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

ORDER MO-1380

Appeal MA-990246-1

Township of Middlesex Centre

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NATURE OF THE APPEAL:

The appellant, on behalf of an engineering company, made a request to the Township of Middlesex Centre (the Township) under the *Municipal Freedom of Information Protection of Privacy Act* (the *Act*) for access to:

> . . .[A]ll files of the Township relating to the Komoka Sewage and Water Works Projects No. 52-0030-01 and No. 53-0082-01 Contracts 3 and 4.

The appellant stated that his request included the following:

1. All documents relating to financing.
2. All documents related to the design, obtaining of approvals, and construction.
3. All agreements signed with respect to the projects including engineering agreements, cost sharing agreements, maintenance agreements, etc.
4. All tenders received for the construction of the project.
5. All reports to the Township Council and resolutions passed by the Council.
6. All correspondence and documents relating to [named company].
7. All the correspondence and documents relating to the Ontario Clean Water Agency.
8. All correspondence and documents relating [named company].
9. All correspondence and documents relating to [named company].

The appellant specifically requested an opportunity to review the files in person at the Township offices. The appellant also wanted to bring his own photocopier to take copies of any documents of interest to him. The appellant also asked that should the Township decide to sever any documents from the files, that he be provided with a list of such documents.

Shortly after the request was received, the appellant met with a representative of the Township. At the meeting, the appellant was provided with a list of files (the file list) by the Township, which referenced 86 file titles. The appellant reviewed the file list and put a check mark beside those files which he wished to see (37 of the 86 files were identified on the file list). The appellant also indicated that since he had already reviewed the minutes of Township Council meetings (Part 5 of the request), they were no longer part of the request.

Following the meeting with the Township, the appellant provided the Township with the following clarification of his request:

> . . . we can advise that the purpose of our request is to review the financing and management of the above projects by the [Township]. We have no interest in reviewing any documents relating to individual homeowners in Komoka. We do however, wish to review all documents relating to owners of underdeveloped land in relation to the projects.

The appellant also provided the following clarification with respect to seven of the nine items identified in his request:

1. Per above comments. All documents relating to financing the project with the exception of detailed information of homeowner financing is requested.

2. Exactly all documents in the Township's possession - design files, calculations, drawing, correspondence, [Ministry of the Environment] design submissions, reports of the construction, invoices, progress payments, minutes of meetings, photographs, etc.

5. Request [for] access to Council meetings is satisfied per above comments.

6. All documents relating to [named company] - proposal for engineering services, agreements for engineering services, proposals, recommendations, designs, calculations, invoices, correspondence, etc.

7. All documents relating to [Ontario Clean Water Agency - MAP] documents, agreements, proposals, recommendations, invoices, correspondence, etc.

8. We are unaware that [named company] was awarded a contract for these projects. If they were, please provide all documents. If [named company] or affiliated company was involved in the projects as an affected landowner, then please provide all documentation.

9. All documents relating to [named company] and the contract for the construction should be covered under item # 2. If [named company] or affiliated company was involved in the projects as an affected landowner, then please provide all documentation.

The Township responded to the appellant's request and clarification by advising that the estimated fee to obtain the requested information is $7,875. The Township requested 50% of the estimate, $3,937.

The appellant then forwarded a cheque in the amount of $3,937 and asked the Township to prepare the records for viewing. In this letter, the appellant stated that the fee seemed excessive and asked the Township to keep detailed records of the time spent preparing the files for review.

Subsequently, the Township advised the appellant that the disclosure of records may affect the interests of a third party, who was being given an opportunity to make representations about the release of the records.

On the same day, the Township also sent a decision letter (the original decision) to the appellant, which included an index of records (the index) which identified the 37 files that the appellant had

checked off on the file list. The index included a brief description of each file and the records which are contained within each one, together with the approximate number of pages. The index also provided a brief description of the records and/or information being withheld. The index also specified whether the appellant could view and/or copy the records within each file.

According to the index, access was granted to items 1, 2, 6-17, 19-31 and 37. Partial access was granted to items 3- 5, 18 and 32-36. Although the index did not refer to specific sections of the *Act*, it did provide a description of the reason why information was being withheld, for example, "exclude invoices for legal services due to solicitor-client privilege".

