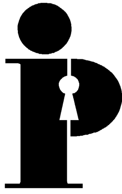

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1816

Appeal PA-990040-1

Ministry of Citizenship, Culture and Recreation

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BACKGROUND:

The Ontario Aboriginal Economic Development Program (OAEDP) provides funding for community-based business development. In 1998, the Ministry of Citizenship, Culture and Recreation (the Ministry) initiated a competitive process for the selection of an administrator of the 1998/1999 OAEDP. In doing so, the Ministry circulated a "Notice of Competitive Application Process" to aboriginal organizations in Ontario and subsequently sent an application package to all interested organizations. Five organizations submitted applications for this initiative.

The selection process for the OAEDP Administrator consisted of several stages, and included the review of written material and the conduct of private interviews with each applicant by a five member panel consisting of both Ministry staff and aboriginal representatives, the evaluation and assessment of the results of the review and interview process by an outside consultant and ultimately a recommendation made by the interview panel regarding the proposed candidate.

The grant for this initiative extends for a 16-month period, and will thus end in 2000. The Ministry expects that there will be a competitive process for the years 2000/2001.

NATURE OF THE APPEAL:

The Ministry received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to certain records relating to the 1998/99 OAEDP Administrator application process. The requester was an unsuccessful candidate in this process.

Pursuant to section 28 of the Act, the Ministry notified seven third parties whose interests might be affected (the affected parties) by the request. Of the affected parties which were notified by the Ministry, four were other candidates and three were panel members of the selection committee. Of the four candidates, three responded but objected to disclosure, and the remaining candidate did not respond. Of the three panel members, one responded to the Ministry and consented to the disclosure of any information relating to him. The other two panel members did not respond.

The Ministry then issued its decision letter to the requester, granting partial access to the responsive records. The Ministry denied access to the remaining records or parts of records pursuant to sections 17 (third party information) and 21 (invasion of privacy) of the Act. The Ministry also provided the requester with an index describing the records and identifying the exemptions claimed for each.

The requester (now the appellant) appealed the Ministry's decision. The appellant's letter of appeal also raised a number of issues concerning the adequacy of the Ministry's decision letter.

This appeal underwent extensive mediation. The following outlines the issues raised, and results of the Mediator's attempts to resolve all or some of the issues:

- The Ministry clarified that with respect to the section 17 exemption, it is relying specifically on sections 17(1)(a), (b) and (c) of the Act;

- The Mediator contacted the affected parties in order to determine if they would consent to the disclosure of any of the records which remain at issue in this appeal;

  One of the affected parties, a candidate, consented to the disclosure of its interview notes and evaluation scoring, subject to the removal of its name and the names of the individuals who were interviewed, from these records. The Ministry, however, has not yet confirmed whether it will be disclosing the relevant portions of the interview notes to the appellant;

  None of the other affected parties consented to the disclosure of any of the records which relate to them;

- The Ministry explained that even though one of the panellists, who was not a Ministry employee at the time of the selection process, consented to the disclosure of any information which relates to him within the records at issue, the Ministry is not agreeable to disclosing the name of this panellist as it would help the appellant to identify the records which relate to the other two panellists who were not Ministry employees. The Ministry took a similar position with respect to the panellists who were Ministry employees at the time of the selection process. In this respect, the Ministry clarified that it is not taking the position that the records contain any personal information of the two panellists who were Ministry employees. However, the Ministry takes the position that disclosing the names of these panellists would help the appellant to identify the records which relate to the panellists who were not Ministry employees;

- During mediation, the Ministry sent the appellant an amended index of records, wherein it clarified that it is prepared to disclose additional pages of records, either in whole or in part;

- The appellant agreed not to pursue access to certain records/information at issue in this appeal. The Ministry also clarified its position with respect to some of the records at issue. The particulars are outlined below under the heading "Records";

- Finally, the appellant raised the possible application of the "public interest override" in section 23 of the Act.

I sent a Notice of Inquiry to the appellant, the Ministry and eight affected parties, including the other four candidates, two of the panel members and the two parties who provided reference checks for the appellant and the successful candidate. Representations were received from the Ministry and four affected parties, specifically, three of the four candidates which were notified by this office and the party who provided a reference check for the appellant. All four affected parties objected to the disclosure of any information pertaining to them.

As I indicated above, one of the candidates consented to disclosure of some information pertaining to it during mediation. However, in its representations, this candidate withdrew its consent. I note that during the processing of this request, the board for this candidate was in transition. It appears that once the new board was in place and it had an opportunity to fully consider the matter, it viewed the records differently. In the circumstances, I accept the withdrawal of consent and will consider whether the exemptions in sections 17 and/or 21 apply to this information.

One affected party raised the possible application of the discretionary exemption in section 15 (relations with other governments). This affected party relies on Interim Order P-1406 as the basis for its position that it is an agency of a First Nations "government" thereby attracting the protection afforded by section 15 of the Act. I will deal with this argument as a preliminary issue in this appeal.

RECORDS:

The records which were identified by the Ministry as responsive to the request consisted of the following:

- Records 1 - 4 - Proposal Submissions;
- Record 5 - Blank copies of: Individual Application Assessment, Applicant Evaluation Record, Evaluation Guidelines, Evaluation Weighting Factors, Interview Questions;
- Records 6 - 10 - Interview Notes from five panellists;
- Record 11 - Reference Check Reports; and
- Record 12 - Report of Procurement Consultant with Applicant Evaluation Records attached

As a result of mediation, the records at issue remain as follows:

Records 1, 2, 3 and 4 - Proposal Submissions

The appellant agreed that it is not pursuing access to the financial statements or the resumes which were included with each of the submission proposals. Accordingly, these records are no longer at issue in this appeal. The appellant is still pursuing access to **all** other information contained in these documents, including the financial budget information relating to the administration of the OAEDP. The Ministry continues to rely on sections 17 and 21 of the Act to withhold the remaining information at issue.

Record 5 - Blank copies of: Individual Application Assessment, Applicant Evaluation Record, Evaluation Guidelines, Evaluation Weighting Factors, Interview Questions

In its decision to the appellant, the Ministry granted access to these records in their entirety. In mediation, the appellant also indicated that it is not interested in these records. Accordingly, Record 5 is not at issue in this appeal.

Records 6 - 10 - Interview notes of each panellist relating to the five candidates

Interview notes relating to the appellant

With respect to the interview notes which relate to the appellant, the Ministry clarified that it is prepared to disclose all such notes, with the exception of the names of the panellists. The Ministry confirmed that it is relying on section 21 of the Act to withhold this information.

Interview notes relating to the winning candidate

With respect to the interview notes which relate to the winning candidate, the appellant agreed that it is not pursuing access to any names of individuals which appear in any of these records, other than the names of the panellists. The appellant confirmed that it is pursuing access to all other information within these records, including the winning candidate's name. The Ministry is relying on sections 17 and 21 of the Act to withhold these records.

Interview notes relating to the other three candidates

With respect to the interview notes which relate to the other three candidates, the appellant agreed that it is not pursuing access to the names of any of the candidates. The appellant also agreed that it is not pursuing access to any names of individuals which appear in any of these records, other than the names of the panellists. The appellant confirmed that it is pursuing access to all other information within these records. The Ministry is relying on sections 17 and 21 of the Act to withhold these records.

Record 11 - Reference Check Reports

The appellant has indicated that it is only pursuing access to the reference check report relating to the appellant, as well as the one relating to the winning candidate. Accordingly, the remaining three reference check reports are no longer at issue in this appeal.

With respect to the reference check report which relates to the appellant, the Ministry clarified that it is not relying on section 17 of the Act to withhold any of the information within this record. The Ministry continues, however, to rely on section 21 of the Act to withhold this record in its entirety.

However, section 17 is a mandatory exemption which, in the circumstances, I believe I must consider. In my view, the party providing the reference for the appellant should continue to be given the opportunity to make submissions on the application of section 17 to this information.

