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

ORDER MO-2115

Appeal MA-050010-1

City of Windsor

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NATURE OF THE APPEAL:

The City of Windsor (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records concerning the disposal and treatment of City sewage sludge. Specifically, the requester sought:

1. The Operating Agreement, less any scientific or technical process information and trade secrets, between the Contractor [the affected party] and the City, including the complete payment schedules with unit prices and escalation clauses and beneficial reuse royalty payment formula and/or revenue sharing for the sale of finished product.

2. Copies of all invoices and reports from the Contractor to the City showing how much sludge was processed monthly from what plant, the unit prices of the work, the final disposition of the sludge (landfill disposal or beneficial reuse) and overall amount of moneys paid by the City to the Contractor for the work performed.

3. Any documentation showing the yearly re calculation of the unit prices to reflect escalation and the agreement of the City to the new pricing.

4. Documentation for any royalty payments received from the Contractor by the City for the beneficial reuse/revenue sharing from the sale of end product.

5. Documentation of and correspondence between the parties showing that the City has accepted what the Contractor has built, and that what was built conforms to (meets or exceeds) all the contractual requirements as set out in the original proposal call and the eventual contract executed between the parties. Any documentation between the parties showing the operational capacity and acceptance of the installed equipment, per section 4.3 Biosolids Stabilization Process in the original proposal call documents.

6. The plant, built and operated by the Contractor, has had some disruptions of service during the life of the contract to date. Since October 25, 2003 the plant has been out of commission and not operational. What discounts has the City received for the continued operation of the sludge disposal given the fact that none of the sludge has been beneficially reused through the plant specifically built for this process. Please provide all documentation, letters and amendments to the operating agreement in this regard.

The City identified records responsive to the request and provided access in full to the Operating Agreement with the attached Schedules "A", "C", "F" and "G" (Part 1) and to sludge volume information from the Annual Reports (Part 2). The City advised that there were no records responsive to Parts 4 and 5 of the request. The City denied access, in part, to records responsive to Parts 1, 2, 3 and 6 of the request, relying on the exemptions set out in sections 10(1) (third party information) and 11 (economic and other interests of an institution) of the *Act*.

The requester (now the appellant) appealed the City's decision.

At mediation, the appellant questioned the adequacy of the City's search for records and posited that further records should exist, particularly in response to Part 5 of the request. The appellant maintained that there should be some documents indicating that the City accepted what the Contractor had designed/built under the contract, which would demonstrate whether the constructed facility met the specifications required under the contract.

Also during mediation, the appellant provided the mediator with a copy of a memo on City letterhead addressed to the Chief Administrative Officer dated January 22, 1997. Page three of this memo consisted of a table of proponents and proposal details, including unit pricing. The appellant is of the belief that since unit pricing was made public in the past, that unit pricing should continue to be made available to the public in the records that are responsive to this request.

The City maintained its reliance on the exemptions set out in sections 10(1) and 11 of the *Act* to deny access to the records at issue.

Mediation did not resolve the appeal and the matter moved to the adjudication stage.

The City and the affected party provided representations with respect to the issues set out in a Notice of Inquiry sent to them. The appellant was provided with complete copies of these representations. However, the appellant did not provide representations in response to the Notice of Inquiry sent to it.

RECORDS:

As set out in an Index of Records provided by the City, subject to a determination on the adequacy of the City's search for responsive records, the following records remain at issue:

Record	City's Index #	Released?	Description
1	2	No	Schedule "B" to Operating Agreement (affected party proposal for biosolids management services for the project)
		No	Schedule "E" to operating Agreement (unit pricing including price adjustment details)
		No	Schedule "H" to Operating Agreement (equipment amortization and buyout)
		No	Schedule "I" to Operating Agreement (site work and building construction description)

Record	City's Index #	Released?	Description
2	3	Part	Invoices (unit prices severed)
3	4	Part	Invoice Summary Sheet (invoice amounts severed)
4	6	Part	Yearly Pricing Correspondence (calculation of price and unit prices severed)
5	7	Part	Memorandum of Understanding (unit and invoice amounts severed)

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Did the City conduct a reasonable search for records?

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.

