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

ORDER MO-2072

Appeal MA-040138-2

Toronto District School Board

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NATURE OF THE APPEAL:

This appeal concerns a decision of the Toronto District School Board (the Board) made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act (*the *Act).* The requester (now the appellant) made the following request under the *Act*:

> Would you please supply a copy of the "evaluation report" or equivalent document, prepared by your Board as a consequence of the following procurement conducted by the Board in the early part of 2004?
>
> - Information Technology Staff Resource, TDSB ID - "AS04-028P".

By way of background, in November 2003 the Board's Purchasing and Distribution Services Department issued a Request for Proposals (RFP) for the provision of "Contract Information Technology Staff Resources" to fill interim staff positions as and when required. Of the bids received in response to the RFP, 24 met the initial criteria set out in the RFP and were considered. As the contract addressed by the RFP would be services over $250,000, pursuant to Board policy, it required the approval of the Board's Accountability and Finance Committee and the Board itself. In anticipation of the matter going before the Accountability and Finance Committee and the Board for consideration, a summary report evaluating the bids received and considered was prepared (the Bid Evaluation).

The Board did not provide an access decision within the 30 days prescribed under the *Act*. The appellant appealed the "deemed refusal", and this office opened Appeal MA-040138-1.

The Board subsequently issued an access decision in which it advised that it had located one responsive record (the Bid Evaluation) and was applying the exemption found in section 10(1) (third party information) of the *Act* to deny access to it in its entirety. This office closed Appeal MA-040138-1.

The appellant appealed the Board's access decision and, as a consequence, this office opened Appeal MA-040138-2, the present appeal.

During the mediation stage of the appeal process, the Board notified all of the parties that had responded to the RFP, including the 24 parties that had met the initial criteria set out in the RFP and whose information appears in the Bid Evaluation (the affected parties). Three of the 24 affected parties consented to the release of all of their information in the record. Two of the affected parties consented to the release of portions of their information contained in the Bid Evaluation. The remaining nineteen affected parties did not consent to the release of any of their information. The Board issued a revised access decision, granting partial access to the record and denying access to the remainder pursuant to section 10(1) of the *Act*.

The Board clarified that with respect to its reliance on section 10(1) of the *Act*, it is applying sections 10(1)(a) and 10(1)(c).

The Board subsequently disclosed additional information in the record for some of the affected parties, found under the heading "reasons for disqualification".

Also during the mediation stage, the appellant raised section 17 (search for responsive records), as an issue in the appeal. The appellant stated that he believes additional evaluative information should exist, either in the form of a report or other documentation, showing how a company was chosen as a successful bidder. He believes that this report, or other documentation, would have been forwarded to the decision maker responsible for choosing the successful bidder.

I commenced my inquiry by sending a Notice of Inquiry to the Board and 21 affected parties. The Board submitted representations as did ten affected parties. Subsequently, two of the ten affected parties that had submitted representations, and three affected parties that chose not to submit representations, consented to the release of their information in the record to the appellant. Acting on the consent of these five affected parties, the Board agreed to the release of this information to the appellant and issued a new decision letter confirming its decision and attaching a new copy of the record reflecting the release of the additional information. Accordingly, this information is no longer at issue in this appeal.

I then sent a Notice of Inquiry to the appellant along with a complete copy of the Board's representations and severed copies of the representations received from the eight affected parties that had not consented to the release of their information contained in the record.

The appellant submitted representations in response. In addition to commenting on the application of section 10(1) to the information at issue, the appellant made representations on the reasonable search issue. However, in my view, the appellant's representations on the reasonable search issue appear to be focused on the scope of the appellant's request. I have, therefore, decided to address scope of request as an issue in this appeal. I will deal with it in my discussion of the reasonable search issue.

I shared the non-confidential portions of the appellant's representations with the Board and the eight affected parties and sought reply representations from them. I received reply representations from the Board and four of eight affected parties. I then shared the Board's reply representations in there entirety, along with the non-confidential portions of the reply representations submitted by the four affected parties, with the appellant and I invited the appellant to respond to them. The appellant responded with sur-reply representations.