With respect to the reference check report which relates to the winning candidate, the Ministry continues to rely on both sections 17 and 21 of the Act to withhold this record in its entirety.

Record 12 - Report of Procurement Consultant with Applicant Evaluation Records attached

In its decision to the appellant, the Ministry granted partial access to this record. During mediation, the Ministry clarified that the only information which it is withholding from this document is the names of the candidates, other than the appellant's, as well as the names, initials and signatures of the panellists.

In mediation, the appellant agreed not to pursue access to the signatures of the panellists which appear at the bottom of some of the pages in this document. Also, the Ministry confirmed that it is relying on section 17 of the Act to withhold the names of the candidates and section 21 of the Act to withhold the names and initials of the panellists.

PRELIMINARY MATTER:

RAISING OF A DISCRETIONARY EXEMPTION BY AN AFFECTED PARTY

As I indicated above, one affected party raised the possible application of the discretionary exemption in section 15 (relations with other governments). The affected party relies on Interim Order P-1406 as the basis for its position that it is an agency of a First Nations "government" thereby attracting the protection afforded by section 15 of the Act.

In my view, this submission relates to the issue of whether an affected party may raise a discretionary exemption when it was not claimed by the institution which received the request for access to information.

In commenting on this issue, former Adjudicator Anita Fineberg stated in Order P-1137:

> The Act includes a number of discretionary exemptions within sections 13 to 22 which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.
>
> The Act also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) and 17 of the Act respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.
>
> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution.

> Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the Act.

I agree with the approach taken by former Adjudicator Fineberg. In the current appeal, the Ministry has claimed the application of the mandatory exemptions provided by sections 17(1) and 21(1) of the Act.

Moreover, I note that although the affected party relies on Interim Order P-1406 to support its argument that section 15 applies, this order does not, in fact, stand for that proposition. The basis of the findings in Interim Order P-1406 (and Reconsideration Order R-970003, a reconsideration of P-1406) is the tripartite negotiations involving the province of Ontario, the federal government and a First Nation. In that Order, Assistant Commissioner Mitchinson specifically declined to make a finding on whether a First Nation is a "government" for the purpose of section 15 of the Act, stating:

> In the Notice of Inquiry I requested representations on the issue of whether a First Nation is a government. However, in view of my finding above, it is not necessary for me to make a determination on this issue.

Other than asserting a "governmental" interest in the records, the affected party has not provided any representations on the issue of whether a First Nation is a government. In addition, despite protracted mediation discussions, this issue was never raised before now. I find that the delay that would be caused by seeking further representations on this issue would be excessive.

The affected party has not provided any information that would render this one of those "unusual cases". In my view, the interests of all the affected parties have been taken into account in the Ministry's decision and they will, of course, also be considered in the ultimate disposition in this order. Accordingly, I will not consider the application of the discretionary exemption sought to be applied by the affected party.

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined in section 2(1) of the Act as:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

Selection panel

The Ministry claims that the names of the aboriginal representatives who sat on the selection panel qualify as personal information when this information is associated with the evaluations, grades or comments made by them.

The Ministry acknowledges that the Ministry members of this panel were performing this function in their professional capacity and does not argue that their names in this context constitute personal information. The Ministry also acknowledges that one of the aboriginal representatives consented to the disclosure of his or her identity. The Ministry takes the position, however, that disclosure of the names of these individuals could reasonably be expected to allow the appellant to infer the names of the other aboriginal representatives.

It has been established by this office in previous orders that information provided by individuals in, and as part of, their professional capacities does not qualify as personal information (see Reconsideration Order R-980015 for a complete discussion on this issue). In Order P-773, I dealt with a claim by the (then) Ministry of Health that the names of individuals who composed an interview panel for a competition qualified as their personal information. I commented on this issue as follows:

> The Ministry submits that the records at issue contain the personal information of the three individuals who composed the interview panel for this competition. Although the identity of the interviewers is known to the appellant, the connection between each interviewer and the

> specific score given by that individual is not known. With respect to Records 40, 41 and 42, the Ministry argues that the appellant, as an internal candidate, is familiar with the handwriting of the interviewers. As these records contain the handwritten notes of the interviewers, the appellant would be able to identify them should the notes be disclosed.
>
> The appellant argues that the members of the hiring panel were acting in their professional capacity, and that the information at issue was compiled by them or relates to them as part of their employment duties.
>
> It has been established in a number of previous orders, decided under both the provincial Act and the Municipal Freedom of Information and Protection of Privacy Act, that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not personal information (Orders P-326, P-470 and P-715).
>
> I have reviewed the records at issue. I agree with the appellant that the identities of the interviewers in Record 72 and their assessments of the suitability of the appellant for employment in Records 40, 41 and 42 were provided in their professional capacities. The information at issue in these four records, therefore, does not qualify as the personal information of the interviewers.

The circumstances in the current appeal are different, however, in that all of the panel members in Order P-773 were Ministry employees. In this case, only two of the panel members are Ministry employees. The Ministry states that the two aboriginal representatives who did not consent to disclosure were recruited volunteers who received no remuneration except for compensation for expenses incurred. The Ministry submits that volunteer interviewers serve a valuable purpose by ensuring aboriginal representation in the decision-making process. The Ministry notes that although these two individuals did not reply to its section 28 notice in writing, they both contacted the Ministry and verbally expressed their concerns about disclosure.

In Order P-235, former Commissioner Tom Wright considered whether the names of individuals who reviewed drug products for the (then) Ministry of Health qualified as personal information. In this regard, he described the circumstances under which the information was obtained:

> All drug product manufacturers are eligible to make submissions for the listing of their drug products in the Formulary/CDI. Documentation provided by the manufacturer, which includes results of tests and/or studies of a particular drug product, is reviewed by a member of the Drug Quality and Therapeutics Committee (the "DQTC") and/or by a consultant retained for that purpose by the Drug Programs Branch. The reviewer analyzes the data, typically prepared by a research laboratory (whether independent or that of the manufacturer) and the reviewer then provides a report based on his or her analysis of the data. Reports prepared by these reviewers are considered by a sub-committee of the DQTC which then makes a recommendation to the DQTC to accept or reject a drug product for listing in the Formulary/CDI. The manufacturer's submissions and the reviewers' reports are considered by both the committee and the sub-committee.

> In this matter, the appellant has had full disclosure of the contents of the reports of both reviewers but not of their names, addresses, titles, positions or signatures.

After considering these circumstances, he found:

> Subparagraph (h) provides that a name is personal information where it appears with other personal information or where the disclosure of the name would reveal other personal information about the individual. In my view, in the circumstances of this appeal, the disclosure of the names of the individuals would reveal other personal information relating to the individuals because it would reveal that a particular person reviewed a particular drug product. I therefore conclude that the information at issue is personal information and that the personal information is that of individuals other than the appellant.

The reasoning in Order P-235 has been applied in a number of subsequent decisions of this office (Orders P-284, P-291, P-611 and P-669). As I indicated above, in the current appeal, the panellists consist of volunteer members and Ministry personnel. The appellant is aware of the identities of the panellists as they were introduced to each candidate at the time of their interviews. The appellant has also received evaluations concerning itself which were made by each of the panellists. The only information the appellant is seeking in Records 6 - 10 pertaining to itself is information which would connect each panellist to a particular evaluation. The appellant is also seeking this information in other records along with additional information. In my view, the principles underlying the former Commissioner's findings in Order P-235 are equally applicable to all of the information which is being requested in this context. Further, although one panellist consented and two are Ministry personnel, to identify which evaluations they gave would have the effect of disclosing the identities of the two panellists who provided the remaining evaluations. Accordingly, I find that the names of all of the panellists on Records 6 - 10 and 12 qualify as personal information of individuals other than the appellant.

The appellant is one of the unsuccessful candidates. I find that any information in the records pertaining to this organization or any of its staff relate to these individuals in their professional capacity and does not qualify as their personal information.

