Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

COURT FILE NO.: T-1587-93
T-1588-93

B E T W E E N:

SOCIÉTÉ GAMMA INC.,

Applicant,

- and -

THE DEPARTMENT OF THE SECRETARY
OF STATE OF CANADA,

Respondent.

REASONS FOR ORDER

STRAYER J.

Relief Requested

These are two applications under section 44 of the *Access to Information Act*.[1] In both applications the Société Gamma Inc. which operates a translation service seeks orders preventing the respondent from disclosing information pertaining to contracts for translation services LSO-2-01445 (T-1588-93), and LSO-2-02172 (T-1587-93).

Facts

In April and May, 1993 the Department of the Secretary of State received requests from one or more individuals for information pertaining to certain contracts for translation services. The respondent

1 R.S.C. 1985, c.A-1.

Department identified certain records of this nature which had emanated from the applicant herein. The respondent Department advised the applicant that it was inclined to disclose those records in response to the request for access to information, and gave the applicant twenty days to object to disclosure as provided in the Act. The applicant did respond by a lengthy letter (essentially identical) in respect of each of the two records in question here stating its objections to their disclosure. The respondent replied indicating that it was prepared to sever from the records certain material (highlighted in copies of the records provided to the applicant) on the basis that those portions came within subsections 19(1) and 20(1)(b) of the *Access to Information Act*. The applicant then filed this application on June 28, 1993. Since that time the respondent has agreed to sever certain additional material from these records. I understand that the relevant records together with the deletions agreed to by the Secretary of State are attached to the affidavits of Ernest Aumand dated April 8, 1994 and filed in these applications.

In each case the record in question is a Proposal ("Proposition de services de traduction") submitted by the applicant in response to a Request for a Proposal issued by the Department of the Secretary of State. In effect the Request for a Proposal was a kind of call for tenders for independent contractors to offer to enter into a contract with the Department for a term of one year to provide a certain range of translation services. Provided with each Request for Proposal was a "grille d'évaluation", a kind of checklist of the information which should be provided by anyone submitting a proposal. The Proposals were then a kind of tender. The documents in question here were the Proposals submitted by the Société Gamma Inc. in respect of contract LSO-2-01445 which was awarded to the applicant and contract LSO-2-02172 which was not awarded to it. I understand that while the respondent has released or is prepared to release certain documents

pertaining to other contracts involving the applicant, the applicant takes no objection to those disclosures.

The applicant objects to the disclosure of any part of the two Proposals in question, invoking all grounds under subsection 20(1) of the Act. Subsection 20(1) provides as follows:

> 20.(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
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> (a) trade secrets of a third party;
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> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
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> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
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> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

The affidavit evidence in support of the applicant's claims is somewhat discursive and general and some of it seems to have been rendered redundant because of deletions which the respondent has already agreed to make. In general it is argued that the Proposal format developed by the applicant is its only "marketing tool". It has developed this format after a good deal of effort and expense, trial and error, interviewing of government officials, etc. As a result, the applicant says, its Proposals have been considered by the Department of the Secretary of State to be the best "as to their completeness, relevance and layout". Thus it is said that even the disclosure of the Table of Contents of the Proposal would be the disclosure of confidential information and harmful to the applicant. The applicant seeks to protect "all information relating to the very content and format of our . . . Proposals . . . ." More particularly, the nature of the harmful information which would be disclosed

by the release of the Proposals would include "the internal administration" of the office of the applicant, its "physical and human resources and the way they are organized and managed", "personnel management, tools and equipment . . .", and the unit price for each year of the duration of a contract, all of which would "educate our competitors at our expense and prejudice our competitive position". It is said that it is the format of its Proposal which gives the applicant its "competitive edge and . . . the well deserved success which we have had in marketing our services to Government".

The respondent has already agreed to delete much of the information concerning personnel or to remove their identification for the protection of their privacy. It has deleted details of the equipment possessed by the applicant, the capacity of its translators in terms of annual production and certain other details concerning its human resources. Proposed prices per word to be paid under the contract are deleted.

Conclusions

I will deal with each of the grounds for objecting to disclosure in the same order in which they appear in subsection 20(1).

