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

ORDER MO-1847

Appeal MA-040091-1

City of Vaughan

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NATURE OF THE APPEAL:

The City of Vaughan (the City) received a request under *the Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the awarding of Tender T-03-003 for the Vellore Village complex. Specifically, the request was for:

- The names and affiliation of individuals who sat on the bid committee to pre-qualify applicants for the job including the name of the consultant hired by the City of Vaughan to give advice on the process.

- Minutes from bid committee meetings where pre-qualification was discussed and any notes indicating scoring by bid committee members deciding on which company was eligible to be pre-qualified.

- All email and other correspondence re: Tender T-03-003 written by [named individual], director of buildings for the City of Vaughan; [named individual], commissioner of finance for the City of Vaughan and [named individual], director of purchasing for the City of Vaughan before RFI [Request For Information] for pre-qualification was published in September 2002 to the present.

- All letters of reference in support of companies wishing to be pre-qualified, whether they were written by an individual or on behalf of a company/institution.

The City identified a number of responsive records, and granted partial access. The City relied on the following exemptions in the *Act* as the basis for denying access to the remaining records, in whole or in part:

- section 10(1) third party information
- section 11(d) economic and other interests of the City
- section 12 solicitor-client privilege

The requester, now the appellant, appealed the City's decision.

During mediation, the appellant narrowed the scope of his request to:

- the various reference letters for four contractors who bid on the Vellore Village project; and
- a specific dollar figure for each contractor contained on a pre-qualification list prepared by the City for the project.

Two contractors consented to disclosure of their information, and the reference letters and dollar figures relating to these contractors was provided to the appellant during mediation.

No other issues were resolved during mediation, so the file was forwarded to me for adjudication.

I began my inquiry by sending a Notice of Inquiry to the City and to the two contractors who did not consent to the disclosure of their information (the affected parties). The City and both affected parties responded with representations. I then sent the Notice to the appellant, along with the representations of the City and the two affected parties. The appellant also submitted representations, which were in turn shared with the City and the affected parties. The City and one affected party (affected party 1) responded with reply representations. I provided these representations to the appellant and received a final set of submissions from him.

RECORDS:

The records that remain at issue in this appeal are:

- A 2-page "General Contractor Pre-qualification" list (the list). Only the dollar figure under the heading "Annual Volume of Business" for the two affected parties that appears on page 1 of the list remains at issue. (section 10(1))

- 23 pages of reference letters, five relating to affected party 1 and 18 relating to affected party 2. (sections 10(1) and 11(d))

- four 1-page e-mail messages/chains and one 2-page memorandum authored by employees of the City. (section 12)

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The City relies on solicitor-client privilege as the basis for denying access to five records (six pages). Four records are email messages/chains exchanged among various City employees, and the fifth record is a 2-page memorandum from the City's Commissioner of Finance & Corporate Services to the mayor and members of City council. I will identify these records as follows:

Record 1	February 5, 2003 email message
Record 2	February 6, 2003 email chain
Record 3	October 22, 2003 email chain
Record 4	November 13, 2003 email message
Record 5	February 21, 2003 memorandum

General principles

Section 12 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. The City must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

In its representations, the City identifies common law solicitor-client communication privilege as the only basis for denying access to the records at issue in this appeal.

Common law solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)]. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the City must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Representations

The City's representations outline the requirements of common law solicitor-client privilege and explain how the various components of the privilege are present for all five records. The City sums up its position as follows:

> These records are written communications between the Financial Services Department, the Community Services Department and the Legal Services Department. [These communications were] written for the purpose of seeking

> legal advice. [These written communications are] confidential in nature. There is a solicitor-client relationship between the various City personnel and the two City Solicitors involved. The subject matter of the record[s] relates to the seeking or giving of legal advice regarding legal issues concerning the request for proposal for the Vellore Village Joint Complex. It is [the City's] position that these written communications qualify for solicitor-client privilege pursuant to section 12 of the *Act*. [The City] has not waived solicitor-client privilege.