Candidates and Referees

One affected party objects to the disclosure of any information in its proposal which would serve to identify any individual associated with it. In particular, this affected party refers to the section of its proposal entitled "Skills Profile" and submits that this section contains personal information of identifiable individuals.

A second affected party submits that disclosure of any part of its proposal would disclose the personal information of the individuals referred to in it.

Records 1 - 4 (Proposals)

The vast majority of the information in these four records pertains to the organizations; their role, structure, funding, and so on. Interspersed in them are references to individual staff. These individuals are referred to in their professional or employment capacity. Some of the documents which contain specific information about individuals in their capacity as Directors of the organizations are contained on information recorded under the Corporations Information Act and would be publicly available. As I indicated above, information about an individual in his or her professional or employment capacity does not qualify as personal information. That being said, however, I note that some of this information contains references to the home addresses of these individuals. I find that this information qualifies as their personal information.

There are, however, some references in the records (Record 1, page 6; Record 2, page 7 and Record 3, pages 13 and 14) which contain the type of information that would be found on a resume, and in fact, appear to be simply a reiteration of the information contained in the resumes which are attached to the proposals. The appellant has indicated that it is not interested in pursuing access to the resumes. In my view, the above noted information would fall into this category of information and to be consistent, I find that these references are also not at issue in this appeal.

Record 2, page 13 and Record 3, pages 31 and 32 contain specific references to personal matters concerning named individuals, including salary information. I find that this information qualifies as the personal information of the individuals to whom the information relates.

The Ministry has identified certain information in the proposed budget for one organization as falling within the definition of personal information. I do not agree with this characterization. The salary information which is contained on this page of Record 4 refers to "proposed" salary details. However, the figures do not relate to any identifiable individual as this forms part of the proposal of an unsuccessful candidate. As such, there is no reasonable prospect that any individual would subsequently be hired to fill these positions. Accordingly, I find that the portions of Record 4 which are at issue do not contain any personal information.

None of these records contain the personal information of the appellant or its employees.

Records 6 - 10 (Interview notes)

As noted above, the appellant does not wish to pursue access to the names of any individual referred to in these records, other than the names of the panellists. Having reviewed these records, I find that there is nothing in them that would reveal the identity of any individual. Even if an individual could be identified through something that was said, I find that the information in these records was provided by the individuals in their professional capacity, speaking on behalf of the organizations they are representing in this process and any comments made or views given are those of the organization.

Record 11 (Reference checks)

The information in the reference checks was provided by individuals in their professional or employment capacity as representatives of other organizations who have had dealings with the appellant and the successful candidate. As such, I find that the information in these records is not "about" them personally, but rather, reflect their positions in and the views of the organizations that they represent.

The reference check information concerns the organizations themselves and does not focus on any particular individual. Therefore, I find that this record does not contain any personal information.

Record 12 (Report of Procurement Consultant)

This record contains the numerical assessments of each organization as recorded by each panellist. Apart from the names of the panellists, which I addressed above, this record does not contain any personal information.

INVASION OF PRIVACY

I found above that the names of the two panellists who did not consent to disclosure in Records 6 - 10 and 12 qualify as their personal information. I also found that disclosure of the names of the other panellists, including one volunteer panellist who consented to the disclosure of his/her identity, would reveal the identity of the first two panellists. Further, I found that certain information on Record 2, page 13 and Record 3, pages 31 and 32 qualify as the personal information of certain named individuals as they contain specific references to personal matters concerning these individuals, including salary information. In addition, I found that the home addresses of the Board of Directors qualify as the personal information of these identifiable individuals. Finally, I found that none of the records contain the personal information of the appellant or any individual employed by it.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Two of these circumstances are found in sections 21(1)(a) and (f), which read:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> ...
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(a)

One of the affected parties has consented to the disclosure of his or her identity to the appellant in connection with the interview evaluations. Previous orders of this office have found that although an individual consents to the disclosure of his or her personal information, where that information is intertwined with the personal information of another individual, it must be considered under section 21(1)(f) (Orders P-998, P-1414, P-1157 and MO-1244, for example). In my view, the reasoning behind this approach is that the consent of one individual to disclosure cannot vitiate the lack of consent of another. To take any

other approach would violate one of the fundamental purposes of the Act as set out in section 1 which is "to protect the privacy of individuals with respect to personal information about themselves held by institutions ...".

I agree with this approach and find that it is similarly applicable in the current appeal. In this case, the information is not intertwined. However, disclosure of the consenting party's identity, along with the identities of the Ministry personnel on the records at issue would effectively identify the evaluations that were scored by the two parties resisting disclosure. Therefore, I cannot conclude that section 21(1)(a) applies to permit disclosure in these circumstances and will consider the disclosure of the names of the panellists under section 21(1)(f).

Section 21(1)(f)

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Ministry relies on the presumption in section 21(3)(f) to exempt portions of the information in the records and claims that the factors in sections 21(2)(e) and (i) are relevant with respect to the remaining personal information in the records.

In its letter of appeal, the appellant refers to the purposes of the Act and states that the Act should not be used to protect institutions from disclosing embarrassing procurement processes and decisions. In this regard, the appellant cites sections 21(2)(a) and (c) as being relevant in the circumstances of this appeal.

The sections of the Act referred to above provide:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

Personal information of the Board of Directors

Both the Business Corporations Act and the Corporations Information Act require the names and residential addresses of the incorporators and directors of every corporation to be provided and made available to the public (see: Order MO-1309 for the specific disclosure provisions under these two Acts). Because this information is considered to be public for the purposes of incorporation, and would be available to anyone reviewing the articles of incorporation or other documents filed under these Acts, I find that its disclosure would not constitute an unjustified invasion of personal privacy in the circumstances of this appeal (Order MO-1309).

Personal information of individuals employed by the other candidates (contained in Records 2 and 3)

It is apparent from the appellant's communications with this office that he is primarily concerned about the selection process itself and the involvement of the panellists in it. While I accept that some of the general information in the records at issue may have some relevance to these objectives, in my view, the personal information contained in Records 2 and 3 does not. In reviewing the types of questions asked by the selection committee and the Ministry's requirements with respect to the OAEDP, I find that the personal information at issue had minimal or no relevance in the selection process. I find that the appellant has failed to draw a connection between sections 21(2)(a) and (c) and the particular personal information at issue in this discussion. Accordingly, sections 21(2)(a) and (c) are not relevant with respect to this information.

Moreover, I find that there are no other factors or considerations which weigh in favour of disclosure. As I indicated above, some of the references in these records pertain to actual salary information of named and/or identifiable individuals. This information falls squarely within the presumption in section 21(3)(f) of the Act.

None of the information at issue in these two records falls under section 21(4). As some of the information falls within the presumption in section 21(3)(f) and there are no factors weighing in favour of the disclosure

of the other personal information in Records 2 and 3, I find that the personal information is exempt under section 21(1)(f) of the Act.

Selection panel

The appellant's primary concern appears to be that the selection panel was not pre-screened for conflict and that it is in a conflict situation with two aboriginal members of the selection panel. The appellant believes, in part, that the selection process has been tainted as a result.

The Ministry notes that the appellant has been granted access to the notes relating to it (in Records 6 - 10) and has been granted access to all of Record 12 with the exception of the names of the interview panel as they are connected to the particular scores given to each candidate and the names of the other candidates. The Ministry takes the position that disclosure of this information without the names of the panellists allows the appellant to fully scrutinize its results. The Ministry points out further that the appellant knows the identities of the individual panellists. The Ministry submits that in seeking to tie particular results to particular interviewers the appellant is going beyond what is required to satisfy itself as to the fairness of the process, or to appreciate the reasons for its failure to win the competition.