The appellant appealed the Township's decision to this office, on the following basis:

> 1. The response of the [Township] does not satisfy our request. Only portions of the documents requested have been listed for viewing. Our request was all encompassing and we paid $3,937.00 . . . in fees for access to these records. We want to view all the files of the [Township] with respect to this project.
>
> 2. [The Township's] decision to sever submitted tender documents on the project. We do not object to the severing of individual unit prices of tenders per FOI custom.
>
> 3. [The Township's] decision to copy the majority of records when our request made it clear that we wanted to copy original documents with our own photocopier. We want to view original files. We have no objection to the severing of records in accordance with the *Act*, but we want a listing and the specific justification under the *Act* for any record severed.
>
> 4. The decision not to supply [us] with a copy of [the Township's] decision with respect to third party submissions.

The appellant subsequently clarified that he is also appealing the Ministry's fee estimate.

During the mediation stage of the appeal, the Township issued a supplementary decision letter to the appellant. In this letter, the Township revised its fee estimate to $2,657.00 for search and preparation time and $316.20 for copying fees, for a total of $2,973.20.

In the same letter, the Township provided the appellant with additional information relating to the records which were being withheld or severed from items 3- 5, 18 and 32-36, including the specific provisions of the *Act* that the Township was relying on. Specifically, the Township cited sections 10 (third party information), 12 (solicitor-client privilege) and 14 (personal privacy) of the *Act*. The Township also withheld some information from item 3 because it was non-responsive to the appellant's request.

With this letter, the Township also provided the appellant with a revised file list which identified additional files as being responsive to the request. The Township indicated in this letter that the additional files were located following its original search.

The appellant responded to the Township's letter indicating that he still did not agree that the documents offered for viewing are responsive to his request. In the same letter, the appellant removed items 3-5 and 18 from the scope of the appeal, but indicated that he still wished to see items 32-36. He stated that he is prepared to accept photocopies of unit price pages (since unit price information would need to be severed), but wishes to view the original of all other tender documents. The appellant also indicated that he is not seeking access to the additional files located by the Township, as identified in its supplementary decision letter.

The appellant also stated that he does not wish to view copied records. The appellant went on, however, to ask that if the Township has to copy a record to sever items it feels can be withheld under the *Act*, that it do so at the Township's own cost.

In his letter, the appellant also stated that "[w]e agree to pay for search time in the amount of $2,657." He asked for a rebate of the difference between this amount and the original payment of $3,937, which amounts to $1,280.

Finally, the appellant requested an appointment to attend at the Township offices to view the records that are being offered for viewing.

The appellant subsequently attended at the Township offices to view the records. Shortly after, the Township issued another decision letter to the appellant. In this letter the Township confirmed that during his visit, the appellant viewed all records as identified in the Township's original decision, with the exception of those records to which access was being denied.

The Township also noted that during the appellant's viewing of the records, he had requested several copies of records and was provided with these, with the exception of 18 pages of information in item 2 and two pages of information in item 16. The Township explained that these records consist of information extracted from the assessment rolls that is available for viewing, as is the assessment roll. The Township went on to explain its practice that any person may take handwritten notes of the information contained in such records, but the roll or portions of the roll cannot be copied.

After the appellant's attendance at the offices of the Township, the appellant advised this office that the records which were presented by the Township did not satisfy the issues in this appeal. Specifically, the appellant indicated that the Township only presented a few records from its files, and that from its experience those records would represent only a small portion of the documents in those files. The appellant went on to state that the Township had not, as requested, provided a list of documents which were severed, so that the appellant may assess the appropriateness of the severances under the *Act*. Finally, the appellant indicated that the Township also would not provide the original tender documents.

In view of the above, the following issues were identified as remaining in dispute in this appeal: (i) adequacy of the Township's decision; (ii) method of access; (iii) reasonableness of search; (iv) fees; and (v) access to items 2, 16 and 32-36.