The appellant defers to me in assessing whether the records qualify for exemption under section 12, but points out that not all communications between a solicitor and client are necessarily privileged. He submits:

> … A city solicitor does more than provide "legal advice". He or she is very much a general advisor who assists on policy and strategy maters. To the extent that the records do not relate to the obtaining of legal advice, I say [they] are not privileged. So, records relating to "business advice", for example are not privileged.

Analysis and findings

Records 1, 2 and 4 are all email messages/chains exchanged among various City employees, including the City solicitor. They all deal with the same topic, namely issues relating to the Vellore Village project tender that is the subject of the appellant's request. The subject matter of these records relates directly to the seeking or giving of legal advice, or is accurately characterized as part of the "continuum of communications" between solicitor and client described in *Balabal*. Although none of these records is marked "confidential", in my view, given the subject matter, it is reasonable to assume in the circumstances that the communications were intended to be treated confidentially. Accordingly, I find that Records 1, 2 and 4 meet the requirements of common law solicitor-client communication privilege, and therefore qualify for exemption under section 12 of the *Act*.

Record 5 is also a written communication, although not between a solicitor and client. Rather, it is a report made by the Commissioner of Finance & Corporate Services to City council outlining the status of the Vellore Village project tender as of February 21, 2003. However, the content of the memorandum is essentially an outline of an outstanding legal issue and the steps being taken by City staff to address it. The memorandum identifies legal advice provided to the City's Finance and Corporate Services department, and disclosing this record would clearly reveal advice that would otherwise be protected by solicitor-client privilege. Record 5 is marked "confidential" and would appear to have been presented as an *in camera* item to City council. Although the communication reflected in the record is not made directly by or to legal counsel, I find that it nonetheless qualifies for exemption because its disclosure would reveal information that does qualify. Therefore, I find that Record 5 qualifies for exemption under the common law solicitor-client privilege component of section 12 of the *Act*.

Record 3 also deals with the Vellore Village project tender process, but from a different perspective. It conveys legal advice provided by the City solicitor to her internal client relating to what information could be disclosed in response to a media inquiry about the project. I find that this email chain is a written communication between various City staff, including legal counsel, made for the purpose of providing and receiving legal advice. As with Records 1, 2, and 4, although there is no explicit reference to confidentiality on the record itself, in my view, given the subject matter of the record it is reasonable to assume that the information was intended to be treated confidentially by the parties. Accordingly, I find that the requirements of common law solicitor-client privilege are present for Record 3, and it therefore qualifies for exemption under section 12 of the *Act*.

In summary, I find that Records 1-5 all qualify for exemption under section 12 of the *Act* and should not be disclosed.

ECONOMIC AND OTHER INTERESTS

The City relies on section 11(d) of the *Act* as one basis for denying access to the various reference letters.

General principles

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c), (d) and (g) all take into consideration the **consequences** which would result to an institution if a record was released. They may be contrasted with sections 11(a) and (e) which are concerned with the **type** of the record, rather than the consequences of disclosure [Order MO-1199-F].

To establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests.

Section 11(d) uses the phrase "could reasonably be expected to". To meet this standard, the City must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

The City's representations on section 11(d) make reference to Order M-892, which dealt with a request for access to reference-related information by a contractor who was the subject of these reference checks. Adjudicator Laurel Cropley in that case found that records of this nature qualified for exemption under section 10(1)(b) (as opposed to section 11(d)) of the *Act*, on the basis that "the confidentiality of reference information would be seriously impaired should

information of the type present in these records be disclosed to the subject of the reference check".

The City also submits that disclosing the reference letters could reasonably be expected to result in "a reluctance on the part of referees to make candid and complete comments to the City of Vaughan". The City points out that references are an important part of the competitive selection process and that they continue to be provided by referees "without fear of disclosure and possible recrimination". Finally, the City submits:

> Potential bidders may refuse to bid on [the City's] projects if they felt that [the City] routinely disclosed their commercial information. Fewer bidders may bid on a request for proposal. If fewer bidders submitted bids, their opportunity to be the successful bidder would be reduced. Failure to submit a bid due to the potential disclosure of their commercial information could result in an undue economic loss. Fewer bidders may result in higher bid prices. Higher bid prices could be injurious to [the City's] financial interests as it could cost [the City] more money to construct a particular project such as the Vellore Village Joint Complex.