The Ministry expresses concern that the appellant's purpose in seeking information which would link the panellists to the particular results is to impugn their credibility in order to discredit the selection process (section 21(2)(i)). The Ministry reiterates that the volunteer interviewers serve a valuable purpose by ensuring aboriginal representation in the decision-making process. The Ministry submits that it would be patently unfair to subject them to what it considers to be a "reasonably foreseeable harm" (section 21(2)(e)). The Ministry submits further that the appellant is not denied the opportunity to challenge either the fairness or results of the selection process without access to this information.

The appellant is already aware of the identities of the panellists. Further, it has already been provided witha considerable amount of information relating to itself in terms of the assessments that were made by the panellists individually and as a group. As a result of this order, the appellant will obtain further information as discussed below. In my view, the information which the appellant already has is sufficient to permit it to challenge the selection process if that is its intention and the disclosure of the names of the panellists in the manner requested would neither be desirable for the purpose of subjecting the activities of the Ministry to public scrutiny (section 21(2)(a)), or promote informed choice in the purchase of goods and services (section 21(2)(c)). Therefore, I find that neither of these factors are relevant in the circumstances of this appeal. In considering the totality of the evidence in this appeal, I conclude that there are no factors which weigh in favour of disclosure of the identities of the panellists which connects them to a particular score.

I accept the Ministry's position that disclosure of the selection panel's identities in connection with the scores they gave could reasonably be expected to result in damage to their reputations (section 21(2)(i)) or exposure to some other harm to their positions in the aboriginal community (section 21(2)(e)). In the circumstances, including the voluntary nature of their involvement and the other avenues available to the appellant to challenge the process itself, any harm to their reputation or otherwise would be unfair. I find these factors to be relevant in determining whether disclosure of the identities of the selection panel in the manner requested would constitute an unjustified invasion of privacy.

After considering all of the arguments presented, I find that disclosure of the identities of the panellists as requested would constitute an unjustified invasion of personal privacy and this information is therefore exempt under section 21(1)(f). I find that none of this information falls under section 21(4).

The appellant has raised the possible application of section 23 to all of the personal information which I have found to be exempt under section 21(1) and I will consider it below.

THIRD PARTY INFORMATION

Section 17(1) of the Act reads, in part:

> 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, where 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (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 17(1)(a), (b) 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), (b) or (c) of section 17(1) will occur [Orders 36, M-29, M-37, P-373].

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 17(1) would occur if the information was disclosed [Orders 36, P-373].

This three-part test and the 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. In its decision upholding Order P-373, 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.)].

The analysis set out below follows the Commissioner's traditional tests considered and found reasonable by the Court of Appeal for Ontario in Ontario (Workers' Compensation Board) cited above.

Part One: Type of Information

The Ministry and one affected party submit that the records contain commercial and financial information. Two other affected parties state or imply that the records contain commercial, financial and labour relations information and one of these affected parties also believes that the records contain technical information.

In particular, the Ministry makes the following submissions with respect to the records:

(a) Records 1 - 4 are submissions containing commercial information in the form of a detailed comprehensive and unique plan for the proposed delivery of services by each applicant. Each submission includes detailed financial information in the form of financial budget projections for the delivery of services including projected expenditures for salaries and benefits, office costs, support for Project Review Committee, technical assessments and miscellaneous costs;

(b) Records 6 - 10 contain commercial and/or financial information provided by way of explanation or elaboration of the original application materials;

(c) Record 11, being reference check reports, contains evaluative information about the quality of services provided by the subject and their estimated capacity to continue to provide such services in the future; and

(d) Record 12, being the report of the procurement consultant with applicant evaluations attached, can be similarly characterised.

While the affected parties' representations tend to support or add to the Ministry's submissions regarding Records 1 - 4, 6 - 10 and 11, none of them address Record 12 with any particularity.

Technical Information

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order P-454].

The records at issue all pertain to proposals relating to community based business development. There is no information in them that is remotely connected to the applied sciences, mechanical arts or any other similarly characterised field. Therefore, I find that they do not contain technical information as defined by this office.

Labour Relations Information

In Order P-653, former Adjudicator Holly Big Canoe defined "labour relations information" as information concerning the **collective** relationship between an employer and its employees.

Although Records 1 - 4 and 6 - 10 refer to employees and the work they perform, none of this information, nor the information in any of the other records at issue is of the type contemplated by the above definition. Therefore, I find that none of the information in the records constitutes labour relations information as defined by this office.

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].

Small portions of Records 1 - 4 and 6 - 10 contain information relating to financial budget projections for the delivery of services and I find that this qualifies as financial information.

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 [P-493]. Commercial information has been found to include such things as price lists, supplier and customer lists, market research surveys, economic feasibility studies, tender proposals, bid bond information and negotiation status reports [Orders 16, 41, 47, 68, 166, P-179, P-228].

Proposals, interview notes and reference check reports

The proposals, interview notes and reference check reports may be described as "commercial" information, in the sense that they relate directly to the awarding of a commercial contract, and thus relate to the buying, selling or exchange of services. As a result, the information in Records 1 - 4, 6 - 10 and 11 meets part one of the three-part test.

Names of candidates

Record 12 is a Report of Procurement Consultant with Applicant Evaluation Records attached. The record contains a summary of the scores given to each candidate. The majority of this record was disclosed to the appellant. The only information at issue in this discussion is the identities of the candidates which are connected in this case to the scores that were given for each. The Ministry and affected parties take the position that the identities of the candidates constitute commercial information.

In Order P-373, Assistant Commissioner Tom Mitchinson considered whether the names and addresses of commercial entities qualified as "commercial information". In this case, the names and addresses were of commercial employers who had been assessed penalties under a government program in which the Workers' Compensation Board identifies employers who have particularly poor accident records for their rate group in terms of accident cost, accident frequency and/or accident severity. Assistant Commissioner Mitchinson came to the following conclusions regarding this information:

> Records 4 and 5 contain only the names and addresses of the employers who have been assessed the highest penalties under the WORKWELL and SECTION 91(7) programs. These records do not contain the amounts of surcharge, payroll, or the nature and volume of accidents; nor would disclosure of the names and addresses reveal this information. In my view, disclosure of Records 4 and 5 would not permit the drawing of accurate inferences as to any information supplied to the Board on the aforementioned forms, with the exception of the names and addresses of the listed employers.
>
> Disclosure of Records 4 and 5 would reveal that the employers on the list were the subject of levies or fines under the WCA in 1990. In addition, because the list is arranged in descending order based on the amount of penalty, disclosure would also reveal the rank of an employer relative to others on the list with respect to amounts of surcharges for 1990. However, in my view, it is not accurate to characterize the names and addresses contained

> in Records 4 and 5 as commercial, financial or labour relations information, or a trade secret, as those terms are used in section 17(1) of the Act.

As I indicated above, the decision in Order P-373 was upheld by the Ontario Court of Appeal in Ontario (Workers' Compensation Board) cited above.

In Order P-1574, Assistant Commissioner Mitchinson again considered whether the name of a commercial affected party qualified as "commercial information". He stated:

> In Order 16, former Commissioner Sidney B. Linden addressed the issue of the name of a third party in the following manner:
>
> > The release of the names of third party appellants is something that should be decided on a case by case basis. Ordinarily, releasing these names would not be a problem. However, if by releasing these names, the very information at issue in the appeal is released, then obviously, the names cannot be released.
>
> While the current appeal does not involve a third party appellant, the same principle applies to an affected third party, such as the Facility in this appeal.
>
> ...
>
> Two previous orders of this office have found that the mere knowledge of the identity of an affected party was sufficient to categorize the information as "commercial" (Orders 68 and 76). In my view, both of these cases are distinguishable from the records at issue in this appeal. In Order 68, the request involved the names of drug manufacturers applying to have products added to the Ministry of Health's Drug Benefit Formulary; and in Order 76 the requester sought access to a listing of dairy producers names and addresses to prepare a customer list for the sale of advertising space in its magazine. In both cases, the names themselves related directly to the "buying, selling or exchange of merchandise or services" and thereby constituted "commercial" information. In my view, the identity of the Facility in this case does not fit this category. The records themselves have already been disclosed, and I find that the identity of the Facility, which is the only undisclosed information, is in itself not a piece of "commercial" information for the purposes of section 17(1).