The City was asked to provide a written summary of all steps taken in response to the request. In particular, the City was asked to respond to the following specific questions:

1. Did the City contact the requester for additional clarification of the request? If so, please provide details including a summary of any further information the requester provided.

2. If the City did not contact the requester to clarify the request, did it:

   (a) choose to respond literally to the request?

   (b) choose to define the scope of the request unilaterally? If so, did the City outline the limits of the scope of the request to the requester? If yes, for what reasons was the scope of the request defined this way? When and how did the City inform the requester of this decision? Did the City explain

to the requester why it was narrowing the scope of the request?

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

   The City should provide the affidavit from the person or persons who conducted the actual search. It should be signed and sworn or affirmed before a person authorized to administer oaths or affirmations.

The City provided two affidavits, one from its Manager, Records and Elections who also serves as its Freedom of Information Coordinator, who attached to his affidavit a table entitled "Summary of Steps Taken in Response to the Request". The second affidavit is from the Pollution Control Project Engineer who has personal knowledge of the search of records that was conducted.

The affidavits contain information about the steps taken in response to the request, including steps taken to clarify the request.

In response to the request, the City sought and received clarification of the request from the appellant by phone and in writing. The City also described in one of the affidavits the details of the searches conducted in accordance with each part of the appellant's request. One of the affidavits lists not only who conducted the search, but who was contacted, what area was searched, what documents were searched and the results of the search.

Findings

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

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

I find that the City has provided a comprehensive description of the steps it undertook to locate records responsive to the appellant's request, as well as two detailed affidavits sworn by the individuals who conducted the searches for records which supports its position. In my view, the

appellant has not provided a reasonable basis for concluding that additional records exist. Based on the submissions of the City, I am satisfied that the City conducted a reasonable search for records responsive to the appellant's request and I dismiss that part of the appeal.

THIRD PARTY INFORMATION

General Principles

The City and the affected party rely on the mandatory exemption at section 10(1)(a), (b) and (c). These provisions read as follows:

> 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; …

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

For section 10(1) to apply, the 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 or financial 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

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

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

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].

Analysis and Findings

I will review each record to determine what type of information it contains. The City takes the position that all of the records contain information that qualifies as a trade secret or represents technical and/or commercial information.

Record 1

Record 1 is comprised of four Schedules to the Operating Agreement.

Schedule "B" to the Operating Agreement

The City only made specific representations on part 1 of the test with respect to this record. The City states in its representations that:

> (Schedule "B" [the proposal for biosolids management services for the project]) contains material that gives detail about:
>
> - A technology that is a patented process and is proprietary to the third party. The (affected party) advises the City that the information is only available through an authorized licensee.
>
> - The (affected party) advises that the document contains information that includes trade secrets, commercial and financial information that was submitted on a confidential basis in the tendering process.

The affected party states with respect to this record that:

> Schedule "B", the company proposal, in particular contains information that can be classified as a trade secret and technical information as it contains information about the [named] Sludge Drying technology, which is a patented process…
>
> [Schedule "B"] was prepared by a number of individuals within the company, including engineering professionals and operators in the field, who provided an assessment of the facility and our intended method of constructing and operating the facility. Commercial information was provided in respect of subcontractors we intend to use and suppliers we intend to purchase from in performing the services. Our Financial Offer provide as part of the proposal submission clearly falls within the realm of financial information, as it contains data relating to our costing of the project, overhead and operating costs. All of the information provided was a requirement of the bid submission, on which the City assessed the merits of each bidder and its determination of the successful proponent.

Schedule "B" to the Operating Agreement is a cost quotation for the provision of biosolids management services to the City. Biosolids is the product that results from the treatment of wastewater. I find that this document contains commercial information as it relates solely to the selling of services. I disagree with the arguments of the affected party that the information in this document can be classified as trade secret, scientific, financial or technical information. I cannot find any reference in this document to the affected party's suppliers or sub-contractors or to information that describes the drying technology.

Schedules "E" and "H" to the Operating Agreement

The affected party states with respect to these records that:

> The information contained in … Schedule 'E", the payment schedule and Schedule "H", the equipment buy-out, is financial and commercial information used by the Company, relating to the application of this process… All of these schedules relate to the pricing we provided to the City of Windsor for provision of services under the Operating Agreement, the equipment amortization being a component of that financial information in order for us to recover the costs of equipment over the twenty year term of the contract.