Analysis and findings

The evidence and argument put forward by the City is clearly not adequate to support the section 11(d) exemption claim as it relates to the reference letters. In my view, the City's representations are primarily directed at the harms component of section 10(1)(b), and I will address them in that context. As far as section 11(d) is concerned, the City's representations are speculative at best and certainly do not reflect the type of "detailed and convincing" evidentiary standard set by the Court of Appeal in *Ontario (Workers' Compensation Board)*.

As far as Order M-892 is concerned, it does not support the City's position. In addition to the fact that it dealt with section 10(1)(b) and not section 11(d), the type of reference in that case was quite different from the reference letters at issue here. In Order M-892, the requester was the contractor who was the subject of reference-related information and did not otherwise know what the references contained; while in this appeal, the reference letters were actually provided to the City by the affected parties who clearly already know their content. As such, the risk that disclosure could impact future behaviour, which was a valid consideration in Order M-892, is clearly irrelevant as far as the reference letters at issue in this appeal are concerned.

Therefore, I find that the requirements of section 11(d) have not been established for the various reference letter submitted by the two affected parties.

THIRD PARTY INFORMATION

The City relies on sections 10(1)(a), (b) and (c) as the basis for denying access to the two figures on the list and all of the reference letters.

General principles

Section 10(1) states, 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;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the City and/or the affected parties must satisfy each part of the following three-part test:

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 City 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 paragraph (a), (b), and/or (c) of section 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Part 1: type of information

The City and the two affected parties all claim that the withheld portion of the list includes "financial information" and that the references constitute "commercial information" for the purposes of part 1. These terms have been defined in prior orders as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

It is clear on its face that the information on the pre-qualification list that remains at issue in this appeal is "financial information". It consists of a dollar figure associated with each affected party under a column titled "Annual Volume of Business". This information is directly related to money and its use and refers to specific data, thereby falling squarely within the definition of "financial information" outlined above.

As far as the reference letters are concerned, the affected parties provided them to the City in the context of a pre-qualification process for the selection of a contractor for the Vellore Village project. As such, I find that they fall within the scope of the definition of "commercial information". The references are part of a proposal package that relates to the selling of services to the City by the affected parties, specifically the contracting services for a major public sector construction project. This is clearly a commercial venture, and information related to a bidding process of this nature is the type of information routinely found to qualify as "commercial information" for the purposes of part 1 of the section 10(1) test.

Part 2: supplied in confidence

General principles

The requirement that information be "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the City on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the City;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [PO-2043].

Representations

The affected parties and the City all submit that the information contained on the pre-qualification application and the reference letters was "supplied in confidence" for the purposes of part 2 of the test.

The City submits:

> As part of the Request for Proposal process, it is [the City's] business practice to protect commercial information supplied by bidders from disclosure. The request for proposal documents, including the General Contractor Prequalification List and the letters of reference, were supplied to [the City]. The information was not the product of any negotiations and remains in the original form as provided by the various bidders to [the City]. At the time of submission, the request for proposals were sealed and delivered to the Purchasing Services Department. The request for proposals remain in their sealed envelopes until the tender opening meeting with the various bidders. At the time, the request for proposals were opened, and [the City] disclosed to those present only the names of the bidders and the total dollar value of the various bids. No other commercial information was disclosed at the tender opening. This was consistent with [the City's] normal business practice. The bidders had an explicit expectation of confidentiality. The bidders expected that [the City] would deny an access request for the request for proposal records. [The City's] business practice is consistent with previous decisions of [the Commissioner's Office] involving information delivered in a proposal by a third party to the institution (Orders MO-1368, MO-1504 and PO-1818). These orders support [the City's] position.

The affected parties' representations essentially support the City.

The appellant acknowledges that the pre-qualification application information was "supplied in confidence", but points out that the reference letters may not have been treated confidentially by the affected parties and, if so, they would not meet the requirements of part 2:

> … One would expect that if third party receives a glowing reference letter, this would be of tremendous assistance in soliciting new clients. For example, it may be included in routine marketing efforts by the third party, i.e. mailings. It may be handed out at meetings or lunches with potential clients. One would not expect a glowing reference letter to sit hidden in a filing cabinet. … It is inconsistent with the purpose of s. 10 to treat a document that is widely circulated and distributed as confidential merely because it is stamped or marked as such when submitted to [the City].

