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

ORDER PO-2453

Appeal PA-040281-1

Ministry of Natural Resources

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BACKGROUND

Quetico Provincial Park is operated by the Ministry of Natural Resources (the Ministry). It has four Ranger Stations which are accessible by float plane. There are weekly runs by float plane to the four stations in the park for the provision of supplies, station maintenance and administrative purposes.

On March 26, 2004, the Ministry's Aviation Services Branch issued a Request for Quotation (RFQ) from local Air Operators to provide aircraft services and operate these runs for the 2004 operating year. The Ministry states that the RFQ process was conducted pursuant to the practices and policies of the Aviation Services Branch. On April 6, 2004, the RFQ closed and two bids were received. The Ministry decided to accept one of those two bids (the "successful bid").

NATURE OF THE APPEAL:

The Ministry subsequently received a request under the *Act* from the unsuccessful bidder for access to the records related to the successful bid for the air services contract to conduct the routine runs within Quetico Provincial Park.

The Ministry identified two records as responsive to the request, one entitled "2004 Considerations When Reviewing Quote Submissions" and one entitled "Quetico Provincial Park 2004 - Quotation Bid Analysis". The Ministry granted access to the first record in its entirety. The second record, the Quotation Bid Analysis (the "record"), outlines the details of the bids submitted by the successful bidder and the requester, who was the only other bidder. The Ministry disclosed the portion of the record containing the details of the requester's bid but withheld the portions of the record containing certain details of the successful bid on the basis of the exemption in section 17(1) (third party information) of the *Act* .

The requester, now the appellant, appealed that decision.

During the mediation stage of the appeal, the Ministry provided this office with portions of two documents that might be relevant to the determination of this appeal. One of these was the portion of the RFQ for air services that outlines a "Notice" or "Disclosure" provision. The other was a document entitled "Procurement Directive for Goods and Services" (the Directive), prepared by Management Board Secretariat. The Directive applies to all ministries and specifies the principles that govern the acquisition of goods and services needed by the government and the mandatory requirements for adherence to those principles.

As part of the mediation process, the Mediator contacted the successful bidder (the affected party). The affected party stated that it would not consent to the release of any portion of the record.

As mediation did not resolve the issues, the appeal was transferred to the adjudication stage. A Notice of Inquiry setting out the facts and issues on appeal was sent to the Ministry and the affected party, initially. Representations were received from the Ministry but the affected party advised that it did not intend to provide representations. Instead, the affected party advised that in lieu of representations, it would rely on a brief letter that it sent to the Mediator stating that it

had provided the information to the Ministry in confidence and that it does not consent to its disclosure. I will treat this letter as the representations of the affected party.

The Notice of Inquiry was then sent to the appellant, along with a copy of the Ministry's representations. The appellant provided representations in response.

RECORD:

The record is a one-page document entitled "Quetico Provincial Park 2004 - Quotation Bid Analysis". The information at issue relates to: (1) the successful bidder's pricing for various components of the service; (2) the "back-up" aircraft (an alternative aircraft that can be provided to perform the service); and (3) the total price of the successful bidder's bid.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry submits that the exemption in section 17(1) of the *Act* applies to exempt the withheld portions of the record from disclosure.

Section 17(1): the exemption

Section 17(1) is a mandatory exemption that applies to exempt information belonging to a third party from disclosure. The portions of section 17(1) that might apply in the circumstances of this appeal read:

> 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; or
>
> …

Section 17(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 17(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 17(1) to apply, the parties resisting disclosure, in this case the Ministry and 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), (b), (c) and/or (d) of section 17(1) will occur.

The Court of Appeal for Ontario, in upholding Assistant Commissioner Tom Mitchinson's Order P-373, discussed the application of the three-part test:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB [Workers Compensation Board]. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

Part 1: type of information

The types of information listed in section 17(1) have been discussed in previous orders. Those that appear to be relevant in the circumstances of this appeal are the definitions of technical, commercial and/or financial information. These types of information have been described 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 [Orders P-493 and 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].

I adopt these definitions for the purpose of this appeal.

