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

ORDER MO-2080

Appeal MA-050390-1

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for two proposals submitted in response to an identified Request for Proposal (RFP). The RFP related to restoration work on a historic railway station building. The request was worded as follows:

> The [requester] wishes to examine both proposals submitted for evaluation under [an identified RFP]: Relocation, Restoration and Adaptive Re-use of [a historic railway station]. The identities of the entities submitting the proposals and the entities recorded as the winning bidder are to be identified.

In its initial decision letter dated October 11, 2005, the City disclosed the names of the proponents and identified the successful one. Having received the successful proponent's position on disclosure, the City advised that it was relying on section 10(1) of the *Act* (third party information) to deny access in full to the successful proposal. The letter also advised the requester that the City was seeking the position of the unsuccessful proponent regarding the disclosure of its proposal.

The requester (now the appellant) appealed the City's decision. In a letter accompanying the Notice of Appeal, and in its representations, the appellant sought to expand the scope of the appeal by requesting some additional information. This is addressed in the discussion of the scope of the appeal, below.

During the intake stage of the appeal, the City issued a second decision letter dated November 18, 2005. The letter advised that, after receiving a response from the unsuccessful proponent, the City had decided to grant partial access to the unsuccessful proposal. The City relied on section 10(1) of the *Act* to deny access to the portion it withheld.

At mediation, the appellant advised that it had obtained a copy of the unsuccessful proposal. As a result, access to the unsuccessful proposal is no longer an issue in this appeal. Also during mediation, as confirmed in a further supplementary decision letter, the City advised that it was also relying on mandatory exemption in section 14(1) of the *Act* (personal privacy) to deny access to any personal information contained in the successful proposal. In addition, the City clarified that it was specifically relying on sections 10(1)(a) and (c) to deny access to the successful proposal.

No further issues could be resolved at mediation and the matter was referred to the adjudication stage.

I sent a Notice of Inquiry to the City and the successful proponent (the affected party), initially. Both the City and the affected party filed representations in response and asked that portions of their representations be withheld due to confidentiality concerns.

A Notice of Inquiry along with the non-confidential representations of the City and the affected party were then sent to the appellant. The appellant also provided representations in response to the Notice of Inquiry.

RECORD

The record at issue is the successful proposal submitted by the affected party. Appendices to the proposal contain letters of support and commitments to provide volunteer services and support to the restoration project. They also contain various notices and an excerpt from a website. In the decision that follows, unless otherwise stated, I will be referring to the proposal and the appendices collectively as "the proposal".

DISCUSSION:

SCOPE OF THE APPEAL

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 and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

The initial request was as indicated above. In a letter accompanying the Notice of Appeal, and in its representations, in addition to the identity of the parties who bid on the project the appellant asked for the corporate status and agents of the bidders and the identities of the parties who "actually were scored" by the committee evaluating the proposals. That being said, in the Notice of Appeal, the appellant indicates that the appeal could be resolved by disclosure of the successful bid.

In my view, the scope of the appeal is as stated in the initial request. As a result of mediation, as set out clearly in the mediator's report and in keeping with the initial request, the record at issue

is the proposal of the successful proponent. If the appellant wishes to do so it may pursue other information in another validly constituted request.

THIRD PARTY INFORMATION

The City is relying on section 10(1)(a) and (c) of the *Act* to deny access to the record.

Sections 10(1)(a) and (c) of the *Act* 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, 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;
>
> …
>
> (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 [*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, PO-2371, PO-2384, MO-1706].

For section 10(1) to apply, the institution and/or the affected 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) and/or (c) of section 10(1) will occur.

Part 1: Type of Information

Previous orders have defined "technical information", "commercial information" and "financial information" as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields 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 PO-2010].
>
> *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].

The City claims that the record contains "financial information" and "commercial information", including proposed costs of memberships in the restoration effort, sources of funds, offers of donations to supply services and supports to the successful proponent, detailed budgets, operating expenses and income. In addition, there is information regarding what private use is to be made of the building, the timelines for the restoration and how the site is to be managed when it is completed.

The City also submits that the record contains details of how the restoration will take place, including changes that are envisioned by the architect and drawings of existing floor plans, including internal space plans. The City submits that this qualifies as "technical information".