A Notice of Inquiry setting out the issues in the appeal was sent initially to the Township and to the companies that submitted tenders to the Township (the affected persons). In response, representations were received from the Township only. None of the affected persons submitted representations, although the Township attached to its representations the submissions it received from one of the affected persons at the request stage. Both the Township and this affected person consented to the sharing of their representations in their entirety with the appellant. Those representations, together with a Notice of Inquiry, were then sent to the appellant, who provided representations in response.

Following receipt of the appellant's representations, the appellant clarified that he is not pursuing access to items 2 and 16, which consist of information extracted from the assessment roll. Accordingly, these records are no longer at issue in this appeal. The appellant also clarified that he is not pursuing access to pages FE 12, FE 41, FE 84; FE 137 and FE 183 within items 32-36, which contain the qualifications of tenderers' senior supervisory staff to be employed on the contracts. Therefore, these pages are also no longer at issue in this appeal.

RECORDS:

The records remaining at issue in this appeal consist of five sets of tender documents relating to a water and sewage project, identified by the Township as items 32-36 on the file list. The Township has confirmed that the first two pages of each tender have been disclosed to the appellant during his last visit to the Township. Specifically, the Township confirmed that the appellant viewed these pages. Accordingly, pages FE 1 & 2; FE 28 & 29; FE 57 & 58; FE 110 & 111; and FE 169 & 170, are not at issue in this appeal. As outlined above, pages FE 12, FE 41, FE 84; FE 137 and FE 183, are also no longer at issue. Finally, the appellant has indicated that he is not pursuing access to the itemized unit pricing within the tenders. Therefore, this information is also not at issue in this appeal.

DISCUSSION:

ADEQUACY OF DECISION LETTER

The appellant submits that the Township's decision letter does not comply with the requirements of section 22 of the *Act*.

Section 22(1)(b) of the *Act* reads:

> Notice of refusal to give access to a record or part under section 19 shall set out,
>
> where there is such a record,

(i) the specific provision of this *Act* under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

Section 22(3.1) of the *Act* states:

> If a request for access covers more than one record, the statement in a notice under this section of a reason mentioned in subclause (1)(b)(ii) or clause (3)(b) may refer to a summary of the categories of the records requested if it provides sufficient detail to identify them.

Previous orders of this office have held that a notice of refusal must contain sufficient detail to allow a requester to make a reasonably informed decision on whether to review an institution's decision (Orders P-554 and M-457).

In his representations, the appellant submits that if the head of an institution wishes to deny access to a record, or part of a record, it must specify the provision of the *Act* it is relying on to deny access. The appellant therefore concludes that "every record severed must be individually justified by a specific provision of the *Act"*. The appellant submits that the Township has not done this and that, therefore, its decision letter is inadequate under the *Act*.

The issue for me to decide is whether the Township has complied with section 22 in providing an index (and file list) that contains "categories of records" as opposed to an index or file list that identifies each record within each category and linking an exemption claim to each individual record and/or severance.

In its submissions, the Township explains that it has provided the appellant with access to all records in the files as identified by the appellant in his clarification letter, and that there has been no removal or severance other than that specifically identified in the Township's response letters. The Township further submits that the file list which was provided to the appellant is the complete summary, by category, for all of the records for the project in question. The Township explains that the file list includes a description of documents in each file and that it considers this to be sufficiently detailed to identify the requested records.

As previously noted, the only records to which access was denied by the Township in its original decision were items 3-5, 18 and 32-36. Although the index of records did provide a general reason why information was being withheld from the items, the Township did not specifically refer to any

provisions of the *Act*. However, as outlined above, the Township later issued a supplementary decision in which it identified specific sections of the *Act* under which access was being denied to these items. In this supplementary decision, the Township also provided additional details with respect to each category of records which were denied within each item.

Section 22(3.1) of the *Act* allows the Township to refer to a summary of the categories of the records which are being denied, as long as it provides sufficient detail to identify them. Therefore, the Township is not required to identify each record individually, as submitted by the appellant. I have carefully reviewed the Township's supplementary decision and I find that the Township's description of the categories of the records complies with section 22(3.1) of the *Act*.