The Ministry "adopts the position that the information would be considered the technical and/or commercial information of the affected party" and submits:

> **Commercial Information**
>
> The information relates to a bid for a contract to provide air services to the Ministry. The record includes the prices or costs of the provision of such services. The information contained in the records is clearly commercial and/or financial information.
>
> Past orders of your office have indicated that "commercial information" relates to the buying, selling or exchange of merchandise or services. In this case, the affected party is offering an exchange of services in providing air service within a provincial park. The record contains information relating to the buying or exchanging of services in that it describes the services or aspects of the services that are to be provided and the bid price. In short, the records in issue detail that

> exchange of services and accordingly are considered "commercial" information as contemplated by the *Act*.
>
> **Technical Information**
>
> Past orders of your office have indicated that "technical information" is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. It usually involved information prepared by a professional in the field and describes the construction, operation, maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> In this instance, the information which has been exempted and relates to Aircraft, fuel burn and flats refers to the type of aircraft which is to be used as back up aircraft which is part of the bid. Thus it is the Ministry's position that applying the above definition that the records contain technical information.

The appellant's representations do not deal directly with any of the types of information listed in section 17(1).

On my review of the record, and consistent with many past orders dealing with similar records, I find that the severed information in the record, which details bid information provided by the affected party in response to a Ministry RFQ, consists of "commercial information", for the purposes of section 17(1). The information was submitted to the Ministry in response to a competitive selection process and pertains to the proposed terms of a commercial relationship between the affected party and the Ministry involving the sale of a service, specifically the provision of flight services for Ministry rangers and staff, by the affected party to the Ministry [Order PO-1073].

I also accept the Ministry's position that some of the severed information consists of technical information. The information has been prepared by a professional in the field and describes the operation of a piece of equipment, an aircraft, by revealing the fuel burn rate in conjunction with the type of aircraft.

Finally, although the Ministry only commented briefly on whether the record contains financial information, on my review of the record, I am also satisfied that some of the severed information contains financial information belonging to the affected party. This includes pricing information as well as overhead and operating costs for the provision of the flight services.

In conclusion, I find that part one of the test under section 17(1) has been established for the information at issue.

Part 2: supplied in confidence

In order to satisfy part two of the test, the affected party must have "supplied" the information to the Ministry in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied by the affected party to the Board, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected 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 17(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 agreed upon with 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)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

In Order PO-2435, Assistant Commissioner Brian Beamish adopted the view articulated in Orders MO-1706, PO-2371 and PO-2384 that except in unusual circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be "supplied". In that order, Assistant Commissioner Beamish rejected the Ministry's position 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 government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

> 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.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather it is the amount being charged by the contracting party for providing a particular individual's services.

I adopt the approach taken by Assistant Commissioner Beamish in Order PO-2435 for the purposes of this appeal.

The Ministry takes the position that the information in the affected party's tender submission has been supplied within the meaning of section 17(1): "The information in question was submitted to the Ministry by the affected party as part of a tendered bid. Clearly, it has been supplied." The appellant does not challenge this assertion.

Analysis and finding

As described above, the information at issue in this appeal details the bid information prepared by the affected party in response to an RFQ issued by the Ministry and contains the successful bidder's pricing for various components of the service, the identification of a "back-up" aircraft, and the total price of the affected party's quotation bid. As the affected party was the successful bidder in the competitive selection process the terms outlined by the affected party presumably formed the basis of a contract for service between the affected party and the Ministry.

Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

Additionally, having reviewed the information at issue, I do not find, nor have I been provided with any evidence to show, that any of the information at issue is "immutable" or that disclosure of the information, including the pricing information, would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied to the Ministry by the affected party. I have also not been provided with any evidence to show that the pricing information reflects the affected party's underlying costs. In fact in my view, the information contained in the record itself appears to point to the opposite conclusion that the amounts charged by the affected party are for the provision of particular services.

Based on my review of the representations submitted by the parties and the record at issue in this appeal, I find that the information contained in the document entitled "Quetico Provincial Park 2004 - Quotation Bid Analysis" consists of agreed upon essential terms that are, in my view, the product of a negotiation process. Therefore, in the circumstances of this appeal, I find that the information was not "supplied" by the affected party, as that term is used in section 17(1).