The affected party did not make detailed submissions on this issue. Instead, it attached to its representations pages of the proposal that it specifically did not want released. The affected party objected in particular to the release of the financial information of a not for profit organization involved in the proposal. The affected party states that this is not information that the organization typically releases to the public.

In its representations the appellant does not specifically address this part of the section 10(1) test.

Based on the representations and my review of the records, I am satisfied that the proposal contains information that is "financial" and/or "commercial" information. I am also satisfied that some of the information in the proposal qualifies as "technical information".

Because all of the withheld information in the proposal could qualify as "financial", "commercial" and/or "technical information", I find that the requirements of part 1 of the section 10(1) test have been met.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the institution and/or the affected party must establish that the information was "supplied" to the institution "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be supplied to an 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].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)* [2005] O.J. No. 2851 (Reasons on costs at [2005] O.J. No. 4153) (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.)).

In Order PO-2384, I addressed this aspect of 17(1) of the Provincial *Freedom of Information and Protection of Privacy Act* (*FIPPA*), which is the equivalent provision to section 10(1) of the *Act*:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. In either case,

except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".

As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

In Order PO-2435, Assistant Commissioner Beamish rejected the position of the Ministry of Health and Long-Term Care that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish observed that the exercise of the government's option in accepting or rejecting a consultant's bid is a "form of negotiation". He wrote:

The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

All parties acknowledge that the proposal was supplied to the City in the context of a bid process. That being said, in accordance with the authorities referenced above, the nature of the bid changed when it was accepted.

However, because of my determination on the "in confidence" component of part 2 of the section 10(1) test, it is not necessary to consider whether any of the information in the successful proposal was "supplied", or whether it falls under one of the exceptions to the normal treatment of contract information because it is "immutable", or because disclosure "would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party".

In Confidence

In order to satisfy the "in confidence" component of Part 2, the parties resisting disclosure, must establish that the supplier of the information 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-2043].

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 party prior to being communicated to the institution;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [PO-2043].

The City refers to representations that it filed on appeal MA-050289-1, which relates to a request for the same record by another appellant (addressed in Order MO-2078, which is being released concurrently with this order). In its representations in that appeal, the City took the position that pages 4, 5, 6, 17, 18, 30, 102, 103 and 104 of the proposal contains information that appears on the affected party's website. In addition, the City advised that after a further review, it was prepared to release pages 1, 2, 3, 7, 8, 9, 20, 21, 23, 27, part of 35, 37, 38, 39, 41-46 and 75-78 of the proposal. The City took the same position in this appeal. The City submits that, except for the pages that contain the affected party's website information, the balance of the proposal contains information that is not routinely disclosed nor is available from publicly accessible sources.

In addition, the City states that all its RFP call documents advise that the proposals are subject to the *Act* and that a proponent should identify any information it wishes to be kept confidential. After consulting its purchasing division, the City reports that the affected party did not specifically address this matter in response to the RFP. However, the City submits that based on the affected party's objection to the release of specific information in the proposal, and its statement that certain information of the not for profit organization is not information that the organization typically releases to the public, it is reasonable to assume that the affected party intended for the information to remain confidential.

In its representations, the appellant refers specifically to section 8.2 of the RFP call document which states, in part:

> Because of [the *Act*], Proponents are advised to identify in their Proposal material any scientific, technical, commercial, proprietary or similar confidential information, the disclosure of which could cause them injury.
>
> Any information in the Proponents' submission that is not specifically identified as confidential will be treated as public information.
>
> …

There is no notation of confidentiality on any of the pages of the proposal.

Analysis

Having carefully reviewed the record at issue and the representations of the City and the affected party, I am not satisfied that any part of the proposal was supplied "in confidence" by the affected party to the City.

Neither the City nor the affected party have provided sufficient evidence that would reasonably lead the affected party to consider that the information was provided in confidence, either implicitly or explicitly. In its representations the affected party identifies certain information of a not for profit organization that it says is *typically* not released to the public. The City points to this statement as establishing a reasonable expectation of confidentiality. However, this statement does not indicate that this information is always kept confidential, or never released. More importantly, although invited to do so in the Notice of Inquiry, the affected party provides no explanation of how an implicit or explicit expectation of confidentiality arose in the context of submitting its proposal. Furthermore, no notation of confidentiality was made on the proposal, although the failure to specifically identify confidential information was expressly stated to result in the City treating it as public information. Finally, the proposal itself contains website materials as well as information that is similar or virtually identical to information that appears on the successful proponent's website.

