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

ORDER M-845

Appeals M_9600190, M_9600191 and M_9600208

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NATURE OF THE APPEALS:

On March 28, 1996, the Regional Municipality of Ottawa-Carleton (the Municipality) received a request for information from a health care services company (Requester A) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). On April 8, 1996, the Municipality received a similar request under the Act from another health care services company (Requester B).

The requested information pertains to portions of the submissions provided by two named companies (the third parties, which I will refer to as Companies A and B in this order) in response to a Request for Proposals (RFP) issued by the Municipality for the provision of Home Support Services to the Home Care Program and Social Services Department.

Specifically, Requester A is seeking access to the portions of the submissions provided by both companies which address items 3 - 19 of point 2.1 under Part 1 of the RFP. Point 2.1 sets out the "required documents/information necessary for submission with the homemaker request for proposal".

Requester B is seeking access to the portions of Company A's submissions which address items 3, 15, 16, 17 and 18.

The Municipality located records responsive to the two requests. The Municipality notified the two third parties pursuant to section 21 of the Act, and requested comments on disclosure of the records. Both third parties objected to disclosure of the information contained in their proposals.

Despite the third parties' objections to disclosure, the Municipality granted access to the requested records in their entirety. Both third parties appealed the Municipality's decision on the basis of sections 10(1)(a) and (c) (third party information).

The Commissioner's office opened three separate third party appeal files. Appeal Number M_9600190 was opened in response to the appeal filed by Company A in response to the request made by Requester A. Appeal Number M-9600208 was opened in response to Company B's appeal. Appeal Number M-9600191 was opened to deal with Company A's appeal with respect to the request made by Requester B.

Because the issues, some of the parties and the types of records at issue are the same in the three appeals, this order will dispose of the issues in all three appeals.

This office sent a Notice of Inquiry to the Municipality, the two third party appellants and the two requesters. Representations were received from all of the parties except for Requester B. In its representations, Requester A narrowed the scope of its request to items 3 - 8, 11, 12 and 17. As a result, the portions of point 2.1 at issue are items 3 - 8, 11, 12, 15, 16, 17 and 18.

RECORDS:

The information required under items 3 - 8, 11, 12, 15, 16, 17 and 18 is for the following: homemaker time and duties, medication assistance, job descriptions, hiring practices, conduct and appearance, performance appraisal, evaluating quality of homemaker service, confidentiality, skills assessment and homemaker assignment, consistency, client independence and field supervision.

The records at issue in these three appeals consist of the portions of the proposals submitted by Companies A and B which address the items referred to above. This information comprises policies, procedures and forms.

PRELIMINARY MATTER:

WHETHER THE ACT APPLIES TO INFORMATION ABOUT PRIVATE COMPANIES

In its letter of appeal, Company A states that it does not believe that the Act was ever intended to disclose information on private companies. In this regard, the company asserts:

> [The Municipality] asked for and received proprietary information on the understanding that in order to get a contract we had to answer their specific questions with specific information. We complied, however, this information was in no way intended to assist our competition. Private companies should have a right to privacy.

The applicability of the Act to information originating from non-institutions has been considered in previous orders of this office. In Order P-239, Commissioner Tom Wright stated:

> It is my opinion that to remove information originating from non-institutions from the jurisdiction of the Act would be to remove a significant amount of information from the right of public access, and would be contrary to the stated purposes and intent of the Act.

In discussing whether the Act can apply to a corporation, Inquiry Officer Anita Fineberg stated in Order P-1001:

> There are innumerable individuals, organizations, agencies and businesses that interact with government institutions on a daily basis. During the course of these interactions, information about these entities often comes into the possession of these institutions. In drafting its freedom of information legislation, the government determined that such information should be subject to the provisions of the Act, unless the exemptions contained in the statute applied. These exemptions are designed to not only protect the interests of government institutions, but also those of third parties (such as individuals, agencies and organizations) whose information may come into the custody or control of an institution as well. Based on the scheme of the Act, therefore, a third party, such

> as the Corporation, will have the opportunity to fully argue that its interests will be harmed by the release of such information.

I agree with these comments and note that, based on the scheme of the Act, the third parties have been given the opportunity to provide their representations on the applicability of the exemption in section 10(1) to the information pertaining to them, and they have done so.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a) and (c) provide:

> 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 the exemption in section 10(1) to apply, the third parties must provide evidence that each of these elements are present in the records at issue.

Type of Information

The third parties submit, and the Municipality acknowledges that the records contain commercial information. In reviewing the records, I find that they all contain information which is directly related to the third parties' proposals in response to the RFP. Moreover, I find that this information "relates to the buying, selling or exchange of merchandise or services" (Orders 47 and M-29), and thus qualifies as commercial information.

Supplied in Confidence

The third parties must demonstrate that the records were supplied to the Municipality in confidence, either explicitly or implicitly, and that this expectation of confidentiality was reasonably held.

Supplied

As I indicated above, the records are parts of proposals which were submitted by the third parties in response to an RFP. Accordingly, I am satisfied that they were supplied to the Municipality by the third parties.

In Confidence

The Municipality's position

In its representations, the Municipality states that its corporate practice is to provide public access to awarded contracts subject to possible exemptions to disclosure under the Act. The Municipality submits that this practice is widely known by third parties contracting with it and by the public generally. In this regard, the Municipality states that "[r]outine disclosure of awarded contracts, subject to [the Act], is a crucial component of open government in Ottawa-Carleton".