Analysis and Findings

The City refers in its representations to a specific provision in its pre-qualification proposal documentation which states, "the information submitted is understood to be confidential". There is no dispute that the dollar figures at issue in this appeal are contained on a list that was prepared by the City based on information provided by the various bidders during the pre-qualification stage for the Vellore Village project. As such, I find that this information was "supplied in confidence" for the purposes of part 2.

As far as the reference letters are concerned, they too were provided to the City as part of the competitive selection process for a general contractor for the Vellore Village project. Similar to other public institutions acquiring goods and services from the private sector, the City's business practice makes it clear to interested bidders that the information contained in their bids will be treated confidentially by the City. However, as has been made clear in many past orders of this office **(**e.g. Order MO-1476**)**, assurances of confidentiality in this context cannot be absolute and remain subject to overriding legislative rights, including a right of access under the *Act*. Although this consideration has no bearing on my part 2 finding, it may be relevant in considering the harms component of section 10(1).

The appellant correctly points out that the expectation of confidentiality must be based on reasonable and objective grounds, and that actions taken by an affected party that are inconsistent with a reasonably-held expectation of confidentiality could impact the part 2 finding. However, I have no evidence that either of the affected parties has treated its reference letters in a manner that would be inconsistent with their characterization as part of the confidential proposal submission, and speculative conjecture on the appellant's part is not sufficient to support a finding that they were not supplied in confidence.

Accordingly, I find that the dollar figures contained on the list and the various reference letters were all "supplied in confidence" in the context of the City's bidding process, thereby satisfying part 2 of the section 10(1) test.

Part 3: harms

Annual volume of business figures

On July 13, 2004, I issued Order MO-1811, which involved the City, the appellant and the same two affected parties. The records at issue in that appeal were the pre-qualification statements submitted by the affected parties for the Vellore Village project. After considering the submissions of the parties on the harms component of sections 10(1)(a), (b) and (c), I summarized my findings as follows:

> In summary, I find the evidence of harm provided by the parties resisting disclosure in this appeal is speculative and does not meet the "detailed and convincing" evidentiary standard established by the Court of Appeal in *Ontario (Workers' Compensation Board)*. Therefore, part three of the 3-part test for exemption under section 10(1)(a), (b) and/or (c) has not been established. Because all three parts of the test must be established, I find that the qualification statements of affected parties 1 and 2 (subject to the severance of section 4 "Financial References" on page 1 of each statement) do not qualify for exemption and should be disclosed.

The records I ordered disclosed in this previous related appeal include the same annual volume of business figure for each of the two affected parties that is at issue in the current appeal.

For the most part, the representations provided by the parties in this appeal as it relates to the annual volume of business figure is highly similar to the representations I considered and rejected in Order MO-1811. In my view, the only significantly different representations here come from affected party 1. In Order MO-1811 this affected party did not reply to the appellant's representations, but here it did. After reviewing the appellant's representations, affected party 1 makes the following specific arguments relating to the annual business volume figure:

> Without disclosing the actual information sought, it is difficult to provide "specific" examples of the harm that [affected party 1] would suffer as a result of disclosure. We submit, however, that the bottom line total value of past projects and a description of "all projects of similar size and scope completed in the past" clearly provides competitors with information that could prejudice [affected party 1's] competitive position in a future selection, as it provides evidence of matters such as:
>
> (i) [affected party 1's] experience and expertise with large projects relative to its competitors; and
>
> (ii) dollar figures coming into the company that may constitute resources for upcoming projects.

In my view, affected party 1's additional representations in this appeal are not sufficient to alter my finding in Order MO-1811. The record at issue here does not describe the various projects of similar size and scope completed by affected party 1 in the past, as alleged in the representations; nor, in my view, does the annual volume of business figure, which is itself an historic number not tied to any individual project, provide sufficient information that could in any reasonable way compromise the competitive position or otherwise harm the interests of affected party 1 in the context of future similar business opportunities.