Assistant Commissioner Mitchinson subsequently applied this reasoning to the names of service providers for government funded programs (Order PO-1802).

This line of orders can be contrasted with Order MO-1237 in which Senior Adjudicator David Goodis considered whether the names of contractors, when associated with the scores given to each one which had already been disclosed, qualified as "commercial information". Earlier in this order, he determined that disclosure of the names of the contractors would reveal the scores assigned to each one with respect to each of the criteria under which they were evaluated. Senior Adjudicator Goodis came to the following conclusion:

> The number of submissions received, the various scores associated with some of the criteria as well as the scores assigned to the contractors with respect to some of the criteria may be described as "commercial" information, in the sense that it relates directly to the awarding of a commercial contract, and thus relates to the buying, selling or exchange of services. As a result, all of the information in question meets part one of the three part test.

In my view, the fact that a commercial entity seeks to do business with the government, in and of itself is not sufficient to bring the information within the definition of "commercial" information as defined in orders of this office. In the current appeal, however, the candidates names are linked with evaluative information relating to their proposals. In particular, the candidates' names are located in two formats on Record 12. The first is a list of the candidates associated with the final score for each one. The scores have been disclosed to the appellant. The second place the names of the candidates is found on Record 12 is in connection with the scores that were given with respect to the different criteria considered by the selection panel. This information has also been disclosed to the appellant.

Record 12 does not contain the specific information from the proposals or interviews; nor would disclosure of the candidates' names reveal this information. Further, disclosure of the names of the candidates would not permit the drawing of accurate inferences as to any information supplied to the Ministry in the proposals and interviews, with the exception of the names of the listed candidates. However, although the information in Record 12 consists only of numerical scores, each score is related to a particular question or component of the evaluation criteria. As a candidate, the appellant is aware of the specific criteria and has been provided with its own results and can thus easily connect the degree to which the other candidates satisfied the selection panel in regards to each one.

In my view, the degree to which a particular candidate has satisfied each of the criteria and the standing of a candidate within the competitive process are both pieces of information regarding the candidates which are directly related to "buying, selling or exchange of merchandise or services". Therefore, I find that disclosing the names of the candidates in this context would reveal "commercial information" and these portions of the record meet the first part of the test.

Part Two - Supplied in Confidence

In order to satisfy the second requirement, the Ministry and/or the affected parties must show that the information was supplied to the Ministry, either implicitly or explicitly in confidence. In addition, information contained in a record will be said to have been "supplied" to an institution, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-179, P-203 and PO-1802).

Supplied

It is clear that the proposals (Records 1 - 4) and the information in the reference check reports (Record 11) were supplied to the Ministry by the candidates and the referees, respectively. Records 6 - 10 are handwritten notes made by the selection panel of the answers given by the candidates during the interview portion of the selection process. The Ministry submits that disclosure of this information would reveal the

contents of the information contained in Records 1 - 4 or would permit the drawing of accurate inferences with respect to it. I agree and find that the information at issue in Records 6 - 10 was supplied for the purposes of this section.

Record 12 contains the scores given by the selection panel to each candidate. As I indicated above, the Ministry has disclosed the scores in Record 12. The only information at issue in this discussion is the names of the candidates.

In dealing with the names of business entities, Assistant Commissioner Mitchinson has found generally that the names of entities doing business with the government would not normally be considered to have been "supplied", simply because they appear on a record. To date he has applied this approach to the names of purchasers of land (Order PO-1786-I), the names of service providers for government funded programs (Order PO-1802), and the name of a commercial fish farm that has commercial involvement with Ontario Hydro (Order P-1574).

In Order MO-1237, Senior Adjudicator Goodis noted comments made by Assistant Commissioner Mitchinson in Order P-373 and concluded:

> In Order P-373, Assistant Commissioner Mitchinson stated:
>
>> Records 1, 2, and 3 list the names and addresses of the employers with the fifty highest surcharges in 1991, together with the amount of surcharge for each employer. Records 4 and 5 list only the names and addresses of the employers with the highest penalties in 1990 under the relevant program.
>>
>> In my view, the surcharge amounts were not "supplied" to the Board by the affected persons; rather, they were calculated by the Board. While it is true that information supplied by the affected parties on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected persons from the surcharge amounts themselves.
>
> In my view, the reasoning in Order P-373 applies to the scores assigned to the contractors with respect to each of the criteria. In each case, disclosure of these scores would not reveal the specific information actually supplied to the architect (as agent for the Board). Rather, the architect calculated or derived the scores based on the information that was actually supplied, or in some cases the architect arrived at the scores based on a subjective evaluation of the information actually supplied. Further, the number of submissions received and the name of the engineering firm clearly does not constitute information supplied to the Board, or to the architect as agent for the Board.

> To conclude, none of the information at issue qualifies as having been "supplied" to the Board, or to the architect as agent for the Board. As a result, I find that part two of the test has not been met with respect to the information at issue.

In my view, the principle that the names of entities doing business with the government would not normally be considered to have been "supplied" simply because they appear on a record underlies the decisions in this line of orders. I find that it also applies in the circumstances of this appeal. In this case, the candidates are seeking to do business with the government and have approached the Ministry on this basis. In my view, "supplied" in the context of the exemption in section 17 implies the provision of something of substance. I find that the mere identification of a business entity in the context of entering into a business relationship with the government falls short of the meaning of this term under section 17. I accept that where this information is contained on a record and is inextricably tied to other information that was supplied, the principles underlying the reasoning in previous orders becomes less clear. However, this is not the case insofar as Record 12 is concerned.

The majority of the information in Record 12 was generated by the Ministry. Similar to the findings in Order MO-1237, disclosure of the scores assigned to each candidate would not reveal the specific information in the other records which were supplied to the Ministry. In my view, the link between information generated by the Ministry and information which identifies the candidates on this record is not sufficient to alter the character of this information. Therefore, I find that the names of the candidates do not constitute information supplied to the Ministry. As a result, I find that part two of the test has not been met with respect to Record 12.

In confidence

In order to establish that the records were supplied either explicitly or implicitly in confidence, the Ministry and/or the affected parties must demonstrate that an expectation of confidentiality existed at the time the records were submitted, and that this expectation was reasonable and had an objective basis (Order M-169). All factors are considered in determining whether an expectation of confidentiality is reasonable, including whether the information was:

(1) Communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the Ministry.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

(Order P-561)

Records 1 - 4, 6 - 10 and 12

The arguments and evidence on the expectation of confidentiality

On the issue of confidentiality, the Ministry states:

> The applicants would have had an implicit understanding that their application would be treated as confidential. This expectation applies not only to the written submissions made directly to the ministry, but also to information provided at the interview sessions which is now recorded in Records 6 - 10, and to record 12, which is the selection committees' evaluation of the applicants' relative strengths and weaknesses. The ministry submits that its consistent treatment of the information as confidential supports this contention.

The Ministry provided me with a copy of its "Debriefing Agenda" for the OAEDP Administrator which indicates that in conducting debriefings the privacy rights of any participant must not be breached and that the "practice used in most cases by Ontario Government agencies in competitive procurement debriefings will be followed in this instance".

One affected party simply states that its proposal was submitted to the Ministry in confidence.

A second affected party claims that its proposal was submitted to the Ministry explicitly and implicitly in confidence. In this regard, this affected party relies on the terms and conditions of a document it signed on October 12, 1998 relating to the OAEDP program which it attached to its representations. Point four under the heading "Statement by Recipient" provides:

> The applicant understands that the information submitted to the Ministry in connection with the grant is subject to disclosure under the *Freedom of Information and Protection of Privacy Act*.