However, the Ministry's third decision letter, concerning items 2 and 16, once again, did not identify the specific provisions of the *Act* upon which the Township was relying to deny access. This issue was, however, later clarified in the Township's representations (which were shared with the appellant), as well as in the Notice of Inquiry.

I also note that none of the Township's decisions identified the person responsible for making the decisions nor his or her position, as required by section 22(1)(b)(iii).

In view of the above, I find that the Township's decision letters did not fully comply with the requirements of section 22(1)(b) of the *Act*.

In the circumstances, no useful purpose would be served by requiring that the Township issue a revised decision letter and, therefore, I will not make such an order (Order MO-1209). I would, however, encourage the Township to review *IPC Practices* Number 1 published by this office. This document provides useful guidelines for institutions in drafting a decision letter refusing access to records under the *Act*.

METHOD OF ACCESS

Section 23(2) of the *Act* states:

> If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.

In response to the Report of Mediator, the appellant clarified that he wishes "to view the actual documents that are in the Township's possession regardless of whether they are signed originals, c.c.'s, copies of third party correspondence, faxes, notes, internal memo's etc".

It appears that at least initially there was some confusion on the part of the Township as to its obligation to provide the appellant with a copy of the requested records, as opposed to allowing the appellant to view the records. The Township subsequently clarified that it will allow the appellant to view records in its custody in whatever form they are in, whether as an original or as a photocopy of

a document provided to it by another party. It also appears from the Township's submissions that, during the appellant's last attendance at the Township' s offices, it did in fact allow the appellant to view the requested documents, with the exception of the records which were being withheld.

In his submissions, the appellant states that the Township has not complied with the *Act* in refusing his request to view the original documents, as it has not given any reason why providing access to the original documents was not "reasonably practicable". The appellant has not, however, provided me with any information as to what records he is referring to. In the circumstances, I am satisfied that the Township has provided the appellant with an opportunity to view records in whatever form they exist at the Township, with the exception of those records to which the Township had denied access. Accordingly, I find that the Township has met its obligations under section 23(2) of the *Act*.

REASONABLENESS OF SEARCH

In appeals involving a claim that further responsive records exist, as is the case in this appeal, the issue to be decided is whether the institution has conducted a reasonable search for the records as required by section 17 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances of this case, I will uphold the Township's decision. If I am not satisfied, I may order further searches.

As noted earlier, in response to the appellant's request, the Township originally identified 86 files relating to the project in question. The Township subsequently located a number of additional files and added these to its file list. From this file list, the appellant identified 37 files which he wished to view. Those files included the following records: project history and background information; schedules attached to by-laws; invoices; final payment certificates; spreadsheet; estimated debenture schedule; cost estimates; letters; background information; resolution for project management services; certificates; agreements; reports; minutes of meetings; purchase order; release of liability; bid summaries; tender invitations; proposals; responses; and other documents, as outlined in the Township's index of records.

During mediation, the appellant stated that there should have been "boxes" of records identified as responsive to the request. In this regard, in response to the Report of Mediator the appellant stated:

> It is our view and that of our consultant, who has many years experience as a municipal engineer and administrator, that the Township has only provided a fraction of the documents that normally are generated by a construction project of this magnitude.
>
> We conducted a similar search of the Ontario Clean Water Agency's (OCWA) files relating to this project in 1999. For example, many letters were issued by OCWA and their consultants, [name of consultant], to the Township directly, or copies to the Township, were not provided for our viewing of the Township's files.

> In its submissions, the appellant adds that "the records to which access was provided by the Township do not represent a complete record of the subject project and are not responsive to our all-encompassing request". The appellant also suggests that the Township may have given the records to its consultant and, therefore, such records would no longer be in the Township's possession.

With its submissions, the Township provided an affidavit from the Administrator-Clerk for the Township. In his affidavit, the Administrator-Clerk explains that he is familiar with the project in question and that he personally set up the administration files for the project as part of his former employment duties as Treasurer, and as Administrative Coordinator for that project.

The Administrator-Clerk goes on to state that he personally searched for and reviewed each file in the Township's possession related to the project in question. As part of this search, he states that he determined that the records in the project files are representative of the "File Title and Description" heading shown in the file index, as provided to the appellant.