As the information at issue in this appeal does not meet the "supplied" component of part two of the section 17(1) test it is not necessary for me to address the "in confidence" component before concluding that part two has not been established. However, for the sake of completeness I will consider whether, were the information found to be "supplied", it can be found to be supplied "in confidence" as required by part two of the test.

In confidence

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]

The Ministry takes the position that the information was supplied by the affected party with the reasonably held expectation that it would be treated confidentially. In support of this, the Ministry submits:

> Contractors, such as the affected party, are or should be familiar with the Ministry's policy around tendered bids by Aviation Services of the Ministry. Accordingly, they would be aware that it is the policy of Aviation Services not to release the total bid price submitted, as it was here, in response to a RFQ via fax for a contract that would be recurring. Disclosure of this bid price would allow a competitor, in this case the appellant, to undercut the successful bidder in the following year. Therefore, the affected party would have a reasonable expectation that the information would be treated confidentially when it was supplied to the Ministry in the bidding process. As this expectation was based on normal business practice of Aviation Services with respect to bids, and a likely understanding of the basis for the policy, it was reasonable and had an objective basis as required by previous orders.
>
> Furthermore, in Order M-250, it was held that where information contained in the tender packages were not disclosed at the public opening that this information was to be treated confidentially. Here, in accordance with Aviation policy, the information, which had been supplied by the affected party, was not read out at a public opening of the tendered bids. Therefore, it is the position of the Ministry that the information was supplied in confidence.

The affected party's brief representations state simply that "the details of [its] bid for the 2004 commercial contract with the MNR were given in confidence."

In her representations the appellant does not directly address the issue of whether the information contained in the record was "supplied in confidence" but makes a number of statements that are relevant to the issue. First, the appellant states that, as an unsuccessful bidder, her original request for information was based on information that she obtained from the Management Board Secretariat's "Procurement Directive for Goods and Services" (the Directive). Section 4.9 of that Directive states:

> On request, unsuccessful bidders must be provided with the name of the successful bidder, the bid price and reasons for non-acceptance of the unsuccessful bid. Any information provided must comply with the *Freedom of Information and Protection of Privacy Act*.

Second, the appellant states that she lives in a small community where very little information is kept confidential and she is "well aware of what the other air service's expenses would be". She also states that she has "heard from a number of sources the amount of the other air services' tender". She states that despite these facts, she needs to have that information in writing.

Analysis and finding

A number of orders issued by this office have found that an important piece of evidence in determining the "in confidence" issue is whether there is a "notice" provision in the RFQ that identifies that the *Act* applies to the information submitted in the quotation [Orders M-511 M-845 and MO-1861].

Order M-845 and Order MO-1861 dealt with this type of notice provision. These orders found that where notice provisions state that quotations are to be received in confidence subject to the application of the *Act* and if the bidder wishes the Crown to attempt to preserve confidentiality of any of the information submitted in the quotation, that information should be clearly marked and designated as confidential. When such a notice provision is present, the onus has been found to rest on the individual bidders to identify the portions of their quotation that contain information that they wish to remain in confidence. Both orders concluded that the parties that submitted the bids did not have a reasonably held expectation of confidentiality with respect to information supplied in their proposals since the affected parties, had been invited to explicitly identify confidential information but have not done so.

In the current appeal, the RFQ for aircraft services to Quetico Provincial Park for the 2004 operating year did contain a "notice" provision in section 8, which is similar to the notice provisions considered in Orders M-845 and MO-1861. Section 8 of the RFQ reads in part:

> Bidders agree that all documentation and information contained in any Quotation Submission become the property of the Crown and as such, may be subject to disclosure under the terms of the *Freedom of Information and Protection of Privacy Act*. Although the Crown can in no way be responsible for any interpretation of the provision of this *Act*, if any Bidder believes any part of its Quotation Submission reveals any trade secret of the Bidder, any intellectual property right, scientific, technical, commercial, financial or labour relations information, or any other similar secret, right or information belonging to the Bidder and if the Bidder wishes the Crown to attempt to preserve confidentiality of same, the particular trade secret, property right or information should be clearly designated as confidential.