Accordingly, for the same reasons as outlined in Order MO-1811, I find that none of the part 3 harm components of sections 17(1)(a), (b) and (c) has been established for the volume of business figures relating to the two affected parties. Because all three parts of the test must be present in order for a record to qualify for exemption under section 17(1), I find that the two dollar figures appearing on the list created by the City should be disclosed to the appellant.

I will restrict the rest of my discussion of part 3 of the test to the reference letters.

General principles

To meet this part of the test, the City and/or the affected parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a): prejudice to competitive position

None of the initial representations provided by the parties resisting disclosure deals specifically with the section 10(1)(a) harm as it relates to the reference letters.

The appellant's representations on section 10(1)(a) focus on his position that reference letters obtained by construction companies are "routinely disclosed and publicly disseminated". He points out that other companies participating in the Vellore Village project have agreed to provide him with comparable reference letters, and identifies company Web sites and brochures as routinely carrying "references touting good work and reliability" from clients, which he presumes are the type of references at issue here. In the appellant's view, there can be "nothing to fear from letting people know what their "satisfied" clients think about them".

In its reply representations, the City makes the following submissions relating to the section 10(1)(a) harm:

> … Once the general contractor has the reference letters, he is free to use the reference letters in any manner that will suit his business needs. There is no onus on a private general contractor to notify a person who supplied a reference each time the reference letter is used by the government contractor. As a result, the person who supplied the reference letter may be subject to commercial harm without their consent or knowledge.

Affected party 1 also makes general submissions in response to the appellant's representations, which speak to the various harms in section 10(1):

> … [W]ith respect to the potential harm caused by disclosing the reference letters, we submit that the relevant inquiry is not whether the disclosure of "glowing references" might harm [affected party 1] or the municipality, but rather whether the disclosure of reference letters given in confidence creates a reasonably expectation of harm to either [affected party 1] or the municipality. Again, we submit that it does.

Affected party 2's representations on section 10(1)(a) do not relate to the reference letters.

In Order MO-1811, I rejected the section 10(1)(a) harm arguments as they related to the pre-qualification statements of the two affected parties. I stated:

> … As the appellant points out, this information is historic, and I am not persuaded that there is any reasonable possibility that a competitor could use the bottom-line total value of these past projects in a way that could prejudice the competitive position of the affected parties in a future selection, as required in order to fall within the scope of the section 10(1)(a) harm. While I can accept the City's and the affected parties' position that construction projects of this nature are highly competitive, it simply does not follow that disclosing the particular information at issue in this appeal, which, as the appellant points out, is frequently made public by either the public institution or the contractor, would compromise the interests of either affected party in bidding on future contracts of this nature.

The same reasoning applies to the various reference letters at issue in this appeal. Although they were submitted by the affected parties in the context of a commercial venture, in my view, they do not contain particularly sensitive information. I agree with the appellant that any reference submitted by a bidding contractor in support of a tender proposal would by definition contain information reflecting positively on the bidders. Not only are letters of this nature inherently complimentary, in my view, it is reasonable to assume that they would be actively disclosed by contractors seeking new work, not carefully guarded in order to avoid competitive harm. As far as the authors of the reference letters are concerned, providing these letters to a contractor for use

in bids for comparable work is inconsistent with any expectation of confidentiality or any reasonable expectation of any sort of harm as it relates to the interests of these past clients.

Accordingly, the parties resisting disclosure of the reference letters have failed to provide the detailed and convincing evidence necessary to establish any of the harms identified in section 10(1)(a), and therefore part 3 of the section 10(1)(a) test has not been established for these records.

Section 10(1)(b): similar information no longer supplied

The City's representations on section 10(1)(b) repeat the same arguments outlined earlier in this order regarding section 11(d). The City also points out that it is in the public interest that reference letters continue to be supplied to the City as part of its request for proposal process "without fear of disclosure and possible recrimination", and that the reference letters "are important evaluation criteria to be considered when evaluating various bidders to select a successful bidder to construct a multi-million dollar public project such as the Vellore Village Joint Complex".

The City also refers me to Orders M-892 and M-1106 in support of its position.