Schedule "E" to the Operating Agreement lists unit pricing including price adjustment details. I find that this document contains financial information as it contains pricing practices. The document also contains commercial information, namely the price for the selling of services, as it refers to unit prices charged for certain items.

Schedule "H" to the Operating Agreement lists equipment amortization and buyout prices. I find that this document contains financial information as it contains cost accounting methods. The document also contains commercial information as it refers to the purchase price for certain equipment necessary to perform the contract.

Schedule "I" to the Operating Agreement

The affected party states with respect to these records that:

> We believe that Schedule "I" - Site Work and Building Construction is also protected by section 10, as this information is directly related to the drawings we excluded from Schedule "B", which are trade secrets and technological information. Schedule "I" is a summary of how the company intended to construct the facility and perform the services, which includes methods and techniques, including architectural and engineering information about how the facility was to be built.

Schedule "I" to the Operating Agreement lists site work and building construction descriptions. I find that this document qualifies as technical information because it contains the technical specifications provided by the affected party for the construction of the building and site for the pelletizing facility.

Records 2 to 5

The affected party submits that:

> Records 2 and 3 comprising the unit pricing in the Invoices and Invoice Summary Sheet are an extension of the financial information contained in the aforementioned Schedules.

The affected party also submits that the excluded monetary amounts from the Memorandum of Understanding in Record 5 contain financial information. The affected party could not comment on the correspondence which comprises Record 4, as it did not have a copy of what was disclosed and what was severed from this record.

As Records 2 to 5 all contain invoice or unit pricing information, for the reasons set out above, I find that they contain financial and commercial information.

Therefore, I conclude that all of the records at issue contain information that qualifies as technical, commercial and/or financial information for the purposes of section 10(1). Accordingly, I find that part 1 of the test has been met with respect to all of the records remaining at issue.

Part 2: Supplied in Confidence

General Principles

In order to satisfy this part of the test, the City and/or the affected party must establish that the information was "supplied" to the City "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 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 the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

Parties' Representations

The City does not directly address this issue in its representations.

The affected party states:

> Schedule "B", the company proposal, …contains information about the [named] drying technology, which is a patented process that is proprietary in nature and only available through an authorized licensee. [The affected party] is not authorized to disclose any such information to the public, as it is not an authorized licensee of the process…

> The information contained in … Schedule "E", the payment schedule and Schedule "H", the equipment buy-out, is financial and commercial information used by the Company, relating to the application of this process… All of these schedules relate to the pricing we provided to the City of Windsor for provision of services under the Operating Agreement, the equipment amortization being a component of that financial information in order for us to recover the costs of equipment over the twenty year term of the contract. Records 2 and 3 comprising the unit pricing in the Invoices and Invoice Summary Sheet are an extension of the financial information contained in the aforementioned Schedules. …
>
> Although the final agreement … does not amount to information being supplied, Schedules … "E", "H" and "I" to the Operating Agreement were created from the proprietary information supplied to the City of Windsor by way of the Schedule "B" proposal and therefore should also be protected by the company's inscription of confidentiality.

Analysis and Findings

I find that all of the records were provided to the City as part of or following a bidding process relating to a specific project for the City. As the affected party states in its representations:

> [We] supplied [our] proposal to the City of Windsor for the purpose of responding to its bid request for constructing and operating a pelletizing facility and negotiating a contract to reflect such agreement.

The affected party submitted the winning proposal and entered into a contract with the City as a consequence. This contract, the Operating Agreement and Schedules "A", "C", "D", "F" and "G" thereto have already been released in full to the appellant. Record 1 is comprised of four schedules ("B", "E", "H" and "I") to this Agreement. The City has not released these schedules, claiming them to be exempt from disclosure under section 10(1). The City has also partially withheld Records 2 to 5. These records came into existence as a result of the terms of the Operating Agreement between the City and the affected party. Various monetary amounts have been severed from these records.

Previous orders have found that 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].