The notice provision in the RFQ is a clearly worded formalized policy regarding the disclosure of information supplied pursuant to an RFQ. The notice provision not only does not specifically state that quotations are to be received in confidence but makes it clear that information submitted in the quotation is subject to the *Act*. Information subject to the *Act*, of course, may be disclosed if none of the exemptions apply. Additionally, like the notice provisions at issue in Orders M-845 and MO-1861, the notice provision in the RFQ relevant to the current appeal places the onus on the individual bidders to identify those portions of their quotation that contain information for which they would like to preserve confidentiality. The provision is also structured to specifically request that the bidders identify to the Ministry any information that might fall within the section 17(1) third party information exemption. In my view, the affected party had an opportunity at the time it completed and submitted its quotation to identify any

information it viewed as confidential. I have no evidence to show that the affected party did so. Having been invited to explicitly identify confidential information and having chosen not to do so, I am not persuaded that the affected party had an implicit reasonable expectation of confidentiality.

Specifically addressing the Ministry's statement that the policy of Aviation Services is *not* to release the total bid price submitted, aside from this statement, and despite repeated requests from this office for any written policies, procedures or other documents that might outline such policy for bidders, the Ministry has not provided any evidence of this policy or practice with respect to information, specifically the total bid price, received through an RFQ process. In my view, if the Ministry wanted to make such a policy clear to any of the bidders involved in the RFQ process it should have been made clear in the notice provision of the RFQ. Moreover, contrary to the Ministry's statement that the total bid price is not released, Management Board Secretariat's Directive, which applies to all Ministries, makes it clear that there are circumstances where such information is disclosed to an unsuccessful bidder, making it difficult for the Ministry to have an established policy not to release the total bid price at all.

For these reasons, I find that the information at issue does not meet the "in confidence" component under part two of the test under section 17(1).

Although the finding that the information was not "supplied in confidence" to the Ministry is sufficient to dispose of the appeal as all three parts of the section 17(1) test must be met for the exemption to apply, I will go on to consider whether part three, which addresses the reasonable expectation of harm resulting from disclosure of the information, can be established.

Part 3: harms

General Principles

To meet this part of the test, the parties resisting disclosure (in this case, the Ministry and the affected party) 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].

The Ministry's representations focus on the harms identified in sections 17(1)(a) and (c) stating that disclosure of the information would result in prejudice to the affected party's competitive position (section 17(1)(a)) which would result in an undue loss or gain (section 17(1)(c)).

Specifically addressing the harms that could result in disclosing the information relating to the affected party's choice of "back-up" aircraft, the Ministry submits:

> This information has been exempted while what appears to be similar information at the top of the record had not. This is due to the fact that the RFQ stipulates that the primary aircraft is to be a Beaver or a similar aircraft. Thus, the information at the top will likely be the same or similar in all expected bids. However, there is no similar requirement for the back-up aircraft. This technical information may be different for each bid. Thus, for the reasons set out below, its disclosure would reveal critical details around the successful bid which could be used by their competitors in subsequent bids thus resulting in undue loss or gain.

The Ministry submits more generally on the harms that might result from disclosure of the information at issue:

> [T]he affected party and not the Ministry [is] in the best position to present argumentative evidence on this question. However, I would again draw your attention to the competitive nature of business /management consulting.
>
> In past orders [P-166, P-408, M-288, M-511], it was found that prejudice to competitive position would result if similar information as that in issue, relating to pricing, material variations, bid break downs, etc. was disclosed. Disclosure of such information would enable competitors to adjust their bids and underbid in future business contracts.
>
> The disclosure of the bid price for a contract which was recurring could undermine the competitive position of the affected party. The unsuccessful party would know what the successful price was and undercut it the next year. Accordingly, it is the position of the Ministry that disclosure of the information would result in prejudice to the competitive position of the affected party. Therefore, section 17 applies to the records and they are exempt from disclosure.

The affected party submits that the following harm would result if the information at issue were to be disclosed:

> If the details [of our bid for the 2004 commercial contract with the Ministry] are given out to the other bidders, those companies will have an unfair bidding advantage in future years and this would harm our chances of receiving this same contract in the future.