The affected party states that it interpreted this provision as meaning that the information submitted would be protected. In addition, this affected party states that it was given verbal assurances at the time of interview by the panel that its documents would be treated as confidential.

A third affected party states as follows:

> It was the understanding of [the affected party] that the proposal was submitted in confidence. The nature of funding for programs such as OAEDP requires each candidate to give detailed personal, program and financial information. The process is competitive in that there are various candidates applying for the same funding. As such, it is reasonable to conclude that when the proposals were submitted, there was an expectation of privacy. Moreover, it is submitted that both [the affected party] and the Citizenship Division intended for the proposal to be submitted in confidence. Since it is the intention of both the supplier and the receiver that the proposal be confidential, there was clearly an implicit, if not explicit confidentiality in the supply of the proposal.

> The program proposal was not otherwise disclosed to any other party or to any other source by [the affected party], or presumably, by the Ministry. There was no public aspect to the proposal, and it was assumed that if the proposal was rejected that it would not be released to the public.

Previous decisions of this office

Previous orders of this office have addressed the reasonableness of an expectation of confidentiality on the part of companies submitting bids as part of the tendering process. It is apparent from a review of these orders that institutional approaches to confidentiality during the tender process and the reasonableness of proponents' expectations are quite varied. It cannot be said that there is one uniform approach.

In some cases, confidentiality assurances are explicitly given (see Order P-1215, for example). In other cases, an open tendering process is followed by the institution subject only to explicit requests for confidentiality (Order M-845, upheld on judicial review January 26, 1998, Ottawa Doc. 1209/96 (Ont. Div. Ct.)). It is common practice with many institutions that the names of the proponents and the total proposed cost, but not the details of the bids are routinely announced as part of the public tendering process (Orders PO-1697, PO-1794 and MO-1239, for example). Previous orders of this office, however, have acknowledged that given the competitive nature of particular industries, it would be reasonable for an organization submitting specific proprietary information to do so with an expectation of confidentiality (Order P-655, for example). This line of orders has recognized that there is a reasonable expectation of confidentiality with respect to the financial details of bid submissions or information that has a proprietary value to the organization (Order PO-1722).

Findings

As I noted above, one affected party relies on references to the Act in a document which it signed following completion of the competitive process as establishing a reasonable basis for an expectation of confidentiality. I do not agree. In my view, this statement simply advises that the Act applies to the information submitted to the Ministry in connection with the grant and if anything, forewarns the applicant that it may be disclosed. Moreover, this statement was only given after the fact and I cannot see how it could be interpreted as creating an expectation of confidentiality at the time the records were originally submitted.

In view of the various practices regarding the treatment of bid information, I find that, to a certain extent, a general reference by the Ministry to "government practice" begs the question "which government practice?". That being said, however, I accept that the evidence provided by the Ministry regarding its debriefing practices suggests that it may have turned its mind to some issues of confidentiality, at least at the debriefing stage.

Other supporting documentation provided by the Ministry with its representations reveals a selection process for the OAEDP Administrator that does not appear to fit with the open tender process described in the orders referred to above. Although the name of the winning candidate has been disclosed, it does not

appear that other information about this candidate or any information about the others was similarly made available to the public. In my view, the manner in which the selection process was conducted supports the arguments made by the Ministry and affected parties with respect to their expectations at that time.

None of the documents which were submitted to the Ministry contain a confidentiality clause or any other notation that they were being submitted in confidence. Even so, I am prepared to find that, taken together, the documentary evidence provided by the Ministry, along with its statement that it consistently treats information relating to the selection process as confidential and the comments made by the affected parties regarding their own treatment of the information and the assurances which were given by the Ministry establishes a reasonably held expectation of confidentiality with respect to Records 1 - 4 and 6 - 10. The submission of the Ministry and the affected parties with respect to their understanding at the time these records were submitted are consistent with one another, and are reasonable in the circumstances.

Record 11

The Ministry submits that:

> With respect to record 11, the ministry submits that it is objectively reasonable to assume references are provided with the expectation of confidentiality unless otherwise stated or waived.

One affected party states:

> The Reference Check Reports should also be withheld on the basis of Sections 17(1)(a) and 21(3)(g) and 21(3)(h). The letters of reference contain information and comments about staff in the nature of *personal recommendations, evaluations and character references*.
>
> The letters also would reveal our Political Associations which we do not wish disclosed.

The referee for the winning candidate did not submit representations and the referee for the appellant simply stated that:

> Upon reviewing the Reference Check Report ... and discussing the situation with [the referee's] counterparts, I regret to inform you that I will not be consenting to the disclosure of the Reference Check Report to the [appellant].

The affected parties, although objecting to disclosure of these two reference checks, have provided no submissions regarding their expectations at the time the information was provided. Although the Ministry is clearly in a position to indicate whether assurances of confidentiality were given at the time the referees were contacted, it has not done so. In my view, I may reasonably infer from this that no assurances were given. The Ministry's bald assertion that "it is objectively reasonable to assume" is not convincing. I find that neither the Ministry nor any of the affected parties have provided information to support a conclusion that

these records were provided with an expectation that they would be confidential or that such an expectation was reasonable in the circumstances.

This finding is consistent with my findings in Order P-1503 in which I was faced with similar circumstances and concluded:

> Pages 83 - 94 consist of reference checks for the successful bidder. Pages 96 - 98 and 100 - 102 are reference checks for the appellant. None of the information on these pages was supplied by the successful bidder, nor would disclosure of this information reveal information supplied by it. Although the information in these pages was clearly supplied by other companies, I have received no representations from them to indicate that the information was supplied with any expectation of confidentiality. Further, the Ministry does not specifically address these pages in its representations. Accordingly, I find that there is insufficient evidence before me to conclude that the information was supplied in confidence.

As a result, I find that the Ministry and affected parties have failed to satisfy the burden on them to establish that Record 11 was supplied in confidence. Although my analysis regarding this record may end here, I will consider whether any of the harms in sections 17(1)(a), (b) or (c) could reasonably be expected to result from its disclosure.

Part Three: Reasonable Expectation of Harm

The words "could reasonably be expected to" appear in the preamble of section 17(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, including section 17(1), in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party or parties 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 the present appeal, the Ministry and the affected parties, as the parties resisting disclosure, must provide detailed and convincing evidence to establish a reasonable expectation of probable harm, in this case one or more of the harms outlined in sections 17(1)(a), (b) and/or (c) of the Act.

Sections 17(1)(a) and/or (c): Competitive position and undue loss or gain

The Ministry submits that disclosure of any of the information in the records at issue could reasonably be expected to prejudice the candidates' future competitive position. In this regard, the Ministry states that the nature and level of detail of information in the proposals, supplemented by the information in the interview notes and evaluations, would provide the appellant, as a competitor, with an inside view of the organization that it would not otherwise have. The Ministry argues that the appellant would receive an unfair advantage as against the other candidates in vying for future grants. The Ministry submits that the records set out

detailed, comprehensive and unique plans for the proposed delivery of services which continue to have commercial value.

One affected party indicates that many of the programs it administers are funded by public money. It notes that access to funding is very limited and is highly competitive. This affected party argues that by revealing its philosophical, financial, technical and program details, other organizations can use this information to formulate their own funding proposals. The other affected parties reiterate this concern.

Another affected party indicates that it invested time and money in the design of its proposal and to provide it to a competitor would provide that party with an unfair advantage. This affected party also notes that disclosure of its funding sources, being limited as these sources are, could reasonably be expected to permit a competitor for this funding to use the information to its advantage. Similarly, this affected party contends that knowledge of the projects it is involved in, and its financial and operational costs could reasonably be expected to provide other parties with important information about its strengths which could be used to advantage in any negotiations in which it is involved.