RECORDS:

Remaining at issue are the undisclosed portions of a four-page record, namely the Bid Evaluation. The record is in the form of a spreadsheet containing bid information provided by twenty-four affected parties, including the Board's "reasons for disqualification". The information relating to eight of the affected parties has been disclosed in full and is therefore not at issue. The information relating to sixteen of the affected parties remains at issue.

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1): the exemption

The Board has claimed the application of sections 10(1)(a) and (c) to the undisclosed information in the Bid Evaluation.

Sections 10(1)(a) and (c) state:

> 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, if 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 institution and/or the third party 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 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

Parties' representations

The Board states that the information severed from the Bid Evaluation was supplied by the affected parties and consists of their "corporate-financial information, prices and other costs for supplying the IT staff to fill the positions specified [by the Board]." The Board states that the Bid Evaluation contains information relating to the "commercial operations" of the affected parties and information "relevant to the formation of a contract between the [affected parties] and the Board for the sole purpose of forming a business relationship involving the supply of Information Technology staff to the Board.

The Board also states that the Bid Evaluation contains financial information, including "information concerning money and its use or distribution", "contractual prices and charges", "pricing practices and profit and loss data", and the "amount of money involved in a transaction".

Some of the affected parties do not address this issue at all while others variously describe the information at issue as "commercial", "financial" or "proprietary information" without further elaboration. Three affected parties make substantive representations in response to this issue. However, for the most part their representations address the contents of their bid proposals rather than the Bid Evaluation document that is before me in this appeal.

The appellant does not make representations that address this issue.

Analysis and findings

The types of information listed in section 10(1) have been discussed in prior orders:

> *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].

Having carefully considered the parties' representations and the contents of the Bid Evaluation, I find that this record contains commercial and/or financial information. The record contains information relating to the proposed terms of a commercial relationship between the 24 affected

parties and the Board for the provision of information technology (IT) staff resources. In addition, I am satisfied that this record contains financial information, including information about the 24 affected parties' pricing practices, including per diem rates for various staff categories and profit margin percentages.

Accordingly, I find that the Bid Evaluation does meet part 1 of the test under section 10(1).

Part 2: supplied in confidence

General

In order to satisfy part 2 of the test, the affected parties and/or the Board must show that the information at issue was "supplied" to the Board "in confidence", either implicitly or explicitly.

The requirement that it be shown that the information was "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 institution 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 person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Parties' representations

The Board states that the severed information in the Bid Evaluation was supplied by the affected parties in their proposals to the Board pursuant to a tendering process. This view is shared by the eight affected parties that submitted representations on this issue. The appellant does not address the "supplied" issue in his representations.

Regarding the issue of confidentiality, three of the eight affected parties state that their proposals contained "express" confidentiality provisions. All three of these affected parties reproduce the text of these confidentiality provisions in their respective representations. The remaining five in this group of affected parties submit that they had an "understanding" with the Board that their proposals were submitted in confidence.

The Board states that as per its tendering process the affected parties' proposals were submitted "sealed" and in confidence. The Board states further that all proposals were "treated, and expected to be treated, in a strictly confidential manner […]". The Board submits that the affected parties had a "reasonable expectation of confidentiality" at the time their information was submitted since it was "specifically prepared for a competitive purpose" which contained "very sensitive proprietary and commercial information" that the affected parties "would not, and do not, make public." The Board also states that the affected parties had an implicit expectation of confidentiality due to the nature of the competitive tendering process.

The appellant states that the "[Board], like any other public agency", discloses the "concluding evaluation report" prepared for any "rational public sector procurement process". The appellant refers to the Board's website and provides an example taken from it in which the Board disclosed evaluation information pertaining to contracts with third parties. The appellant states that "several textbooks speak to the practice of public bid openings" where the "vendor name, bid price, and bid details are read out." Finally, with reference to Order MO-1559, the appellant states that this office has ordered the release of both an evaluation report and a successful vendor's proposal in a competitive procurement process.