Accordingly, I am not satisfied that the information that is sought to be withheld under section 10(1) of the *Act* was supplied by the affected party in confidence, either explicitly or implicitly within the meaning of section 10(1). I find, therefore, that the City and the affected party have not satisfied the requirements of part 2 of the test for any of the information sought to be withheld from the successful proposal under section 10(1).

As all three parts of the test under section 10(1) must be met with respect to information that qualifies as "commercial", "technical" or "financial", I find that section 10(1) does not apply to any of the information sought to be withheld from the proposal under section 10(1). It is therefore unnecessary to address the submissions on the harms component of the test under section 10(1) of the *Act*.

PERSONAL INFORMATION

The City is seeking to rely on section 14(1) of the *Act* to sever any personal information from the proposal. The City submits that this type of information is found at pages 11, 33, 54, 55, 56, 57, 58, 59, 61, 86, 93, 94 and 105-113.

In order for a record, or a portion of a record, to qualify for exemption under section 14(1), it must contain "personal information", as defined in section 2(1) of the *Act*. Under this definition, "personal information" means recorded information about an identifiable individual including information relating to "the employment history of the individual or information relating to financial transactions in which the individual has been involved" (paragraph (b)), the "address [or] telephone number of the individual" (paragraph (d)), "the personal opinions or views of the individual except if they relate to another individual" (paragraph (e)) or 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 (paragraph (h)).

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225]. Previous decisions of this office have drawn a distinction between information relating to an individual in a *personal capacity* and information relating to an individual in *a professional or official government capacity*. As a general rule, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of section 2(1) definition of "personal information" [Orders P-257, P-427, P-1412, P-1621].

As explained by Assistant Commissioner Brian Beamish in Order PO-2435:

> … In determining whether information relating to a named individual is "personal information", the appropriate approach is to look at the *capacity* in which the individual is acting and the *context* in which their name appears. This was enunciated in Order PO-2225 where former Assistant Commissioner Tom Mitchinson considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. The Assistant Commissioner posed two questions that help to illuminate this distinction:
>
> > Based on the principles expressed in these [previously referenced] orders, the first question to ask in a case such as this is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
> >
> > ....
> >
> > The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

The City takes the position that the names, telephone numbers, addresses and email addresses of individuals, including those who wish to provide voluntary services or support to the restoration project, the work history of some of these individuals and the views of individuals about the project, is personal information under paragraphs (b), (d), (e) and (h) of the definition.

The appellant submits that the proposal does not contain personal information. According to the appellant it contains information about an organization or a corporation. The appellant submits that personal activity in an organization does not qualify as personal information. While the appellant insists that it should be provided with the personal views of individuals contained in letters, it would have no objection to deleting any addresses. The appellant submits that "at the very least, the letters themselves, minus the names, are not 'personal information'". In its representations the affected party does not specifically address this issue.

Analysis

In considering the nature of the information in the proposal, I have reflected on the context in which the information was provided. In keeping with my determination that the proposal

contains financial and commercial information, and the fact that the proposal was submitted in a competitive bid in the marketplace, I find that the information was given in a context analogous to that of a business enterprise. Although avowedly not for the purpose of making a profit, the business enterprise in this case is a proposal for the restoration and operation of a historical building. In the context of this enterprise, individuals provided letters of support and companies and individuals made offers to provide services and support to the successful proponent. The offers of services and support took the form of the volunteering of information, assistance, donations or donations in kind. Because the proposal had not been accepted at the time the offers were made, by their very nature, they were conditional on the proposal being accepted by the City. In my opinion, in the circumstance of this appeal, the information that the City claims is personal was provided in what amounts to a business context removed from the personal sphere.

However, as pointed out by Assistant Commissioner Beamish, the analysis does not end there. I must also consider if disclosure of the information reveals something that is inherently personal in nature.

As section 14(1) is a mandatory exemption, I have examined the entire record for any information, in addition to the information identified by the City, which might qualify as personal information.

In addition to the home and email addresses and telephone numbers of individuals found in the proposal, which I find to be personal information, at first blush, pages 4, 11, 25, 33, 47, 51-53, 54, 55, 56, 57, 58, 59-60, 61, 66, 85, 86, 87, 93-94, 96, and 105-113 contain information which might also qualify as personal information.