The Administrator-Clerk also explained that during his search he did find additional files related to the project that were not detailed on the file list, and that he subsequently prepared a revised file list, which was also provided to the appellant. He went on to indicate that to the best of his knowledge, no records have been destroyed which relate to this project which are in the Township's possession.

With respect to the appellant's suggestion about records possibly being given to the Township's consultant, the Administrator-Clerk clarified that if the Township did provide any records to the consultant, it would have retained either the originals or copies of any such records. He also confirmed that all records relating to the project in question have been identified in the revised file list which was provided to the appellant.

I have carefully considered all of the material before me on this issue. In the circumstances, I am satisfied that the searches which were conducted by the Township were done by an experienced and knowledgeable individual within the Township, and that all reasonable steps have been taken to identify responsive records. Therefore, I am satisfied that the search conducted by the Township was reasonable.

FEES

Introduction

The charging of fees is authorized in section 45 of the *Act*, and more specific provisions regarding fees are found in section 6 of Regulation 823 made under the *Act*. The relevant provisions of section 45 read:

> (1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> . . . . .
>
> (e) any other costs incurred in responding to a request for access to a record.
>
> . . . . .
>
> (3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this *Act* that is over $25.

The relevant provisions of Regulation 823 state:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> . . . . .
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

As noted earlier, the Township originally estimated the fee for search and preparation to be $7,875.00 and the appellant has provided the Township with $3,937.00, or 50% of the fee estimate. The Township subsequently revised its fee estimate to $2,657.00 for search and preparation time and $316.20 for copying, for a total of $2,973.20. The appellant believes that this fee is too high.

In its submissions, the Township notes that the search and preparation estimate should have been $2,675.00 and not $2,657.00. The Township also notes that the photocopying was estimated at $316.20, based on the Township's expectation that it will be providing copies, rather than the appellant viewing the records, and that "to date there have been only a few records copied", and it is prepared to issue a refund for any excess fees.

The Township also submits the following:

> The Township has logged the staff time to search and prepare the records for disclosure. All files were taken to a central search location, every file was reviewed and filing errors corrected so that the requested records would be provided for access, records requiring third-party notice were identified, records requiring severance were identified, and the Township's decision letter then prepared.

In addition to its original submission, the Township provided a detailed breakdown of the original fee estimate, the revised fee estimate, as well as the actual fees incurred in order to process the appellant's request. According to the Township, the actual fees incurred total $2,973.65. This fee was broken down as follows:

Search	
Gather and search files	
15.5 hours @ $7.50 per 15 minutes	$542.50
Prepare/copy	
Search and prepare for third party notice Prepare for disclosure Prepare for view Prepare and assist for view and copying	
31.25 hours @ $7.50 per 15 minutes	1,093.75
Copies at $0.20 each	15.00
Other	
Review and respond to appellant and Commission	
12 hours @ $7.50 per 15 minutes	210.00
Legal fees [section 45(1)(e)]	1,112.40
Total	$2,973.65

I will address each portion of the Township's fee below.

Search

Based on the Township's submissions and the large number of files which were requested by the appellant, I am satisfied that the 15.5 hours of search time to locate the records is reasonable in the circumstances of this appeal. I note, however, that the Township's fee calculation in this regard, which totals $542.50, is not correct. The correct charge for 15.5 hours @ $7.50 per quarter-hour ($30.00/hour) is $465.00. Accordingly, this portion of the Township's fee estimate should be reduced to $465.00.

Preparation

"Preparing the record for disclosure" under subsection 45(1)(b) has been construed by this office as including (although not necessarily limited to) severing exempt information from records (see, for example, Order M-203). On the other hand, previous orders have found that certain other activities, such as the time spent reviewing records for release, cannot be charged for under the *Act* (Orders 4, M-376 and P-1536). In my view, charges for identifying and preparing records requiring third party notice, as well as identifying records requiring severing, are also not allowable under the *Act*. These activities are part of an institution's general responsibilities under the *Act*, and are not specifically contemplated by the words "preparing a record for disclosure" under section 45(1)(b) (see Order P-1536).