Records 1 - 4 and 6 - 10

In my view, the Ministry and affected parties have provided persuasive arguments to support the harms claims under paragraphs (a) and (c) of section 17(1) with respect to portions of the proposals (Records 1 - 4) as well as the answers given by each candidate during the interview portion of the selection process (Records 6 - 10 in their entirety). The relevant portions of Records 1 - 4 are those which specifically address the proposed services to be provided in response to the Ministry's requirements for the OAEDP Administrator and internal details of the candidates' organizational structures that would not appear to be public information. I am satisfied that the proposals and responses to questions are unique to each candidate and in the highly competitive environment of government funding the disclosure of this information to the appellant and the public could reasonably be expected to result in significant prejudice to the affected parties' future tenders generally, and in particular, for the next OAEDP initiative, and result in undue loss to the affected parties.
The proposals also contain other types of information. In general, each one describes the organization and its members, its philosophy and/or mandate and the various services and programs it provides, incorporation information and associations. Much of this type of information is already publicly available or is the type of information that the organizations would make available to anyone interested in the services they provide. Several of the candidates have or are developing web sites which contain elements or variations of this background information and/or produce newsletters containing various types of information about the organization and its programs.

None of the affected parties has specifically addressed the disclosure of information which would identify them as having submitted a proposal and been considered by the selection panel. In my view, it would be a very rare case where the disclosure of the identity of a candidate, including the public services it provides, in and of itself, could reasonably be expected to result in harm under either of these two sections. I find that neither the Ministry nor the affected parties have provided the kind of detailed and convincing evidence necessary to establish a reasonable expectation of harm from the disclosure of these portions of the records in this case.

Consequently, I am not persuaded that disclosure of the following pages of Records 1 - 4 could reasonably be expected to result in the harms contemplated by either section 17(1)(a) or (c):

- Record 1 - cover page, index, covering letter, pages 1, 2, 3, 4, and part of page 5, parts of the list of appendices and Appendices A, E, F and N;

- Record 2 - cover page, table of contents, index page, Introduction, pages 5, 6, 9, 10, 11, 12 and parts of pages 8 and 13, three-page printout from web site, incorporation documents and organizational chart;

- Record 3 - pages 1 and parts of 2 and 3, part of covering letter, two pages following covering letter, bid cover page, table of contents, pages 2, 3, 4, 5, 7, 38, 45 and parts of pages 1, 6, 8 and 9 of bid proposal, all headings pages of bid proposal, 16-page "newsletter";

- Record 4 - cover page, cover letter, pages 1, 2, 3, 4, 5, 6, 7, signature page, Board resolution, Schedules A and C and slides 1 - 7.

One affected party has raised the application of section 17(1)(b) to the records and I will consider it below.

Record 11

The Ministry makes the following statement regarding Record 11:

> With respect to Record 11, the ministry has not heard from the reference for either the appellant or the winning candidate and it is willing to defer to their view as to the possibility of harm since they are in the best position to make this assessment.

I have received no representations which specifically address the harms in section 17(1)(a) and/or (c) from either of the referees. As I noted above, one affected party simply does not want the information disclosed.

Apart from revealing the identity of the referee, there is nothing in the reference check for the winning candidate which would disclose or reveal any component of its proposal. The information in this record and that relating to the appellant is very brief and relatively innocuous with respect to any standing or future possibilities the candidate or the referee may have in the community or in any other competitive process. I therefore, find that this record does not meet the harms threshold set out in sections 17(1)(a) or (c) of the Act.

Record 12

None of the affected parties makes reference to the information in Record 12. The Ministry indicates simply that its disclosure would reveal the selection panel's evaluation of the candidates' relative strengths and weaknesses. However, it has not explained how disclosure of the scores assigned to the candidates could reasonably be expected to result in any harm. In my view, the evidence before me on the harm in

disclosing this record falls well short of the "detailed and convincing" standard, and does not establish a reasonable expectation of probable harm with respect to the scoring information as it pertains to each candidate.

In reviewing the record itself, I find that the kind of generalized information which might be revealed if this record is disclosed could not reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the candidates within the meaning of section 17(1)(a). Nor could its disclosure reasonably be expected to result in undue loss or gain to any person, group or other organization as contemplated by section 17(1)(c).

Section 17(1)(b): Information no longer supplied

One affected party states:

> First Nations and First Nations organizations are loathe to release to the non-Aboriginal public, their philosophical, financial, technical and program details. It is [the affected party's] position that no other government has the right to access its private matters. Nonetheless, certain disclosure is compulsory, primarily as a result of funding agreements, and accountability measures provided therein. However, First Nations have gone to great lengths to prevent disclosure of financial statements and other information related to the First nation, to third parties...
>
> Therefore, it is reasonable to believe that if detailed financial and technical information contained in proposals were released to the public that such information would no longer be provided to the provincial government by First Nation organizations or by others. (Reference: Order P-604)
>
> It is submitted that it is in the public interest that such information continue to be supplied to the Ministry for such program funding applications. The mandate of the Ministry of Citizenship, Culture and Recreation is, among other things, to support equal opportunity for all Ontarians. One of the strategies of the Ministry is to support community and economic development in Aboriginal communities. This is done through programs such as the [OAEDP]. This, it is submitted, it is in the public interest that programs such as OAEDP continue and that decisions on funding be made with the highest quality and most comprehensive information. (Reference: Order P-604).

Records 1 - 4

It should be noted that financial records for each candidate are not at issue in this appeal and that I have found that proposal details and other internal organizational information are exempt under sections 17(1)(a) and (c). The only information relating to the proposals themselves remaining at issue in this discussion is that which, for the most part, is already in the public realm, and in part, is the type of information contained on web sites and/or newsletters maintained by, at least some of the organizations in question. I therefore have

some difficulty accepting the affected party's arguments that First Nations and First Nations organizations hold this type of information close within their own communities.

In Order P-604, former Assistant Commissioner Irwin Glasberg comments as follows on the application of section 17(1)(b) to records containing financial and business information relating to loan applications:

> From one perspective, it could be argued that, because there is a strong demand for government loans, businesses in the province would have a clear incentive to provide the Ministry with as much information as is necessary to secure such funds. It is equally true, however, that the detailed sort of financial information which the Ministry requires before it will grant a loan will often reveal confidential information about the financial status of the business and the commercial strategies of the enterprise.
>
> In my view, the disclosure of this type of information could provide an applicant's competitors with an unfair and, at times, significant business advantage. I also believe that, if such information were subject to release under the Act, this approach could reasonably be expected to create an environment where other prospective loan applicants would no longer supply information to the Ministry which was as frank and detailed as would otherwise be the case.

Again, it is important to note that financial and business strategy records are not at issue in this discussion.

In Order P-604, the records at issue were created as a result of a request by the organization to the Ministry for financial assistance in establishing a Technology Centre at a designated location in the province. In my view, the circumstances in that case are distinguishable from the current appeal.

In this case, the candidates have submitted their proposals as part of a competitive and, although government funded, commercial project. In general, where information is provided to an institution by an affected party submitting a bid for a government contract, it is difficult to conclude that section 17(1)(b) applies (see Orders P-418 and P-647). It is reasonable to expect, therefore, that in competing for selection as the Administrator of the OAEDP, the candidates will continue to provide the type of information that is remaining at issue in order to be successful (see Order M-1150, for example). In my view, the fact that the initiative is part of the Ministry's overall mandate to support economic and community development in Aboriginal communities does not detract from the commercial realities of the competitive process.

The portions of Records 1 - 4 at issue in this discussion do not contain financial or business strategies. As I noted above, much of this information is in the public realm. Further, I find that the candidates have a commercial interest in providing this information to the Ministry in order to enhance their chances for success in the competitive process. Taking all of this into consideration, I am not persuaded that the disclosure of these portions of the records could reasonably be expected to result in similar information no longer being supplied. Because of this finding, it is not necessary to determine whether it is in the public interest that it continue to be supplied.