Affected party 1 submits:

> There is a clear risk to the City and other public bodies if information is disclosed. Construction companies knowing that their confidential information would or could be disclosed publicly, may choose not to bid or not be as forthcoming in their disclosure. Alternatively, companies which might serve as references could direct that no information be provided with respect to their projects.

Affected party 2's representations do not deal with the section 10(1)(b) harms.

The appellant points out that the City is in control of the tendering process for the purchase of goods and services and can establish what information must be supplied by bidders interested in obtaining work. He submits:

> … The power and control is completely within the municipality - the bidders have no choice to not supply it if they choose to bid. Therefore, there is little, if any risk of information not being provided by contractors because of the risk of this information being disclosed in the freedom of information process.
>
> The disclosure of reference letters will not result in the municipality not being able to obtain references for potential contractors. The duty is on the contractor to supply the reference in order to be pre-qualified. If a contractor fails to provide references or provides inadequate references, it risks not being pre-qualified. Again, if the contractor wishes to secure the contract, he must provide references complying with the requirements dictated by the municipality.

The appellant also agues that the orders identified by the City are distinguishable from the facts and issues in the current appeal.

Again, I considered the section 10(1)(b) harms in Order MO-1811, and made the following findings:

> … I am not persuaded that disclosing the specific information that is at issue in this appeal could reasonably be expected to result in similar information no longer being supplied to the City in the context of future construction projects. Construction companies doing business with public institutions such as the City understand that past work experience on similar scale projects is often an important part of a competitive selection process, and it is simply not credible to argue that the City would be provided with less information of this nature in future. The qualification statement is a requirement set by the Canadian Standards Association and would appear to be a widely accepted component of any competitive selection process of this nature. The fact that other participating contractors have agreed to disclose their qualification statements also supports my conclusion that the harms in section 10(1)(b) are not present. While different considerations might apply to other information forming part of a contractors competitive bid for a project, the information at issue in this appeal is a high-level, bottom-line cost figure for past work, and I do not accept that its disclosure could reasonably be expected to have any impact on a contractor's willingness to provide the City with similar information in future.

In my view, the same reasoning applies to the various reference letters at issue here. These letters are required as part of the City's pre-qualification process for construction contracts of this nature, and I do not accept that the prospect of their release under the *Act* could reasonably be expected to result in a reluctance on the part of contractors to participate in future projects. Different considerations might apply to references obtained directly by the City from previous clients, the contents of which would otherwise not be known to the bidder (as was the case in Orders M-892 and M-1106), but it is simply not reasonable to expect that a bidder would be dissuaded from providing references letters that are inherently supportive and complimentary and chosen specifically by the bidder.

Accordingly, I find that the evidence and argument provided by the parties in support of the section 10(1)(b) harm is neither detailed nor convincing, and part 3 of the section 10(1)(b) test has not been established for the various reference letters.

Section 10(1)(c): undue loss or gain

The representations provided by the City and the affected parties on the section 10(1)(c) harm is general in nature and, for the most part, integrated with the submissions on section 10(1)(a). I have reviewed all of the representations in the context of section 10(1)(c) and find that none of

the parties resisting disclosure has provided the level of detailed and convincing evidence necessary to established any of the section 10(1)(c) harms as they relate to the reference letters.

In summary, I find the evidence of harm provided by the parties resisting disclosure of the reference letters is speculative and does not meet the "detailed and convincing" evidentiary standard established by the Court of Appeal in *Ontario (Workers' Compensation Board)*. Therefore, part three of the 3-part test for exemption under section 10(1)(a), (b) and/or (c) has not been established for these records. Because all three parts of the test must be established, I find that the reference letters submitted by affected parties 1 and 2 as part of the pre-qualification selection process for the Vellore Village project do not qualify for exemption and should be disclosed.

ORDER:

1. I uphold the City's decision to deny access to the five records withheld under section 12 of the *Act*.

2. I order the City to disclose the 23 pages of reference letters relating to affected parties 1 and 2 and the dollar figures for these two affected parties under the heading "Annual Volume of Business on the "General Contractor Pre-qualification" list to the appellant by **November 12, 2004** but not before **November 5, 2004**.

3. In order to verify compliance, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, upon request.

October 6, 2004

Tom Mitchinson
Assistant Commissioner