However, pages 47, most of 59-60, 85 and 87 of the proposal are letters on company or organization letterhead, or email exchanges to and from business email addresses. In my view, except for a portion of page 59 (discussed below), although these letters or exchanges sometimes speak in the first person, they represent a corporation or organization's offer of assistance, or an approach for their assistance, and do not relate to an individual's personal information. As a result, the information in these pages does not qualify as personal information.

In my view, however, the offer from individuals to volunteer background historical data at page 11, the individual named as architect on pages 25 and 66, the key members mentioned on page 33, the email exchange on pages 51-53, pages 54, 55, one sentence on page 59, the letters from individuals at pages 61 and 93-94, and the list of individuals making donations of their time and money at pages 105-113, are of a different nature. Although the information appears in what amounts to a business context, it is a conditional commitment by individuals to provide donations or to volunteer to provide services and support in their personal capacity, which I find reveals something that is inherently personal. Furthermore, the information in the emails on pages 56 and 58 contain the views of individuals about the project along with other information about them and pages 4, 11, 33, 54, 55, 58 and one sentence on page 59 may reveal an individual's employment history, all of which may also qualify as personal information.

No other mandatory exemptions apply to pages 47, most of 59-60, and pages 85 and 87 of the proposal, and no discretionary exemptions were claimed for this information. Therefore, as a result of my finding that this information does not qualify as "personal information", I will order it to be disclosed.

PERSONAL PRIVACY

Where an appellant seeks the personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In my view, the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 14(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 14(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of the affected party's personal privacy.

In applying section 14(1)(f), the factors and presumptions in sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. The specific provisions of these sections that are relevant in the circumstances of this appeal provide, as follows:

> (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 institution to public scrutiny;
> >
> > …
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence;
> >
> > …

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (d) relates to employment or educational history;
>
> …

Section 14(2) provides some criteria for the institution to consider in making this determination; section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 14(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 under section 14(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 14(4) of the *Act*, or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

Section 14(3)(d)

The City submits that pages 33, 54, 55 and 59 of the proposal contains personal information describing the employment history of identifiable individuals and, as a consequence, falls under the presumption in section 14(3)(d) of the *Act*. To this I would add certain information on pages 4 and 11 of the proposal.

I have reviewed the information on pages 4, 11, 33, 54, 55 and one sentence on page 59 of the proposal and find that it describes the employment history of identifiable individuals. I therefore find that this information falls within the presumption in section 14(3)(d). Disclosure of this information is presumed to constitute an unjustified invasion of privacy. Section 14(4) does not apply to this information. Therefore subject to the possible application of section 16 (see below), this information is exempt under section 14(1).

The remaining information does not fall within any section 14(3) presumption.

All the Relevant Circumstances in Section 14(2)

The City also submits that the individuals provided their personal information for inclusion in the proposal with the expectation that this information would only be released with their consent. The City submits that as a result this information was provided in confidence and falls within section 14(2)(h) of the *Act*, a factor favouring non-disclosure.

The appellant submits that the factor favouring disclosure in section 14(2)(a) of the *Act* is relevant in the circumstances of this appeal. The appellant makes extensive submissions on this point, some of which are found in its submissions on the application of the public interest override in section 16 of the *Act*.

Analysis and Findings

Notwithstanding the submissions of the City, I find that section 14(2)(h) does not apply to the remaining information. This is because I am not satisfied that the City has established a reasonable expectation that this information would be kept confidential.

The appellant's submissions point to disclosure of the information being desirable for the purpose of subjecting the activities of the City to public scrutiny. The submissions also raise another circumstance which is not listed in the section but is often considered in balancing access and privacy interests under section 14(2) in matters of this nature i.e. that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution".

With some exceptions, I find that section 14(2)(a), which favours disclosure, is a relevant factor and has significant weight. I base this conclusion, in part, on the nature of the information, the concerns expressed by the appellant about how the proposal was awarded and whether the bid requirements were met, the circumstances surrounding the project and its current state. Based principally on these same factors, with the same exceptions, I also find that the "public confidence in the integrity of the institution" consideration applies and carries significant weight.