(a) Trade Secrets

The applicant appears to assert that it is the whole of the Proposal which is a "trade secret".[2] There is unfortunately no authoritative jurisprudence on what is a "trade secret" for the purposes of the *Access to Information Act*. One can, I think, conclude that in the context of subsection 20(1) trade secrets must have a reasonably narrow interpretation since one

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2 See affidavit of Micheline Cloutier of June 25, 1993, para. 3.

would assume that they do not overlap the other categories: in particular, they can be contrasted to "commercial . . . confidential information supplied to a government institution . . . treated consistently in a confidential manner . . . " which is protected under paragraph (b). In respect of neither (a) nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely "confidential" and supplied to a government institution. I am of the view that a trade secret must be something, probably of a technical nature,[3] which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure. Clearly the whole of the Proposal of the applicant cannot be of that nature and the applicant has not identified any particular aspect of it which must be regarded as a trade secret. Also, for reasons which I will indicate below, I think that most of the Proposal format which the applicant strives to protect cannot be regarded as "secret" at all.

(b) Commercial Confidential Information Treated in a Confidential Manner

After a careful review of the expurgated versions of the Proposals which the respondent is prepared to disclose, I am unable to conclude that what remains is confidential. As has been well established, whether information is confidential must be decided objectively.[4] I do not believe that the material from the applicant's Proposals which the respondent intends to disclose can be regarded as confidential by its intrinsic nature. In the first place the format of the Proposals, to which the applicant attaches

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3 This impression is strengthened by the French version which uses the term "secrets industriels" as the equivalent of "trade secret".

4 See e.g. *Maislin Industries Ltd. v. Minister for Industry, Trade and Commerce* [1984] 1 F.C. 939 at 947; *C.F.L. v. Canada* (1989) 24 F.T.R. 62; and *Air Atonabee v. Minister of Transport* (1989) 27 F.T.R. 194 at 210 (F.C.T.D.).

such importance, is really with the exception of two paragraphs[5] a simple rendition of the items listed in the "grille d'évaluation", one of the documents distributed by the government as part of its request for proposals. As for the information provided within that format, some of it is clearly material already in the public domain such as the judgments of court included as samples of the applicant's work. General information about the applicant and the nature and quality of its work not otherwise exempted appears to me to be of a nature not inherently confidential. One must keep in mind that these Proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability. The onus as has been well established is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature. I accept that the applicant and, up to now, the respondent, have treated this material as confidential but that is only one part of the test prescribed in paragraph 20(1)(b) for confidentiality.

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5 1.7, 1.8.

(c) Information Whose Disclosure Could Prejudice Competitive Position

The exemptions in both paragraphs 20(1)(c) and (d) require the third party to show that the anticipated harm from disclosure "could reasonably be expected". The Court of Appeal has interpreted that to require a "reasonable expectation of probable harm".[6] In my view the applicant has not met the burden of proof on it in this respect. Many of the concerns expressed by it to the respondent including the possible harm to it of revealing information as to price, personnel, and equipment have already been met by the respondent agreeing to sever portions of the proposals dealing with these matters. Apart from that there is simply not enough evidence to show a reasonable expectation of probable harm to the applicant by disclosure of the remainder. The applicant has not demonstrated to me that its success is so precariously dependent on the form of its proposals instead of on its competitive advantage based on its past record and future capacity.

(d) Information Whose Disclosure Could Interfere With Contractual Negotiations

I take it that this ground must be distinguishable from prejudice to the *competitive* position of a third party such as the applicant, a matter which is dealt with in paragraph (c). That is, when paragraph 20(1)(d) refers to disclosure which could "interfere" with contractual negotiations it must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from disclosure. That being the case I am unable to perceive from the evidence and submissions of the claimant any demonstration as to how the disclosure of their Proposal format

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6 *Re Canada Packers Inc. and Minister of Agriculture* (1988) 53 D.L.R.(4th) 246 at 255 (F.C.A.).

could obstruct their future contractual negotiations with the respondent. Further, there is the same problem of causality as in paragraph (c), the language being the same in both and therefore its standard being the same: namely, "a reasonable expectation of probable harm". No such reasonable expectation of interference with its future negotiations has been proven. Therefore the applicant has not shown that the material in question comes within paragraph (d).

Disposition

These applications are therefore dismissed. I will direct that the expurgated Proposals not be disclosed until 30 days from this order, nor, if an appeal should be taken, until final disposition of that appeal. Until such disclosure the copies of the Proposals in the Court are to be kept under seal.

Ottawa, Ontario
April 27, 1994

Original signed by
B. L. Strayer

Judge

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.:	T-1587-93, T-1588-93
STYLE OF CAUSE:	Société Gamma Inc. The Department of the Secretary of State of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 18, 1994

REASONS FOR ORDER OF Strayer J.

DATED: April 27, 1994

APPEARANCES:

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