The appellant disputes the positions taken by both the Ministry and the affected party:

> Despite the fact that we requested the bid from the other air service, the [Ministry] deemed it would not be right to give our company an "unfair advantage" in future bidding. That statement is utter nonsense since all Tariffs are published;

> furthermore, insurance costs, fuel costs, etc. are all standard expenses for air service companies.
>
> If the shareholders of [the appellant company] decide to seek compensation from the Crown, we need a hard copy of the complete "Quotation Bid Analysis" in order to proceed.
>
> We do not intend to go through all the points of the Notice of Inquiry as the lawyers for the [Ministry] have done. I will note, however, that we do not agree with the [affected party] and the letter where they stated:
>
> > The details of our bid for the 2004 commercial contract with the [Ministry] were given in confidence. If the details are given out to the other bidders, those companies will have an unfair bidding advantage in future years and this would harm our chances of receiving this same contract in the future.
>
> As I've indicated previously, we are well aware what the other air service's expenses would be. Further, we live in a small community where very little information is kept confidential. Hence we have heard from a number of sources the amount of the other air service's tender. We simply need to have that information in writing.

Having reviewed the information at issue, I am not persuaded that disclosure could reasonably be expected to result in the harms outlined in section 17(1)(a) or (c) of the *Act*. Moreover, having reviewed the representations submitted by the parties, I am not persuaded that either the Ministry or the affected party have provided me with the detailed and convincing evidence required to establish a reasonable expectation of any of those harms and I find that sections 17(1)(a) or (c) of the *Act* do not apply.

Previous orders of this office have addressed similar situations where the party with the onus to establish the harms under section 17(1) have failed to provide the kind of detailed and convincing evidence required to establish those harms [Orders MO-1319, PO-1791, MO-1914, MO-1996-I and PO-2435]. Assistant Commissioner Beamish comments on this issue in Order PO-2435 are, in my view, equally relevant to the circumstances of this appeal:

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385). Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

> …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold

> politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

> The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP, there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

In the circumstances of this appeal, both the Ministry and the affected party argue very generally that disclosure of the information would allow competitors to undercut the affected party's bids in the future (particularly given that this is a recurrent contract) which would result in prejudice to the affected party's competitive position (section 17(1)(a)) which, in turn, would result in an undue loss or gain for the affected party (section 17(1)(c)). The affected party and the Ministry do not provide more detailed evidence than this and do not point to any objective or factual basis for believing that disclosure of the information contained in the record could reasonably be expected to result in the harms listed in sections 17(1)(a) and (c). In my view, the Ministry and the affected party have not provided the "detailed and convincing evidence" required to establish a "reasonable expectation" of the identified harms in section 17(1)(a) and (c).

In Order PO-2435, Assistant Commissioner Beamish also speaks to the disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor. While acknowledging that in some "rare and limited circumstances" disclosure might result in the harms section out in section 17(1)(a), (b) or (c) he found that in the circumstances of that appeal it did not. Assistant Commissioner Beamish stated:

> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have actually been signed. *The fact that a*

> *consultant working for 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 or result in undue loss to them.* [My emphasis]

I agree with these comments made by Assistant Commissioner Beamish and have reviewed the information at issue in the current appeal which, in my view, is substantially similar to the information at issue in Order PO-2435. Given the very general submissions that I received from the Ministry and the affected party, I find that his comments are equally applicable in the circumstances of the current appeal. Disclosing the information contained in the record at issue, the Quotation Bid Analysis, would reveal financial details of a contract that has already been signed. Although this might allow for competitors to adjust their bids accordingly in future bidding processes in an attempt to undercut the affected party, I am not satisfied that in this case disclosure could reasonably be expected to, in and of itself, significantly prejudice the affected party's competitive position or result in undue loss to them.

Accordingly, I find that the Ministry and the affected party have failed to establish that disclosure of the record could reasonably be expected to result in the harms identified in sections 17(1)(a) or (c) and part three of the test has therefore not been met.

In summary, I have found that parts two and three of the section 17(1) test have not been established by the Ministry and the affected party. As all three parts of the test under section 17(1) must be established for a record to qualify for exemption, I find that the record at issue in this appeal does not qualify for exemption under section 17(1). As no other exemption has been claimed, I will order that the record be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the responsive record, in its entirety, to the appellant no later than **April 5, 2006** but not before **March 30, 2006.**

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record disclosed to the requester pursuant to Provision 1.

Original Signed By: February 28, 2006
Catherine Corban
Adjudicator