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

ORDER P-1605

Appeal P_9800078

Ministry of the Solicitor General and Correctional Services

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BACKGROUND:

The Integrated Justice Project (the IJ Project) is an undertaking by the Government of Ontario to identify, design, develop and implement new ways of managing the judicial system. The IJ Project will result in the restructuring of Ontario's justice system through the implementation of business re-engineering and technological solutions involving the municipal and provincial police, the criminal and civil courts and correctional services.

In 1996, the Ministry of the Attorney General (MAG) and the Ministry of the Solicitor General and Correctional Services (the Ministry) solicited proposals for the IJ Project, through a Common Purpose Procurement process (the CPP). The CPP process is defined as follows:

> Common Purpose Procurement is a competitive procurement process for selecting a private sector partner to work closely with government to identify, design, develop and implement solutions to complex business problems. These projects generally involve a multi-stage process. Both government and the private partner share the risks, investments and rewards of the project.

The Ministry has included Management Board's Common Purpose Procurement Managers Guide which describes the circumstances when the CPP process may be of benefit:

> When a Ministry has a multi-stage design-build-operate project and does not have the right mix of time, skills and money to identify, design and develop its own solution, then the Ministry needs private sector expertise and resources. Since the Ministry does not have the resources to write detailed specifications before selecting a partner, vendors cannot propose prices at this early stage of the project. And since the Ministry needs private sector investment and will likely be unable to pay a return on that investment until the project succeeds in providing anticipated benefits, the potential vendor-partners must be capable of sharing the project risks and investments with deferred benefits.
>
> In contrast to traditional procurement processes where proposals are selected chiefly on the basis of lowest or evaluated cost, the CPP process selects partners on proven experience and expertise, project approach and management, financial stability and capacity, and financial and partnership arrangements for sharing the risks, investment and benefits.
>
> ... Project management, risk management and contract management are especially important with CPP because of the scope and complexity of the project and the innovative nature of the partnership involved.

This is only the second time that such a process has been utilized by a ministry. A consortium made up of the affected party in this appeal and other private sector companies, known as the IJ Team, was identified as the highest ranking vendor for the IJ Project. The affected party is identified as the "primary vendor" from the IJ Team. A "Master Agreement" was entered into by MAG, the Ministry and the affected party and constitutes the subject of the request.

NATURE OF THE APPEAL:

MAG received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to contract documents relating to the IJ project being considered by MAG and its negotiations with several named companies. The requester then clarified that the request was for any and all contract documents pertaining to the Integrated Justice system that had been signed by MAG and a named company (the affected party).

MAG could not locate any records responsive to the request and it forwarded the request to the Ministry. The Ministry located one record in response to the request and denied access to it on the basis of sections 17(1) (third party information) and 18(1) (economic and other government interests) of the Act. The requester appealed the denial of access.

As I have indicated previously, the record at issue consists of a "Master Agreement" between the Ministry, MAG and the affected party (the Agreement). The Agreement relates to the IJ Project, a government initiative to identify, design, develop and implement new ways of managing the judicial system.

This office provided a Notice of Inquiry to the appellant, the affected party and the Ministry. Representations were received from all parties.

PRELIMINARY MATTERS:

Adequacy of the decision letter

The appellant submits that the decision letter was inadequate in that it failed to provide any reasons for denying access to the requested information, pursuant to section 29(1)(b)(ii) of the Act. The appellant states that he "has a statutory entitlement to full and cogent reasons explaining" the Ministry's decision to deny access. The appellant goes on to say that this has limited his ability to make "clear and detailed representations" and he submits that he should be given an opportunity to "substantively rebut any reasons eventually put forward by the Ministry or the affected third party."

Section 29(1)(b)(ii) of the Act states:

> Notice of refusal to give access to a record or a part thereof under section 26 shall set out,
>
> (b) where there is such a record,
>
> (ii) the reason the provision applies to the record.

In Order M-936, former Inquiry Officer Anita Fineberg addressed this issue in the context of a claim under section 52(3) of the Act. She commented that "the purpose of the inclusion of the above information in a notice of refusal is to put the requester in a position to make a reasonably

informed decision on whether to seek a review of the head's decision" (Orders 158, P-235 and P-324). She found that the decision letter to the appellant in that case was inadequate in that it simply restated the sections of the Act which contained the exemptions the institution was relying on. However, she also found that no useful purpose would be served by requiring the institution to provide a new, more detailed decision letter.

