

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-013

December 8, 1997

ALBERTA PUBLIC WORKS, SUPPLY AND SERVICES

Review Number 1247

Background:

[1.] On November 21, 1996, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Public Works, Supply and Services (the "Public Body") for access to a proposal submitted to the Public Body from a third party contractor (the "Third Party").

[2.] In response to the Public Body's Request for Proposals regarding a specific contract for services, the Applicant, and two competitors, including the Third Party, had submitted proposals. The Third Party's proposal was accepted by the Public Body.

[3.] After consultation with the Third Party, the Public Body concurred with the Third Party's position that it would be harmed by disclosure. On December 20, 1996, the Public Body provided the records requested to the Applicant with much of the information severed. The Public Body claimed that the severed information fell within the exception to disclosure contained in section 15(1) of the Act.

[4.] On January 14, 1997, the Applicant requested that this Office review the decision of the Public Body. Mediation was not successful. Under section

66(4) of the Act, written representations were made by the Public Body and the Third Party at the written inquiry held on July 24, 1997.

Records:

[5.] There are four records at issue:

- Record #1: Letter dated August 9, 1996 to the Public Body from the Third Party enclosing Proposal (disclosed);
- Record #2: Proposal (8 pages)- Four paragraphs completely disclosed and remaining paragraphs either completely or partially severed;
- Record #3: Letter dated August 12, 1996 to the Public Body from the Third Party regarding greater detail on Proposal (2 pages) - Content of letter severed;
- Record #4: Letter dated August 12, 1996 to the Public Body from the Third Party regarding advertising schedule (2 pages)-Content of letter severed.

Issue: Do the Records fall under the exception in section 15(1)(a),(b),(c)(ii)(disclosure harmful to business interests of a third party)?

Third Party's Position:

[6.] The Third Party claimed the exception under section 15(1)(a)(i)(ii),(b),and (c)(ii) and stated that it did not wish to have its method of sale and set-up, its method and scope of advertising, and its cost structure for conducting a sale of this type to be known by anyone, especially competitors. It objected to the disclosure of Records #3 and #4 because it did not wish that its advertising and its business experience be disclosed.

[7.] In addition, the Third Party stated that it supplied the information to the Public Body on a confidential basis.

Public Body's Position:

[8.] On the basis of s. 15(1), the Public Body concurred with the Third Party's position that it would be harmed by disclosure and decided not to disclose the severed portions of the Records because the Applicant is a direct competitor of the Third Party

Burden of Proof:

[9.] Under section 67(1) of the Act, it is up to the Public Body to prove that the Applicant has no right of access to the Records.

Discussion:

[10.] Section 15(1) of the Act reads:

15(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly, or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[11.] First, I note that section 15(1) provides a mandatory exception. That is, if the head of a public body determines that the records fall within the exception, access must be refused.

[12.] For the record to qualify for exception under section 15(1)(a),(b),(c)(ii), the Public Body must satisfy the following three-part test:

[13.] Part 1: Does the information contain trade secrets or commercial, financial, labour relations, scientific or technical information of the Third Party? (Section 15(1)(a))

[14.] Part 2: Is the information supplied, explicitly or implicitly, in confidence? (Section 15(1)(b))

[15.] Part 3: Could disclosure be reasonably expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Third Party (Section 15(1)(c)(i))?

Part 1: Does the information contain trade secrets or commercial, financial, labour relations, scientific or technical information of the Third Party? (Section 15(1)(a))

[16.] The Public Body claimed that section 15(1)(a)(ii) applied to the severed information whereas the Third Party applied both sections 15(1)(a)(i)(trade secrets) and (ii). However, only one has to be proven to satisfy Part 1 of the test under section 15(1)(a). I will first deal with section 15(1)(a)(ii).

[17.] In Order 96-013 I stated that the category of “commercial information” in section 15(1)(a)(ii) includes “contract price” and information, “...which relates to the buying, selling, or exchange of merchandise or services...”

[18.] A review of the Records showed that most of the information severed falls within the category of “commercial” since the information is business information about the Third Party, such as its associations, past history, references, insurance policies held, bonding held or provided.