In response to the appellant's suggestion that that there is precedent for full disclosure, the Board submits that full disclosure of bid information only occurs in circumstances where it is the "practice of the institution to fully disclose and the bidders have been previously notified of that practice […]." The Board states this is "clearly not the case" in this appeal. The Board states that it "does make a great deal of information available on its website dealing with contract awards." However, the Board cautions that "different RFPs proceed in different ways, often dictated by industry norms." The Board distinguishes the circumstances in Order MO-1559 from those in this case. The Board states that in Order MO-1559 the City of Hamilton (the City) had a policy of disclosing bid amounts to unsuccessful bidders and so the Commissioner held that there was no evidence that the affected party in that case had a reasonably-held expectation of confidentiality for its information in the hands of the City. Contrasted with this case, the Board states that it "does not have a policy or practice of releasing the information found within the

record" to anyone. The Board states that the bids received in response to the RFP were "consistently treated by the Board in a strictly confidential manner […]."

Analysis and findings

Dealing first with the "supplied" element, on my review of the parties' representations and the record at issue, I am satisfied that the information presented in the Bid Evaluation was drawn directly from the proposals submitted by the affected parties to the Board in response to the RFP process. Accordingly, I find that the information contained in the Bid Evaluation was supplied by the affected parties to the Board within the meaning of part 2 of the test under section 10(1).

Turning next to the "in confidence" element, previous orders have established that the provisions of the *Act* can apply to information contained in a record, notwithstanding the existence of a confidentiality provision, but also that the existence of such an explicit arrangement may provide evidence of the confidentiality expectations of the parties [see orders MO-1476 and PO-2478].

In this case, the evidence submitted by the affected parties and the Board focuses on an expectation of confidentiality, either by way of an express confidentiality provision, as set out in the proposals submitted by three affected parties, or through an implied understanding that the information disclosed through the RFP process would remain confidential. I find the evidence of the three affected parties, regarding an express expectation of confidentiality, compelling. That said, I also accept the evidence of the Board and the other affected parties that there was an implied expectation that the information provided by the affected parties in their proposals, which found its way into the Bid Evaluation, would be received and held in confidence by the Board. While I acknowledge the appellant's views regarding the public disclosure of bid information, I agree with the Board that the circumstances in this case are distinguishable from those in Order MO-1559 and I am satisfied that both the Board and the affected parties understood that the information at issue would remain confidential. Accordingly, I find that the information contained in the Bid Evaluation was supplied "in confidence" in accordance with part 2 of the test under section 10(1).

I will now consider the part 3 "harms" test under section 10(1).

Part 3: harms

General principles

To meet this part of the test, the Board 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].

In this case, the Board has raised the application of sections 10(1)(a) (prejudice to competitive position) and (c) (undue loss or gain) to the information at issue.

Parties' representations

Affected parties

Of the eight affected parties that provided representations, six delivered general and brief representations while two offered more detailed submissions.

The representations submitted by the group of six affected parties suggests that disclosure

- could have negative implications on its business
- could result in harm to its competitive position
- has the potential to significantly prejudice its competitive position in the marketplace
- may allow its competitors to gain a competitive advantage
- will put it at a commercial disadvantage
- has the potential to cause irreparable harm to its organization
- may cause it to choose not to participate in future RFPs

Affected party #7 submits that the RFP it responded to is commonly referred to in the information technology industry as a competition for a "staff supplementation" (staff supp) engagement. In these competitions a successful bidder's objective is to provide competent and qualified staff to a client, such as the Board, to "supplement" the work being performed by its existing staff, on an as needed basis. Affected party #7 states that the market for "staff supp" engagements is particularly competitive, since they are "price driven". Affected party #7 suggests that if its competition has access to its pricing information but it does not have reciprocal access, the competition would have the ability to underbid on future RFPs, representing a "significant advantage" in the bidding process. Affected party #7 concludes that disclosing its information could, therefore, reasonably be expected to significantly prejudice its competitive position.

Affected party #7 also submits that disclosing its information could reasonably be expected to result in undue loss to itself. Affected party #7 states that the competitive advantage secured by its competitors, as described above, would result in the "loss of ['staff supp'] contracts" and lead to "significant financial impact", described as "loss of future revenue and profits" and possibly the "costs of terminating [staff] to the extent that [it] cannot re-assign such staff to other billable work within a reasonable time."

Affected party #8 states that these contracts are tendered for "short time periods" so that the release of its "financial information" to a competitor would have an "immediate impact" on its ability to win any successive bid with the Board. Affected party #8 states that the pricing structure is "simplistic", based on "relatively static bill rates, pay rates and margins" and not subject to dramatic fluctuations over short periods of time. Affected party #8 states further that in the public sector market budgets are particularly tight and, as result, "pricing is, in the bidding process often the key discerning factor between competitors and bids are won and lost based on price alone."