To summarize, I have found that the factor favouring disclosure at section 14(2)(a), relating to the desirability of subjecting the activities of the institution to public scrutiny, and the consideration relating to "public confidence in the integrity of the institution" both apply, and both carry significant weight. That said, in the circumstances of this appeal, I do not believe that the home and email addresses and telephone numbers of individuals, or the information in the emails on pages 56 and 58 that contains the views of individuals about the project along with other information about them, engages their application. In my view there are no factors or circumstances in section 14(2) that favour disclosure of this information. In the absence of those factors or circumstances, I find that disclosure of the home and email addresses and telephone numbers of individuals, or the information in the emails on pages 56 and 58 that contains the views of individuals about the project along with other information about them, would constitute an unjustified invasion of personal privacy. It is therefore exempt under section 14(1).

In my view, the transparency purposes of the *Act*, (as reflected in section 14(2)(a) and the "public confidence in the integrity of the institution" consideration) are substantial and pressing objectives, and in the circumstances of this appeal, after removing the home and email addresses and telephone numbers of individuals and the content of pages 56 and 58 of the proposal from consideration, I find they outweigh *any factor* favouring privacy protection for the remaining information in proposal.

I therefore find that disclosure of the balance of the personal information in the proposal is not an unjustified invasion of personal privacy, and as such falls within the section 14(1)(f) exception. It is therefore not exempt under section 14(1) and I will order it disclosed.

PUBLIC INTEREST OVERRIDE

General principles

The appellant has taken the position that there is a public interest in the disclosure of the proposal. Based on my findings set out above, I must therefore determine whether section 16 applies to the portions of the proposal that contain the home and email addresses and telephone numbers of individuals, the information in the emails on pages 56 and 58 that contains the views of individuals about the project along with other information about them or that fall within the presumption in section 14(3)(d).

Section 16 of the *Act* provides as follows:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphasis added]

The City submits that the information in the record does not qualify as information for which there exists a compelling interest in disclosure. The affected party expresses a concern that release of the information could allow the unsuccessful proponent to adversely affect the affected party's ability to proceed with the project In the reply representations the affected party filed on appeal MA-050289-1 (addressed in Order MO-2078, which is being released concurrently with this order) the affected party submits it took steps to ensure the transparency of its proposal and questions the motivation of the unsuccessful proponent as well as the timing of the access request. The affected party also explains the challenges it has faced in relation to the project.

The appellant submits that the public interest in the information is the "dominant issue" in this appeal. In this regard the appellant points to newspaper articles emphasizing the need for openness of public institutions. The appellant also expresses in its confidential submissions concerns about the status of the successful proponent, how the proposal was awarded, whether the bid requirements were met and the circumstances surrounding the project.

For section 16 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 exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

> "Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. 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.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

Section 14(1) is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. [Order PO-1705]

The appellant submits that the purpose of the request is to provide the public with information relating to whether the proposal was properly awarded and whether the bid requirements were met. The appellant takes the position that the disclosure of this information would provide the public with important information regarding the City's activities, the proposal and the project.

Although I accept the appellant's position that there is a public interest in some of the information contained in the records, in my view this interest will be satisfied by the level of disclosure required under this order. I find that there is no "compelling" public interest in disclosure of the remaining undisclosed personal information (which, as I have noted is the home and email addresses and telephone numbers of individuals, relates to employment history or contains their views of the project and other personal information), and section 16 therefore does not apply.

ORDER:

1. I uphold the decision of the City to deny access to pages 54, 55, 56 and 58 of the proposal in full and to the portions of pages 33, 56, 57, 58, 59, 61, 86, 93 and 105-113 of the proposal that are highlighted on the copy of those pages provided to the City with this order. The highlighted information is **not** to be disclosed.

2. I also order the City to deny access to a portion of pages 4, 11 and 60 of the proposal that contains personal information. I have highlighted those portions on the copy of the pages provided to the City with this order. The highlighted information is **not** to be disclosed.

3. I order the City to disclose the remainder of the proposal by providing it to the appellant**, by October 2, 2006**, but not before **September 26, 2006**.

4. In order to verify compliance with the terms of this order, I reserve the right to require the City to provide me with a copy of the proposal as disclosed to the appellant, upon request.

Original Signed By: August 25, 2006
Steven Faughnan
Adjudicator