and in blue on the copies of the records which are being sent to the Town's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order to the Town to disclose the remaining information to the company by sending it a copy of these records on or before **February 26, 1997** but not earlier than **February 21, 1997**.
3. I order the Town to conduct a further search for responsive records and to provide the company with a detailed response to each of the items referred to in its request. Specifically (as identified by me in this order):
 - minutes of all public Committee meetings at which the tenders were discussed;
 - the places, dates and particulars of all in camera Committee and all other closed door meetings, formal or informal, at which the tenders were discussed or reviewed, including the names of all individuals present at such meetings;
 - any and all reports prepared by the Town's professional consultants and any and all recommendations prepared by them and any other entities or individuals in respect of the tenders;
 - a copy of the Town's general purchasing by-law and any other relevant by-law or guideline that governs the awarding of contracts generally;
 - the name of any person(s) who provided the Town with an unfavourable reference; and
 - any other relevant information available to the company.

Further, as clarified by the company in its representations:

- committee and subcommittee meeting minutes
- notes of telephone calls made by the committee and subcommittee members
- written evaluations of all tenders
- records of all investigations into the company's construction and litigation experience
- records relating to the investigations into the experience of other bidders

- correspondence by and between the Town, OCWA and the consultants which include the terms of the engagements of OCWA and the consultants.
4. If, as a result of the further search, the Town identifies any records responsive to the request, I order the Town to provide a decision letter to the company regarding access to these records in accordance with section 19 and 22 of the Act, considering the date of this order as the date of the request and without recourse to a time extension.
 5. I order the Town to forward copies of the correspondence referred to in Provisions 3 and 4 of this order to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
 6. In order to verify compliance with this order, I reserve the right to require the Town to provide me with a copy of the records which are disclosed to the company pursuant to Provision 2.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ January 22, 1997