Affected party #8 distinguishes the circumstances in this case from those in Order MO-1706, stating

> [U]nlike the scenario in the Peel District case, where branding and other marketing and other selling features would have given the cold beverage companies a competitive advantage, in the consulting industry in which [affected party #8] operates, […] pricing is one of, if not the only, differentiating factor between competing companies. [Affected party #8] regularly competes with similarly situated consulting companies who have the ability to provide virtually identical services (and can attract the same resource for placement) to a client like the [Board]. Thus, the impact of the disclosure of [affected party #8's] financial information is not speculative, but is genuine and is based upon the reality of the industry in which [it] operates.

Board

The Board provides detailed submissions on harms under both sections 10(1)(a) and (c).

The Board states that disclosing the information at issue in the record "would prejudice significantly the competitive position" of the affected parties under section 10(1)(a). Quoting directly from Order MO-1471, the Board states that the "unit pricing structure underlies a bidder's competitive advantage" and the disclosure of unit prices would allow competitors to "underbid and prejudice that bidders competitive position." The Board submits that the affected parties compete with each other on an ongoing basis and their billing and pricing arrangements are "not commonly shared among competitors." The Board suggests that the affected parties' competitive position would be significantly prejudiced in the event of disclosure for the following reasons:

- competitors would have access to "inside" information for the purpose of building or improving their proposals in future bidding competitions for similar contracts

- "price specification" information is "commercially confidential" and, if disclosed to competitors, would reveal "competitively-sensitive information about [the affected parties'] prices and costs

- Competitors would be able to "underbid" the affected parties in other contract competitions

The Board states that disclosing the information at issue would "interfere significantly with the contractual or other negotiations of the affected parties'" under section 10(1)(a) for the following reasons:

- their "price breakdowns would already be in the public domain"

- their relationships with other clients could be seriously impaired since others will learn of any "special price allowances" made by the affected parties and will want the same treatment

With regard to the application of section 10(1)(c), the Board submits that the affected parties would suffer "undue loss" and the appellant and competitors experience "undue gain" in the event of disclosure. In support of its position, the Board states that upon disclosure of the information at issue the affected parties "highly-sensitive commercial and financial information" would then be in the "public domain and no longer confidential" and, as a result, the affected parties would lose any pricing advantage that they had previously enjoyed. The Board submits that prices ultimately determine not only who is awarded a service contract, but also a company's profit on a particular service contract.

Appellant

The appellant's representations on the harms issue are brief. The appellant submits that the "integrity of the public procurement process rests on transparency and public disclosure." The appellant also states that the Bid Evaluation "appears to contain a limited subset of a proper evaluation report, thus further undermining any rationale for its suppression, in whole or in part."

Analysis and findings

The information at issue in the Bid Evaluation consists of several categories containing pricing information, comprised of staff pay rates for various positions, margins, overtime rates, discounts and other fees, as well as a category entitled "reasons for disqualification". All of this information is drawn from the proposals submitted by 24 affected parties in response to the RFP.

In the past, previous orders issued by this office have addressed the issue of harm under section 10(1) in the context of records containing specific bid information. Former Adjudicator Holly Big Canoe in Order PO-1696 comments:

> In past orders a reasonable expectation of prejudice to competitive position has been found in cases where information relating to pricing, material variations, bid break downs, etc. was contained in the records (Orders P-166, P-610 and M-250). Past orders have also upheld the application of section 17(1)(a) [the provincial equivalent of section 10(1)(a)] where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts (Orders P-408, M-288 and M-511).

This approach was followed by former Adjudicator Dawn Maruno in Order MO-1471, which was cited by the Board in its representations on the harms issue. In that case, former Adjudicator Maruno examined the application of section 10(1) to a tender that was submitted by the lowest bidder in a competition for the provision of garbage collection services for the Town of Ajax. The record at issue contained "unit pricing" information. In finding the information at issue met the harms test under section 10(1)(a), former Adjudicator Maruno stated

> …both the Town and the affected party [have established] that the unit pricing structure underlies a bidder's competitive advantage and that disclosure of unit prices in these circumstances will allow competitors to underbid and prejudice that bidder's competitive position.