As a result, the following pages are not exempt under section 17(1) and should be disclosed to the appellant:

- Record 1 - cover page, index, covering letter, pages 1, 2, 3, 4, and part of page 5, parts of the list of appendices and Appendices A, E, F and N;

- Record 2 - cover page, table of contents, index page, Introduction, pages 5, 6, 9, 10, 11, 12 and parts of pages 8 and 13, three-page printout from web site, incorporation documents and organizational chart;

- Record 3 - pages 1 and parts of 2 and 3, part of covering letter, two pages following covering letter, bid cover page, table of contents, pages 2, 3, 4, 5, 7, 38, 45 and parts of pages 1, 6, 8 and 9 of bid proposal, all headings pages of bid proposal, 16-page “newsletter”;

- Record 4 - cover page, cover letter, pages 1, 2, 3, 4, 5, 6, 7, signature page, Board resolution, Schedules A and C and slides 1 - 7.

Record 12

As I indicated above, the affected party did not make any specific references to Record 12 in its submissions. Similar to my findings above under sections 17(1)(a) and (c), I have not been provided with the kind of “detailed and convincing” evidence required for me to make a finding that the information in Record 12 is exempt under section 17(1)(b). Moreover, it is not reasonable to expect that organizations such as those involved in this appeal will cease to bid for government funded programs simply because they may be identified as having done so or because the Ministry’s assessment of their strengths and weaknesses with respect to a particular tender may be made public. Therefore, I find that section 17(1)(b) does not apply.

The information in Record 12 was not supplied to the Ministry and its disclosure could not reasonably be expected to result in any of the harms in sections 17(1)(a), (b) or (c). Accordingly, I find that this information is not exempt under section 17(1) and should be disclosed to the appellant.

COMPELLING PUBLIC INTEREST

During the course of the appeal, the appellant raised the possible application of section 23 with respect to both the section 17(1) and 21(1) exemption claims.

Section 23 of the Act reads:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In Order P-241, former Commissioner Tom Wright commented on the burden of establishing the application of section 23. He stated as follows:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

I agree with these comments.

Section 23 was included in the Notice of Inquiry and I provided the appellant with an opportunity to submit representations on its applicability in the circumstances of this appeal. The appellant did not provide representations on this or any other issue in response to the Notice. I noted above, however, that the appellant's primary concern in requesting the records appears to be that the selection panel was not pre-screened for conflict and that it is in a conflict situation with two aboriginal members of the selection panel. The appellant believes, in part, that the selection process has been tainted as a result.

In its submissions on the application of section 23, the Ministry stated that the following factors weigh against such a finding:

> The considerable amount of public scrutiny involved in development and execution of the OAEDP administrator selection process. A joint planning committee comprised of representatives of aboriginal organizations ([four organizations] and ministry staff) developed the terms of reference for the competitive application process in a planning exercise which took place between April 1 and June 5, 1998. Representation from the aboriginal community was included in the selection process.
>
> The reasonable amount of information provided to appellant prior to and outside of its request under the Act ...

The Ministry indicates in this regard that the appellant's queries and concerns about the process and panellists were all responded to and the appellant was provided with Record 5 and the evaluation criteria. Further, the Ministry states that staff and a procurement consultant "debriefed" the appellant after the interview. Finally, the Ministry indicates that it severed the records to provide the appellant with as much information as possible.

It has been established in a number of orders of the Commissioner's office that in order for section 23, "the public interest override", to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the

personal information and third party exemptions [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1998] O.J. No. 420, 107 O.A.C. 341, 5 Admin. L.R. (3d) 175 (Div. Ct.), reversed (January 27, 1999), Docs. C29916, C29917 (C.A.)].

In Order P-984, former Adjudicator Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

> In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

Former Adjudicator Big Canoe went on to address the second component of the "public interest override" as follows:

> Once a compelling public interest is established, it must be balanced against the purpose of the exemption which has been found to apply. Section 23 (the equivalent provision to section 16 in the provincial Act) recognizes that each of the exemptions listed therein, while serving to protect valid interests, must yield on occasion to the public interest in access to government information. Important considerations in this balance are the principle of severability and the extent to which withholding the information is consistent with the purpose of the exemption.

I adopt the approach to the interpretation of the "public interest override" articulated by former Adjudicator Big Canoe for the purposes of this appeal.

Is there a compelling public interest in disclosure?

In Order P-1398, former Adjudicator John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding former Adjudicator Higgins's decision in Order P-1398, the Court of Appeal for Ontario in Minister of Finance (above) stated:

> . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

In light of the Court of Appeal's comments, I am adopting former Adjudicator Higgins's interpretation of the word "compelling" contained in section 23.

Bias and conflict of interest in a competitive government procurement process is a serious matter and the public has an interest in knowing that the government selection processes are conducted in a fair and equitable manner and that public funds are appropriately spent. An allegation of bias and conflict is also a serious matter and in my view, a party raising such a claim must do more than merely assert it before the interest of the public is engaged. In this case, the appellant alleges bias and conflict in the selection panel and explains why he believes the conflict exists. The appellant also believes that the selection process itself was unfair, in part because of the conflict, but for other reasons as well.

It is apparent that the appellant is unhappy with the results of the competitive process and believes that it should have been selected. In my view, the appellant clearly has a "private" interest in the matter. However, I find that the appellant has not provided sufficient evidence regarding its reasons for believing that the selection process was unfair to support the allegation such that it would raise a "public" interest in the issue.

With respect to the selection panel, I note that the appellant is already aware of the identities of the panel members and this information alone should provide considerable assistance in establishing any relational irregularities. Further, as a result of this order, the identities of the other candidates will be made available. As well, the Ministry has granted the appellant access to the evaluations for all of the candidates which contain a breakdown of the scores given for each candidate with respect to each category. Given the amount of information now available to the public regarding this issue in particular, I am not persuaded that any public interest in the remaining information could be said to be "compelling".

Further, as the Ministry notes, the development of the selection process for this initiative involved a considerable amount of Aboriginal involvement from a number of different organizations, and the evaluation part of the process was multi-staged and involved outside consultants. Moreover, the debriefing package that the Ministry submitted with its representations was comprehensive. In my view, the overall selection process itself was exposed to a considerable amount of public scrutiny. In these circumstances, I am not persuaded that there exists a compelling public interest in further disclosure of the records.

ORDER:

1. I order the Ministry to disclose the reference checks for the winning candidate and the appellant in Record 11, Record 12 with the exception of the names, initials and signatures of the panellists, and the following portions of Records 1 - 4 to the appellant by providing it with copies of these records and parts of records by **October 6, 2000**, but not before **October 2, 2000**:

    - Record 1 - cover page, index, covering letter, pages 1, 2, 3, 4, and part of page 5, parts of the list of appendices and Appendices A, E, F and N;

- Record 2 - cover page, table of contents, index page, Introduction, pages 5, 6, 9, 10, 11, 12 and parts of pages 8 and 13, three-page printout from web site, incorporation documents and organizational chart;

- Record 3 - pages 1 and parts of 2 and 3, part of covering letter, two pages following covering letter, bid cover page, table of contents, pages 1, 2, 3, 4, 5, 7, 38, 45 and parts of pages 6, 8 and 9 of bid proposal, all headings pages of bid proposal, 16-page “newsletter”;

- Record 4 - cover page, cover letter, pages 1, 2, 3, 4, 5, 6, 7, signature page, Board resolution, Schedules A and C and slides 1 - 7.

For greater clarity, I have attached copies of these pages to the copy of this order which is being sent to the Ministry’s Freedom of Information and Privacy Co-ordinator. Where part of a page is to be disclosed, I have highlighted in yellow on the copy of each page the portion which is **not** to be disclosed. It should be noted that a portion of the severances made to page 13 of Record 2 consist of the personal information which I found to be exempt under section 21(1).

2. I uphold the Ministry’s decision to withhold the remaining records and parts of records from disclosure.

3. In order to verify compliance with Provision 1, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant.

Original signed by: August 31, 2000
Laurel Cropley
Adjudicator