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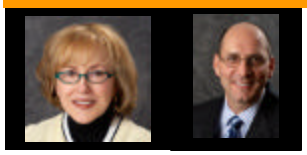
LEGAL NOTES



Battling
for
transparency

by Priscilla Platt and Paul Lalonde

Access to information legislation is having an effect on the commercial interests of third parties.

ACCESS TO INFORMATION legislation is not only expanding to cover an increasing number of entities, but is resulting in the disclosure of more information than ever before. At issue is the opposing interest of transparency in the public sector versus the need for confidentiality of commercial interests of third parties.

The entities covered by access to information legislation extend well beyond traditional government. For example, in 2006, Ontario added universities as institutions covered by the Ontario's *Freedom of Information and Protection of Privacy Act* (*FIPPA*). The federal government recently added a number of entities to those already covered by the *Access to Information Act* (*AIA*), including the CBC, Canada Post and other federally funded entities. Other provinces and territories in Canada have similar legislation.

Typically, in addition to government, municipalities, polices services, school boards, colleges, universities, hydro electric commissions and transit authorities are governed by access to information legislation.

All information provided by third parties to government or the broader public sector that is governed by this legislation, may be the target of requests for information including information from third parties engaged in public private partnerships, tenders, and those that provide information to government to obtain licences or grants. Corporations often do not appreciate that their information may be vulnerable to disclosure to competitors or other requesters once it is in the hands of an entity governed by access to information legislation.

Since this legislation has openness and transparency as its central purpose, government and the broader public sector receiving requests for information are only entitled to refuse disclosure based on narrow statutory exemptions. Not all the exemptions for commercially valuable information of third parties are identical, but most have the following hallmarks:

a. the information must be a certain type, namely, commercial, financial or trade secret;
b. the information must have been supplied by the third party in confidence; and
c. a harm to the competitive position of the third party could reasonably be assumed to result from the disclosure.

Before the exemption may be applied, each element of the test must be satisfied, which can be challenging and, increasingly, information about third parties is ordered disclosed.

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Information provided by third parties to government and the broader public sector procurement process has become fertile ground for access to information requests. In the push toward more open tender processes, there are suggestions that the winning and losing bids for contracts be posted on the Internet regardless of the kind of good or service being procured.

Increasingly, third parties are finding that information they provide to government is not "supplied" if it finds its way into a contract with the winning bidder. Since all parts of the test must be met, the failure to establish that information was "supplied" means that the information must be disclosed. This is particularly true in Ontario under *FIPPA* and its municipal counterpart *MFIPPA*. Under section 17 of *FIPPA* and section 10 of *MFIPPA*, the definition of "supplied" makes it difficult to keep the winning bidder's terms confidential once included in the contract.

As well, where the third party cannot or does not provide detailed and convincing evidence of the harm that may result from disclosure, the information may also be disclosed. Proof of harm is often challenging for third parties to establish, as third parties are required to provide clear and specific evidence of likely harm.[1]

With competitors eyeing tender documents as a valuable source for competitive intelligence, bidders struggle to respond to tenders demanding sensitive information. While bidders want to provide creative, comprehensive and winning solutions to government clients, they justifiably do not want their hard won expertise made available to their competitors.

With so much at stake, companies need to be sophisticated in the way they engage with government and the broader public sector. Companies need to know what information they can obtain from public sector institutions to maximize their own competitive advantage and to be defensive when giving information.

Individuals making access to information requests are increasingly savvy, thus more and more information held by public sector institutions is vulnerable to disclosure. This increases transparency in government operations but may undermine procurement processes where confidential, commercial information is needed from the supplier community in order to select the best solutions. The right balance will be hard to achieve but clearly government contracting authorities need to better educate access to information authorities about the legitimate need for confidentiality in some procurement process. Where finding solutions to complex government requirements calls for commercially sensitive or proprietary information to be shared with government purchasers, great care needs to be taken to ensure the protection of this information to avoid unanticipated disclosure orders.

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Note: This article is not intended to provide legal advice and readers are encouraged to consult with counsel concerning access to information issues that may impact them.

[1] Electronic Guide to *M/FIPPA*, www.accessprivacy.ca.