The Municipality indicates that its procedures regarding RFPs is contained in its Corporate Policy Manual which is adopted by by-law of Regional Council. The Municipality then goes on to outline these procedures generally and in respect of the subject RFP. In this regard, the Municipality states that while the information provided by bidders in submissions to RFP's are reviewed on a case-by-case basis, there is no presumption of confidentiality. Rather, in many cases, an RFP will explicitly state that documents submitted in response to the RFP "will not be considered confidential and may become public if awarded, **except if** the bidder explicitly informs the [Municipality] of a desire to consider certain parts of the submissions confidential".

The Municipality indicates that this was the case with respect to the subject RFP. Specifically, page 4, Part I, section 8 of the RFP contains the following paragraph:

> I/We understand that submissions in response to this proposal may become public information unless I/we specifically request certain parts of the submission to remain confidential and permission will be granted at the Program's discretion and will be subject to the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA).

This paragraph is followed by an acknowledgment, which in this case, was signed by an officer of each company. The Municipality notes that in the covering letter attached to its submission, Company A stated:

> We require that all information in this agreement be kept confidential, and that you would advise us when and if such information needs to become public. At that time, we will comply.

The Municipality states that it has interpreted this statement as an acceptance of the Municipality's policy of open awarded contracts by Company A. The Municipality indicates that Company B did not provide it with any request to keep certain parts of the submission confidential.

Accordingly, in the absence of an explicit request by the third parties that specific parts of their proposals be kept in confidence, the Municipality asserts that there is nothing in its practice or policy to create the assumption of confidentiality.

Company A's position

In its representations, Company A refers to its covering letter and submits that the proposal was submitted by it explicitly in confidence. The signing officer for the company states further:

> I did sign an agreement that came with the [RFP] to allow disclosure under the [Act], as it had to be signed in order to proceed with answering the required information. However, I did not intend to sign away the proprietary rights of my company in order to respond openly and truthfully about our policies and procedures. I signed with the understanding that the information could not be accessed or used by my competitors but by other municipal departments.

Company B's position

Company B refers to several "Certifications and Assurances" contained in the RFP to support its position that it had a reasonable and objective basis for believing that its proposal was submitted in confidence. For example, at page 3, paragraph 1, the proponents are required to give the following assurance:

> The responses to questions on the RFP document, have been determined independently, without consultation, communication or agreement with others for the purpose of restricting competition.

Without detailing the extensive representations of Company B on this point, I note that much of what the company is referring to relates to the integrity of the tendering process. In my view, this does not form a reasonable basis for an expectation that the proposals were submitted in confidence.

Company B also refers to the statement on page 4, Part I, section 8 of the RFP (quoted above) and argues that the obligations of the Municipality to apply the Act does not support a conclusion that information is not provided in confidence. Rather, Company B asserts that despite its statement that tendering documents may become public, disclosure by the Municipality is limited by the Act.

Company B submits that because of the nature of this RFP, which is based on the actual services provided rather than on costs, and because of the competitive nature of the companies providing these services, the Municipality has a duty to ensure that confidentiality of the proposals be protected.

Findings

I agree with Company B that reference to the Act in the statement on page 4 of the RFP does not mean that records are not provided in confidence, or that they will automatically be disclosed. In my view, this statement advises proponents that the information contained in their proposals will be made available to the public, subject to a clear expression to the contrary by individuals or

companies providing information in response to the RFP, and subject to the provisions of the Act.

Therefore, in order for the third parties to demonstrate that the information contained in the records was supplied "in confidence", there must be some evidence that they provided an indication that the records were submitted with an expectation that they be maintained in confidence. As I noted above, this expectation of confidentiality must be **reasonably** held.

In this regard, I find that the Municipality has clearly stated its intended treatment of the information contained in proposals submitted in response to the RFP (as noted above). I am also satisfied that the Municipality's policy and practices regarding awarded contracts are generally known in that community.

Both third parties were made aware of this policy in the RFP and acknowledged their understanding of its meaning. Company B did not request that any of its proposal be kept confidential at the time the proposal was submitted. In my view, any expectation it had regarding the Municipality's duty to maintain confidentiality was, therefore, not reasonable.

Although Company A indicated in its covering letter that the proposal was confidential, it did not provide any specifics as to which parts of the proposal were confidential and/or why. Given the very clear position of the Municipality on this issue, a general statement of confidentiality by the company is not sufficient to establish a reasonable expectation of confidentiality. Moreover, I find that the remaining portion of the paragraph in the covering letter contradicts this intention. Finally, I find the signing officer's view that information would only be shared with other municipal departments to have no reasonable basis. Accordingly, I find that any expectation held by Company A regarding confidentiality of its proposal was not reasonable.

In conclusion, I find that Company B's proposal was not supplied in confidence. Although the proposal submitted by Company A contained a statement that it was provided in confidence, I find that this expectation was not reasonable in the circumstances. As the second element of section 10(1) of the Act has not been met for the records at issue in this appeal, the section 10(1) exemption does not apply.

ORDER:

1. I uphold the Municipality's decision to disclose the records at issue to the requesters in all three appeals.

2. I order the Municipality to disclose the records at issue to Requesters A and B by sending them copies by **November 14, 1996** but not earlier than **November 11, 1996**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Municipality to provide me with a copy of the records which are disclosed to the requesters pursuant to Provision 2.

Original signed by: October 10, 1996
Laurel Cropley
Inquiry Officer