[19.] I also believe that the information contained in paragraphs 7.2.1 and 7.2.9 of Record #2 and the contents of Records #3 and #4, which describe how the Third Party proposes to organize its work relate to “the buying, selling or exchange of merchandise or services”. It is therefore commercial information.

[20.] In Order 96-018, I stated that “financial information” includes information regarding the monetary resources of the Third Party. The Third Party in paragraphs 6, 7.2.1, 7.2.2, and 7.2.12 of Record #2 describes insurance, past performance, estimated advertising costs and commission which the Third Party expected or proposed in respect of the sales involved. I find such information to be “financial information”.

[21.] Having reviewed all the information severed under section 15(1)(a)(ii), I find that both the Public Body and the Third Party have provided sufficient evidence to show that the information severed contains financial and commercial information.

[22.] Since I found that section 15(1)(a)(ii) has been satisfied, I do not need to deal with section 15(1)(a)(i)(trade secrets).

**Part 2: Is the information supplied, explicitly or implicitly, in confidence?
(Section 15(1)(b))**

[23.] Three factors in the evidence show that the information provided by the Third Party was supplied in confidence. First, paragraph 7.4 of the Public Body’s Request for Proposals states:

All information concerning business and financial affairs provided in the bidders Proposal is for exclusive use of the Minister and will be kept strictly confidential.

[24.] This is an explicit condition of confidentiality.

[25.] Second, paragraph 3.3 of the Public Body's Request for Proposals and paragraph 3 of the cover sheet accompanying the Request for Proposals, also require that the proposals be submitted in a sealed envelope. By imposing such a condition, confidentiality is implied.

[26.] Third, the Third Party's evidence was that it also considered the information to be supplied in confidence.

[27.] Based on the above evidence, I am satisfied that the information was therefore supplied on the condition that it would be kept confidential in accordance with section 15(1)(b).

Part 3: Could disclosure be reasonably expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Third Party?(Section 15(1)(c)(i))

[28.] The Public Body and the Third Party claimed that disclosure of the information could reasonably be expected to harm significantly the competitive position of the Third Party.

[29.] As to the harm test specifically under section 15(1)(c)(i), I refer to Order 96-003, in which I stated that "...[The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue." (*Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054 (Fed. T.D.)). In that Order, I also said that the public body must provide evidence of the following to prove significant harm to the third party's competitive position under section 15(1)(c)(i):

- (i) the connection between disclosure of the specific information and the harm which is alleged;
- (ii) how the harm constitutes "damage" or "detriment" to the matter; and
- (iii) whether there is a reasonable expectation that the harm will occur.

[30.] In response to the above test for determining "harm" the Public Body submitted:

1. There is a connection between the disclosure of the specific information and the harm alleged to the competitive position of the Third Party in that the

Records reveals the basis of the Third Party's successful proposal. A competitor (the Applicant) will obviously gain from knowing this information with respect to future proposals and in future competitions involving the Third Party.

2. The harm constitutes damage to the Third Party's competitive position because the industry in question is highly competitive. The Public Body calls for proposals from time to time and the parties involved compete on a regular basis for contracts. Providing access to the Records will enable a competitor to focus its own competing proposal in such a way as to better the Third Party in future proposals.
3. There is a reasonable expectation that the harm will occur because the Applicant is the Third Party's competitor.

[31.] I find that it is reasonable to expect that should the Third Party's successful proposal, as described in the Records, be disclosed to a competitor, the information would significantly harm the Third Party's competitive position with future contracts, including those with other parties. The Public Body has therefore met the evidentiary burden of proof to show that the criteria in section 15(1)(c)(i) has been met.

Conclusion:

[32.] Since the three criteria of section 15(1) have been met, the Public Body has properly withheld the Records.

Order:

[33.] Under section 68(2)(c) of the Act, I find that the Public Body correctly applied section 15(1) of the Act (disclosure harmful to business interests of a third party). Therefore, I uphold the head's decision to refuse access to the information severed in the Records.

Robert C. Clark
Information and Privacy Commissioner