The Board has asked that I follow the reasoning in Order MO-1471 and apply it in this case.

Affected party #8 has also asked that I distinguish the circumstances in this case from those in Order MO-1706. In that case, there were two records at issue, an affected party's successful "partnership proposal" and a "vending and pouring agreement" between the affected party and the Peel District School Board (Peel), which contained the terms proposed in the proposal, for the exclusive provision of soft drink and snack vending machines in Peel's schools. In finding that the harms tests under section 10(1)(a) and (c) had not been met with regard to the information at issue in that case, including unit pricing information, I stated:

> I am not convinced that there is any inherent value in this information. The information is now more than three years old and there is evidence to suggest that it would be of little value to competitors as the landscape changes with respect to the creation of cold beverage vending arrangements between public institutions and prospective vendors.
>
> In short, I find both the affected party's and the Board's evidence speculative. The affected party and the Board have not provided detailed and convincing evidence that disclosure of this information could lead to a reasonable expectation of harm. […]

I now turn to my analysis in this case. On my review of the parties' representations, the record at issue and the surrounding circumstances, I am not persuaded that disclosing the information remaining at issue in the Bid Evaluation could reasonably be expected to result in any of the harms outlined in sections 10(1)(a) or (c) of the *Act*.

As already noted above, the Bid Evaluation contains selected portions of proposals submitted by 24 affected parties in response to the Board's RFP. The Bid Evaluation was created by the Board and used by it to review, compare and evaluate the relative merits of the 24 proposals submitted.

I agree that the decision whether to disclose specific bid information must be approached in a careful way, applying the tests as developed over time by this office while appreciating the commercial realties of the RFP process and the nature of the industry in which the RFP occurs [see Order MO-1888]. That said, in my view, the case for harms in situations involving pricing information is not absolute. Each case must be considered independently, with a view to the evidence presented and the impact of other factors, such as the positions taken by all affected parties, the passage of time, and the nature of the record and all of the information at issue in it.

While not determinative of the harms test under section 10(1), I cannot ignore the fact that of the 24 affected parties addressed in the Bid Evaluation, eight consented to the release of their information in its entirety. In effect, one-third of the affected parties with information in the record consented to the release of their information. Of the 16 remaining affected parties, eight submitted representations, six of which provided vague and speculative suggestions regarding potential for harm while two submitted fairly detailed representations on the harms issue.

Therefore, while in my view the representations submitted by the group of six affected parties clearly do not amount to "detailed and convincing" evidence of a reasonable expectation of harm, a closer examination of the representations submitted by affected party #7, affected party #8 and the Board is required.

The Board has offered detailed representations on what the affected parties would stand to gain from disclosure, including access to inside pricing and costing information, the ability to underbid competitors. The main thrust of the representations submitted by affected party #7 and affected party #8 appears to be that bidding on "staff supp" engagements is "particularly competitive" because they are "price driven" contracts of a short term duration. Affected party #8 adds that pricing is relatively "simplistic" in these cases and based on relatively "static" pay rates and margins. It suggests that price is one of, if not the only, differentiating factor between competitors, whereas in Order MO-1706 other factors, such as brand recognition and marketing, gave companies in that context a competitive advantage. As a result, these affected parties argue that the release of this information to their competitors would have an immediate impact on their ability to compete for future "staff supp" engagements on equal footing.

While I acknowledge the importance that price may play in determining success in the bidding process in this context, it is not the only assessment criteria that appears in the Bid Evaluation. The record also sets out each affected party's overtime policy, price guarantee date, discount criteria and additional notes on particular points of interest in specific proposals. I am not convinced, based on the evidence before me that price is the determining factor. I note, on my review of the record, that the affected parties "recommended" for engagement by the Board did not have the lowest staff prices. There were other bidders with lower prices. In addition, in the category marked "reasons for disqualification", in only two cases out of 24, was price a determining factor. In all other cases, other factors, such as, company equity, ability to provide for all staffing needs, and pricing methodology were the key factors in assessing a company's proposal. As well, while not expressly mentioned in the Bid Evaluation, in my view, other factors, such as, past performance, reputation in the industry and references would also play a role in the assessment process.