In addition, even though the Township provided a detailed breakdown of the time spent preparing records for disclosure/view, it has not provided any information as to exactly what this involved. As previously mentioned, the appellant attended at the Township's offices and reviewed the requested files, with the exception of those records which were denied. Therefore, without any additional information from the Township with respect to its fee for the preparation of records for disclosure/view, I am unable to determine precisely what the Township is charging the appellant for in this regard.

Based on the above, I do not uphold this portion of the fee estimate, with the exception of the $15.00 fee for photocopying charges.

Other

It appears that under this portion of the fee, the Township has charged the appellant for responding to his request, as well as for responding to this office during the course of the appeal. Both of these functions are a necessary part of an institution's obligations in administering the *Act*, and associated costs are not recoverable (P-1536). Therefore, I find that this portion of the fee is not allowable under the *Act*.

It also appears that the Township has charged the appellant for the legal costs which it incurred as a result of the appellant's request and/or appeal. The Township has cited section 45(1)(e) of the *Act* for this part of the fee. In my view, legal costs associated with an access request are not contemplated by section 45(1)(e). This section, in my view, is intended to cover general *administrative* costs resulting from a request which are similar in nature to those listed in paragraphs (a) through (d), but not specifically mentioned. Legal costs clearly are outside the scope of these types of costs.

In summary, I uphold the Township's fee of $465.00 for search time, as well as $15.00 for photocopying, for a total of $480.00. I do not uphold the remainder of the Township's fee.

As outlined above, in response to the Township's original fee estimate, the appellant provided the Township with a deposit of $3,937.00. The Township has clarified that after it issued its revised fee

estimate, it provided the appellant with a refund in the amount of $963.80. The Township provided our office with a copy of its letter to the appellant in this regard, dated March 7, 2000. Accordingly, the total fee which has been paid by the appellant to date equals $2,973.20.

Since I have upheld the Township's fee in the amount of $480.00 only, I will order the Township to issue a refund to the appellant in the amount of $2,493.20.

The appellant indicates that he seeks interest on any refund paid to him by the Township. In my view, this is a matter that the appellant should initially take up with the Township.

THIRD PARTY INFORMATION

Introduction

As noted above, the records at issue consist of five sets of tender documents, with the following exceptions:

(i) the first two pages of each tender, specifically pages FE 1 & 2; FE 28 & 29; FE 57 & 58; FE 110 & 111; and FE 169 & 170, as these were disclosed by the Township;

(ii) pages FE 12, FE 41, FE 84; FE 137 and FE 183, which the appellant has clarified that he is not pursuing; and

(iii) the itemized unit pricing, as the appellant has indicated that he is not pursuing access to this information. I have also decided to exclude from the scope of this appeal the quantity of units in items 32, 34, 35 and 36 since disclosure of this information, together with the total price paid, would in effect reveal the unit prices.

The Township has claimed that section 10(1)(a) and (c) of the *Act* applies to the records. Those sections read:

> 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;
>
> . . . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order for a record to qualify for exemption under sections 10(1)(a) or (c) of the *Act*, each part of the following three-part test must be satisfied:

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) or (c) of section 10(1) will occur [Orders 36, M-29, M-37, P-373].

Both the appellant and the Township made representations on this issue. The Township's representations include the following documents:

1. a letter from the Ontario Clean Water Agency from the contracted Project Manager who assisted with the form of tender;

2. a letter from the consulting engineers for the project who prepared the form of tender; and

3. a fax cover page and a letter from one of the affected persons who submitted tenders and was subsequently awarded the contracts as the low bidder (this letter was provided to the Township by the affected person in response to being notified at the request stage).

Part one: type of information

Introduction

The affected person's submission to the Township appears to suggest that at least some of the information at issue qualifies as "financial information." It also appears that the affected person considers some of the information to qualify as a "trade secret".

The terms trade secret, as well as financial and commercial information have been defined in previous orders as follows:

Trade secret

"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 [Order M-29].

Financial information

This term refers to information relating to money and its use or distribution and must contain or refer to specific data, for example, cost accounting method, pricing practices, profit and loss data, overhead and operating costs [Orders P-47, P-87, P-113, P-228, P-295 and P-394].