In my view, the same holds true in the present situation. The decision letter provided by the Ministry does not explicitly state the reasons why access to the information was denied. It does, however, make reference to the sections of the Act which address the types of information which are exempt from disclosure. I also note that the appellant did not appear to have suffered any prejudice in his ability to evaluate whether to appeal the decision to deny access or to make adequate representations. Accordingly, I find that no useful purpose would be served by ordering the Ministry to provide the appellant with another decision letter in this appeal.

Access to representations of other parties

The appellant argues that the principle of administrative fairness requires that he be given an opportunity to respond to the reasons for the denial of access put forward by the Ministry and the affected party.

Section 52 of the Act sets out the powers of the Commissioner with respect to conducting inquiries to review decisions of institutions that are appealed to the Commissioner. The statutory authority of the Commissioner includes, *inter alia* the right to conduct an inquiry in private. Specifically, section 52(13) of the Act reads as follows:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

The appellant has been provided with a Notice of Inquiry which describes the record, explains the exemptions which have been relied on and the onus requirements under the Act. In my view, the appellant has been provided with sufficient information to enable him to address the issues in this appeal and he has, in fact, made detailed representations on all the issues in this appeal. Accordingly, I find that this is not a case in which the exchange of representations should be ordered.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 17(1)(a), (b) and (c) of the Act 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, where 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.

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the Ministry and/or the affected party 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 institution 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.

[Order 36]

All three parts of the test must be satisfied in order for the exemption to apply.

Type of Information

The affected party submits that the record contains trade secrets and/or technical, commercial, financial or labour relations information. The affected party submits that the information system designed for implementation under the Master Agreement and contained in the schedules to the Agreement constitute a trade secret. The affected party states that the Agreement deals with the design and implementation of technological solutions necessary to modernize the justice system and includes source code, hardware and customized software. The Agreement specifically addresses the financial arrangements among the parties to the Agreement and the Agreement, as a whole, deals with the development, acquisition and delivery of systems and related services by the affected party and its subcontractors. In this regard, the affected party submits that the Agreement also contains financial and commercial information. The affected party points out the Agreement also deals with the staffing requirements of the information systems and that particular information relates to labour relations.

The Ministry concurs with the affected party and submits that the Agreement contains commercial, financial, technical and labour relations information related to the affected party's successful bid to provide the services requested in the IJ Request for Proposal. It is the

Ministry's position that the Agreement in its entirety may be viewed as consisting of commercial information relating to the buying and selling of technology services.

In Order M-29, former Commissioner Tom Wright adopted the following definition for the term "trade secret" for the purposes of section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act, which is the equivalent of section 17(1) of the Act:

> "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.

I adopt this test for the purposes of this appeal. I have carefully reviewed the record and I find that it contains information relating to a specific and unique business proposal with technological solutions and programs developed by the affected party for its venture with the Ministry. I am satisfied that this information qualifies as a "trade secret" within the meaning of section 17(1) of the Act. I also find that the Agreement, in its entirety, qualifies as commercial information as it relates to the buying and selling of technology products and services. The first part of the test has been met.

Supplied in Confidence

In order to meet the second component, the Ministry and/or the affected party must establish that the information in the record was supplied to the Ministry in confidence explicitly or implicitly. The information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P_203, P-388 and P-393).

Previous orders of the Commissioner have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis (Order M-169).

The appellant submits that the record at issue is a contract between the Ministry and the affected party, which was negotiated as part of the normal business processes, over a period of time. It is the appellant's position that such information was "negotiated" and therefore, not supplied for the purposes of section 17(1) of the Act.

The affected party acknowledges that the original draft of the Master Agreement and some schedules were provided by the Ministry as part of the Request for Proposal process. However,

it submits that most of the information in the signed agreement was designed, developed and provided to the Ministry by it. The affected party states that the information in the Agreement was developed by the affected party and other members of the consortium over a period of a year to meet the specific needs of the IJ Project and was supplied to the Ministry in confidence, both implicitly and explicitly. The affected party submits therefore, that disclosure of the information in the Agreement would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry.

The Ministry confirms that the information in the Agreement was supplied by the affected party to the Ministry, explicitly and implicitly in confidence. The Ministry explains that the Agreement details the commitment undertaken by the affected party and the consortium "to develop and implement technological solutions to support new business processes and the Government's vision for a modern, more effective, integrated justice system in Ontario". The Agreement covers the areas of project management, financial arrangements and benefit sharing, deliverables and services, personnel issues and dispute resolution. The Agreement involves a complex multi-phased information technology project which is just in its initial phase and the confidentiality of the information is critical to its success for all the parties concerned. Both the affected party and the Ministry submit that such sensitive business information is generally accepted as being highly confidential and it was supplied to the Ministry in confidence and treated as such. The Ministry and the affected party explain and I note, that the Agreement addresses the specific issue of confidentiality in detail, and that disclosure would also breach the confidentiality provisions contained in related contracts with other third parties.