Furthermore, as in Order MO-1706, I am not convinced that there is any inherent value in the information contained in the Bid Evaluation. The information at issue was submitted by the affected parties more than two and a half years ago. The bidding process has long concluded. Despite the suggestions of affected party #7 and affected party #8, there is little evidence to suggest that this information would be of any value to competitors today as the economic conditions and needs of public institutions has likely changed through the passage of time.

Finally, the fact that a consultant seeking a "staff supp" contract from the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position, significantly interfere with their contractual or other negotiations, or result in undue loss to them [see Order PO-2435].

Accordingly, for the reasons set out above, I find that the part 3 harms test has not been met with regard to the information remaining at issue in the Bid evaluation.

Because parts 2 and 3 of the section 10(1) test have not been met, I will order the entire Bid evaluation disclosed.

SCOPE OF REQUEST/SEARCH FOR RESPONSIVE RECORDS

Introduction

In this case, as stated above, the appellant initially raised "reasonable search" as an issue at the mediation stage. However, during the course of this inquiry, after receiving representations from the appellant, it became apparent that the appellant's real interest was in the Board's alleged failure to identify a second record, "Report 01-04-0446" (the Report), as being responsive to the appellant's request. This raises "scope of request" as an issue.

Under the circumstances in this case, I will deal with the scope of request and reasonable search issues together.

Scope of request

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Reasonable search

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Parties' representations

The appellant submits that on February 18, 2004 the Board's Accounting and Finance Committee met and received the Report on recommended contract awards. The appellant states that Appendix 1, Chart C of the Report, "Contracts Requiring Board Approval >$250,000", includes a summary assessment of the procurement process addressed by the RFP and, therefore, is also responsive to the appellant's request as an evaluation report.

The Board states that Chart C is non-responsive to the appellant's request as it "does not contain any evaluative content whatsoever." In particular, the Board submits that Chart C does not contain any information that serves to "critique, assess, compare, analyze or appraise the bids received" in response to the RFP. The Board states that Chart C is "simply a reporting document" setting out "contract information and staff recommendations already made, following, and as a result of, the evaluative process embodied in the [Bid Evaluation]." Finally, the Board states that Chart C, together with the entire Report, is a public document available on the Board's website.

In response, the appellant challenges the Board, stating that the Report was "expressly created to convey evaluative recommendations", including "recommended suppliers", "low bid [confirmation]" and "number of bids [received]". The appellant suggests that the Board's failure to identify this Report represents "bad faith" on the part of senior staff employed by the Board.

The Board was also asked to provide a written summary of all steps taken in response to the appellant's request, including affidavits from the people who conducted the actual searches. The Board provided affidavit evidence from two senior Board staff, the Board's Freedom of Information and Privacy Co-ordinator and its Assistant Comptroller, Administrative Services, regarding the Board's search efforts. The Board's representations include a detailed chronology of the steps taken to respond to the appellant's request. The Board reaffirms in its representations that it identified the one record responsive to the appellant's request, the Bid Evaluation.

The appellant, again insisting that the Report is responsive to his request, suggests that the Board employees' affidavits are "at best, seriously misleading; arguably materially false."

Analysis and findings

On my review of the parties' representations, I find that the Board has properly discharged its obligations under section 17 regarding the interpretation of the scope of the appellant's request. I am satisfied that the Report does not reasonably relate to the appellant's request for an "evaluation report", as it does not contain evaluative content. In any event, even if it did fall within the scope of the appellant's request, the issue appears moot since the appellant has obtained a copy of the Report. As an aside, while I am not suggesting that the Board should have done so in this case, in the future, the Board should consider bringing information that it

knows is publicly available on its website, and may be of interest to a requester, to that person's attention as early as possible in the process.

Dealing briefly with the reasonable search issue, I am satisfied that the Board has adequately discharged its responsibilities under section 17 of the *Act* to conduct a reasonable search for records responsive to the appellant's request.

ORDER:

1. I order the Board to disclose the Bid Evaluation to the appellant in its entirety, by **September 1, 2006** but not before **August 28, 2006**.

2. I uphold the Board's interpretation of the scope of the appellant's request and its search for responsive records.

Original Signed by: July 27, 2006
Bernard Morrow
Adjudicator