Commercial information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order P-493].

It is clear on the face of the records that they contain detailed information about the bid proposals submitted by the affected persons, including detailed pricing information relating to the work to be performed. I find that this information qualifies as financial information. Further, I find that all of the information in the records qualifies as commercial information, as defined above [MO-1237]. Accordingly, the first part of the test has been met.

With respect to the issue of whether the information qualifies as a trade secret, the affected person states the following:

> A trade secret confidential tendered price adjustment for Period of Validity of Tender was used in both contract No. 3 & 4. Ultimately this adjusted our contract No. 3 price to low bid.
>
> The method of this tendered adjustment is unique and unknown in the industry and in the hands of competitors can be used to eliminate this unique tendering advantage that we presently possess.

In his submissions on this issue the appellant states the following:

> ... The "trade secret" the [affected person] is referring to is simply a handwritten modification to the tender submission providing alternatives not requested in the tender request. This is not a unique and unknown method of tender submission. It usually causes rejection of the tender under explicit criteria in the tender documents which prohibit informal or modified submissions such as the [affected person's].

I am not persuaded in the circumstances that the information the affected person refers to constitutes a trade secret within the meaning of section 10(1) of the *Act* although, as I indicated above, all of the information at issue in the records meets the first part of the three part test for exemption.

Part two: supplied in confidence

Part two of the three-part test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient to demonstrate simply that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly [M-169].

It is clear that the information at issue was supplied by the companies to the Township in the context of responding to the Township's tender for the project. Accordingly, I find that the "supplied" component of part two has been established.

The Township submits that the information was supplied in confidence, and that the letters which were attached to its submissions support the confidentiality of the tender details.

The letter from the OCWA provided by the Township states that the OCWA has no concerns regarding the disclosure of any records related to the project in question. However, this letter also indicates that any document that contains unit prices for the contracts may be considered confidential by the contractors. The OCWA goes on to state the following:

> Historically when tenders are opened by OCWA, the total tender price submitted by each contractor is read out for the information of those in attendance. The unit prices contained in the tenders are kept confidential throughout, as this is critical to each contractor's ability to win future contracts.
>
> As the [projects in question] were not tendered recently, the contractors involved in the projects may not consider their unit prices to be confidential any more, and thus may have no objection to such information being released....

In its letter, the affected person indicates that the records at issue were implicitly supplied to the Township in confidence.

The appellant submits that Township has not demonstrated that there is either an explicit or implicit expectation of confidentiality in their tendering process.

Based on the material before me, I am not satisfied that any information in the records remaining at issue was supplied either implicitly or explicitly in confidence. While it may be the case that unit prices and information which would reveal unit prices was supplied implicitly in confidence, this information is no longer at issue. The Township and the affected person have simply failed to provide the necessary detailed and convincing evidence to establish a reasonable expectation of confidentiality with respect to the information at issue.

Part three: harms

Introduction

Having found that the information at issue does not satisfy the second part of the section 10(1) exemption test, it is not necessary for me to determine whether the requirements of the third part of the test have been satisfied. However, in the circumstances of these appeals, I feel it would be useful to comment on this part of the test.

The Commissioner's three-part test for exemption under section 10(1), and statement of what is required to discharge the burden of proof under part three of the test, have been approved by the Court of Appeal for Ontario. That court overturned a decision of the Divisional Court quashing Order P-373, and restored Order P-373. In that decision the court stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "*detailed and convincing"* do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm [emphasis added] [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy*

> *Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)].

In order to discharge the burden of proof under part three of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed [Orders 36, P-373].

In Order PO-1747, I stated the following with respect to the phrase "could reasonably be expected to", which appears in the opening words of section 17(1):

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In my view, the Township and the affected person must provide detailed and convincing evidence to establish a "reasonable expectation of probable harm" as described in paragraphs (a) and (c) of section 10(1).

Section 10(1)(a) and (c): prejudice to competitive position and undue loss or gain

In its letter to the Township, the affected person stated:

> The Invoices, Form of Tender, and Contracts for Contract 3 and 4 [Items 34 and 35 respectively] contain:
>
> 1. A forty page breakdown of our tendered price with detailed unit prices for each and every activity on the project. These unit prices are secret financial costs to the Company which in the hand of competitors can be used against us to underbid our future tenders.
>
> 2. A confidential eight page list of equipment (assets) along with the accompanying serial numbers.