Based on my review of the record and the submissions of the Ministry and the affected party, and having regard to the nature of the information and the objective of the Agreement, I am satisfied that some of the information in the Agreement is the same as the information that was actually supplied to the Ministry by the affected party and that disclosure of the information in the Agreement would also permit the drawing of accurate inferences with respect to other information actually supplied to the Ministry. On this basis, I find that the information in the record was supplied to the Ministry by the affected party in confidence both explicitly and with a reasonably held expectation of confidence. Accordingly, I find that the second part of the test has been met.

Harms

In order to meet the third part of the test, the Ministry and/or the affected party must demonstrate that one or more of the harms enumerated in sections 17(1)(a), (b) or (c) could reasonably be expected to result from the disclosure of the information.

The affected party submits that disclosure of the information in the Agreement would prejudice its competitive position and interfere with contractual negotiations with third parties such as subcontractors hired pursuant to the terms of the Agreement. The affected party argues that disclosure of the Agreement at this stage would also prejudice its negotiations related directly to the IJ project and other government projects and affect its competitive position against other vendors in the bidding processes. The affected party states that it, together with the other consortium members, invested considerable time, money and expertise to design, structure and develop a unique and innovative business arrangement between the public and private sectors to

modernize and manage the justice system. It claims that other jurisdictions are considering court reform and the Agreement could be used as a template to structure reforms in other jurisdictions. The affected party submits that disclosure of the Agreement to the appellant would prejudice significantly its competitive position and result in undue loss to it and other consortium members and gain to the appellant.

The Ministry supports the affected party's position and states that the Agreement will be the template agreement for contracting out for all the projects required under the IJ Project. The Ministry states that:

> Integrated Justice Initiative Project groupings (i.e.bundling) will be subject to an **ongoing competitive procurement process...** Release of the IJ Master Agreement, at this point in time, would provide the appellant and other interested parties with an unfair advantage with respect to the IJ Project bundles, justice reform projects in other jurisdictions and other private-public sector projects. The appellant would have the benefit of [the affected party's] significant investment of financial, human, technology and legal resources. Release of the Master Agreement would provide competitors with a significant advantage when competing against consortium members, particularly with regard to the IJ Project bundles which have yet to be tendered. When negotiating, competitors would not have to factor in the significant costs already incurred by [the affected party] thus far. It would enable competitors to build upon [the affected party's] innovative work and place [the affected party] at a competitive disadvantage.

In addition, the Ministry submits that the Agreement would have significant monetary value to companies wishing to embark upon similar complex multi-phased information technology projects.

The appellant states that the onus lies on the Ministry and the affected party to demonstrate that the harms envisioned in section 17(1) are present or are reasonably foreseeable. The appellant points out that if any part of the record should fall under the exemption, it can be severed out under section 10(2) and the remaining part of the Agreement should be disclosed. The appellant also submits that both the exemptions claimed by the Ministry should be narrowly interpreted in keeping with the spirit and intent of the Act.

I have reviewed the record and the submissions of the parties. I find that, given the present circumstances, where there is a joint business venture between the public and private sector and given that the information relates to a unique and specific information technology program affecting the entire justice system and given that the project is in its initial stages and that the record contains sensitive business and proprietary information, there is a strong basis for the information to be protected. I also find that based on the nature of the information in the record, disclosure could have a significant negative impact on the affected party's competitive positive in its continuing relationship with the Ministry, other sectors of this government and other jurisdictions and interfere significantly with the affected party's contractual and other negotiations for other government contracts and with its sub-contractors. My findings pertain to the following parts of the record:

> Article 2.3(e) and (f), Article 2.7, Article 3, Article 4, Article 5, Article 7, Article 8.4 and 8.8, Article 9, Article 10, Article 11, Article 14, Article 15, Article 17, Schedules A, B, C, D, and Schedules E, I, J, K

The third part of the test has been met for the parts of the Agreement which I have identified above. Since all three components have been satisfied, I find the above parts of the Agreement to be exempt from disclosure under section 17(1) of the Act.