> 3. A trade secret confidential tendered price adjustment for "Period of Validity of Tender" was used in both contract No. 3 & 4. Ultimately this adjusted our contract No. 3 price to low bid.
>
> The method of this tendered adjustment is unique and unknown in the industry and in the hands of competitors can be used to eliminate this unique tendering advantage that we presently possess.

With his submissions, the appellant attached page TF-22R of a named company's tender for Contract #3 (Item 34), which the appellant indicated was obtained from the OCWA under another freedom of information request. The appellant states the following:

> ... The "trade secret" the [affected person] is referring to is simply a handwritten modification to the tender submission providing alternatives not requested in the tender request. This is not a unique and unknown method of tender submission. It usually causes rejection of the tender under explicit criteria in the tender documents which prohibit informal or modified submissions such as the [affected person's].

In his submissions the appellant also states:

> Neither the Township nor the [affected person] has provided detailed and convincing evidence that the disclosure of tender information would cause harm. Specifically, there is no evidence that the release of the tender documents would prejudice *significantly* the competitive position of any of the contractors who submit tenders [original emphasis].

In Order PO-1791, Adjudicator Sherry Liang stated the following in the context of a request under the *Act*'s provincial counterpart for unit pricing information contained in tender documents:

> A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records: Orders P-166, P-610 and M-250. Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.
>
> In general, therefore, there are many cases where the exemption described in section 17(1)(a) has been applied to information which is similar to that at issue here. The difficulty with the case before me, however, lies with the scarcity of evidence on the

> specifics of this affected party's circumstances. I am left without any guidance, for example, as to whether unit pricing information is viewed as commercially-valuable information in the particular industry in which this affected party operates. As I have indicated, the affected party has chosen, as is its right, not to make representations on the issues. While I do not take the absence of any representations as signifying its consent to the disclosure of the information, the effect of this is that I have a lack of evidence on the issues raised by sections 17(1)(a)(b) and (c), from the party which is in the best position to offer it. This is demonstrated by the submissions from MBS which, while correctly identifying the conclusions reached in other cases, do not offer any evidence applying these general principles to the circumstances of this affected party.
>
> In the circumstances, I am unable to find that the submissions of MBS provide the "detailed and convincing evidence" which is required to support the application of section 17(1)(a) to this case.

In my view, Adjudicator Liang's comments are applicable here.

In reviewing the affected person's submissions relating to items 34 and 35 (Contracts 3 and 4), I note that they refer to the unit pricing, which as indicated previously is not at issue in this appeal. The affected person also refers to the list of equipment (assets) along with the accompanying serial numbers, but provides no information as to the specific harms which may result should this information be disclosed. With respect to the remainder of the submissions, I find that the affected person has not provided me with the kind of "detailed and convincing" evidence required to satisfy the third part of the test under sections 10(1)(a) and (c).

Also, in the absence of representations from the rest of the affected persons, I am left without any guidance on the issue of reasonable expectation of harm from disclosure, with respect to the information contained within the remainder of the records. As a result, I am unable to conclude that the harms described in section 10(1)(a) or (c) could reasonably be expected to result from disclosure of the information at issue. Accordingly, the information at issue is not exempt from disclosure under section 10 of the *Act*.

ORDER:

1. I do not uphold the Township's fee decision, and I order the Township to issue a refund to the appellant in the amount of $2,493.20.

2. I partially uphold the Township's decision to withhold certain portions of the records at issue under section 10(1) of the *Act*.

3. I order the Township to disclose the records at issue to the appellant, with the exception of the information highlighted on the Township's copy of the records included with its copy of this order, no later than **January 29, 2001**, but no earlier than **January 23, 2001**.

4. In order to verify compliance with provision 3, I reserve the right to require the Township to provide me with a copy of the material disclosed to the appellant.

Original Signed By: December 21, 2000
David Goodis
Senior Adjudicator