In my view, the remaining parts of the Agreement, which include the Table of Contents, all of Articles 1, 6, 12, 13, 16 and 18 and Schedules F, G, H and L and parts of Articles 2 and 8, include standard clauses used in business contracts. They do not contain the type of information, the disclosure of which could reasonably be expected to result in the harms envisioned in sections 17(1)(a), (b) or (c). In my view, neither the Ministry nor the affected party has established how disclosure of the remaining information could possibly result in the harms described in section 17(1).

ECONOMIC AND OTHER INTERESTS

The Ministry has also claimed section 18(1) and I will consider the application of sections 18(1)(c), (d), (e) and (g) to the remaining parts of the Agreement. These sections read as follows:

> A head may refuse to disclose a record that contains:
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
>
> (g) information including the proposed plans, policies pr projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

The Ministry submits that the IJ Project has significant financial implications for the Ministry and the Ministry of the Attorney General and disclosure of the Agreement could compromise the business interests of the Ministry and its business partners. It states that release of the record will interfere with the Ministry's ability to obtain the required services in the most competitive and

cost efficient manner and will also result in an undue advantage to the companies bidding for the various projects who will have premature access to the Agreement. It adds that the terms and conditions of the Agreement are subject to regular review and possible revision as circumstances dictate. Disclosure at this time could jeopardize the Ministry's ongoing and future negotiations with the affected party and could put confidential business information in the public domain. The Ministry states that disclosure of the Agreement could result in a reluctance on the part of the affected party and other businesses to enter into a partnership with the public sector.

The Ministry states "that there has not yet been a large-scale public announcement regarding the successful negotiations between the Ministry, the Ministry of the Attorney General and [the affected party]" and that a public announcement will likely occur in the next few weeks. The Ministry submits that disclosure of the Agreement prior to the public announcement could give the appellant and others an undue financial advantage from the sale of the information in the Agreement.

I have already found the major part of the Agreement to be exempt from disclosure under section 17(1) of the Act. The remaining parts of the Agreement include definitions, listing of schedules and appendices, table of contents, Rules of Procedure for Mediation and Arbitration and other information which in my view, consist of standard clauses used in business contracts. Having reviewed the remaining portions of the Agreement and the representations of the Ministry, I find that I have not been provided with sufficient evidence as to precisely how the disclosure of this information would in any significant way prejudice the Ministry's competitive position or economic interests or be injurious to the financial interests of the Government of Ontario. In addition, it is not apparent on the face of the remaining portions of the record that prejudice to the Ministry's ability to negotiate ongoing and similar contracts with the affected party and other companies would be adversely affected by the disclosure of this information. I find therefore, that the remaining parts of the Agreement are not exempt under sections 18(1)(c) or (d).

The appellant submits that the Master Agreement has already been signed between the parties and therefore, there can be no future "harms" as contemplated by section 18(1)(e). The appellant submits that "disclosure of the record at issue cannot lead to the premature disclosure of a pending policy decision since the government has already announced its decision to move forward with the Integrated Justice System".

With respect to the application of section 18(1)(e), I find that the remaining parts of the record do not contain information that would qualify as "positions, plans, procedures, criteria or instructions" for the purpose of this section and the exemption does not apply.

In order for the exemption in section 18(1)(g) to apply, the Ministry must establish that the information in the record includes proposed plans, policies or projects, the disclosure of which could reasonably lead to the disclosure of a pending policy decision or result in undue financial loss or gain to a person. As I have noted previously, the information that remains consists of definitions and various paragraphs which would normally be included in standard business agreements. Further, while the details of the IJ Project have yet to be announced, the government has already publicly declared its intention to proceed with the enterprise. In my view, therefore, release of this information could not reasonably be expected to result in the disclosure of a pending policy decision. I have also not been provided with sufficient evidence

to establish that disclosure could result in undue financial loss or gain to a person. Accordingly, I find that the exemption in section 18(1)(g) has no application to the remaining parts of the record.

ORDER:

1. I order the Ministry to disclose the following parts of the record by sending a copy to the appellant by **September 25, 1998** but not before **September 21, 1998**:

   - Table of Contents and all of Article 2 with the **exception** of 2.3 (e) and (f) and 2.7
   - all of Articles 1, 6, 12, 13, 16 and 18
   - all of Article 8 with the **exception** of Article 8.4 and 8.8
   - all of Schedules F, G, H and L

2. I uphold the Ministry's decision to deny access to the remaining parts of the Agreement.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with copies of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: August 21, 1998
Mumtaz Jiwan
Adjudicator