In Order MO-1706, Adjudicator Bernard Morrow states:

> … [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the

> criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has 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 inferences 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 to change, such as the operating philosophy of a business, or a sample of its products.

As stated by Adjudicator Steve Faughnan in Order PO-2384:

> The intention of section 17(1) (section 10(1) of the municipal *Act*) 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.

I will now review each record to determine whether it was "supplied" to the City within the meaning of section 10(1).

Record 1

Schedule "B" to the Operating Agreement

This record is entitled "Form of Quotation for the Proposal for Biosolids Management Services for the [Named Project]". The form for this quotation was provided by the City to the bidders for the project as part of its proposal call. The appellant already has a copy of the uncompleted form in the disclosed Schedule "A" to the Operating Agreement. All the affected party was required to do was to fill in the missing information on this form. The information provided by the affected party included its name, address, contract price and breakdown and proposed bonding company name. The completed form was the affected party's price quotation for services relating to the proposal call.

In terms of the contents of this record, it includes the following information:

- Estimated total quotation price with details as to how this price was arrived at;
- Total price included in total quotation price for proposed capital improvements;
- Total price for capital improvements; and,

- Name of the proposed bonding company.

Although the affected party claims that it is not authorized to disclose the information in Schedule "B" to the public, as it is not an authorized licensee of the patented drying technology, it did not provide any documents in support of this contention. This record is a quotation for services to be rendered. It is the affected party's quotation for the costs of the haulage, processing, storage and disposal of sludge or biosolids cakes. The final agreement, the Operating Agreement, between the City and the affected party incorporates this entire record into the agreement as Schedule "B".

The affected party states that: "…information was provided in respect of sub-contractors we intend to use and suppliers we intend to purchase from in performing the services". Upon review of this record, I find that there is no such information included in Schedule "B".

Order PO-2384, Adjudicator Faughnan found that:

> 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.

Schedule "B" is a three page document appended and referred to in the already-released Operating Agreement. Having reviewed Schedule "B", I find that it does not contain information that is immutable or not susceptible to change. I find that by the City's acceptance of this quotation bid, the information therein, including pricing information, became, in effect, "negotiated" information. By the acceptance of this bid and the inclusion of it in a contract for services, the City has agreed to the terms of the bid. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

Following the reasoning in Orders MO-1706, PO-2371, PO-2384, PO-2435 and MO-2093, I find that the information in Schedule "B" was not "supplied" for the purposes of section 10(1).

Schedule "E, to the Operating Agreement

This document lists unit pricing, including price adjustment details. The unit pricing is the processing price per unit charged by the affected party to the City. Schedule "E" indicates that the pricing adjustment formula was defined in the City's Proposal Document and, therefore, was not "supplied" by the affected party. The already-disclosed Schedule "A" contains this price adjustment formula.

With respect to the information relating to unit pricing, I agree with the findings of Assistant Commissioner Brian Beamish in Order PO-2435, where he stated that:

> 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 … is a form of negotiation.

This schedule is appended to and referred to in the already released Operating Agreement. I find that the unit pricing was not supplied by the affected party. Therefore, I conclude that all of the information in Schedule "E" was not supplied by the affected party to the City within the meaning of section 10(1).

Schedule "H" to the Operating Agreement

This document describes information relating to equipment amortization and buyout prices. This schedule is referred to in the Operating Agreement in the following clause:

> …In the event that Government Legislation or Regulation is changed or comes into effect or is effective after the second [2nd] anniversary of the Operating Phase, and which change reasonably viewed, materially and adversely affects the Contractor's ability to perform its Windsor Biosolids cake removal and processing services hereunder at the agreed upon price, the Contractor may request the [City] to enter into discussions with a view to agreeing upon an equitable adjustment of this Agreement which may include, inter alia, an increase in price. In the event that the parties are unable to reach any such agreement, the same shall not be subject to arbitration. However, the Contractor in such eventuality shall have the option to require the [City] to acquire the Biosolids Cake Processing Site as a going concern, paying for the building portion of the facility the capital recovery payment calculated in accordance with Appendix D of the Lease, and paying for the non-mobile equipment the capital recovery payment calculated in accordance with Schedule "H" of this Agreement…

The Operating Agreement also granted the City the option to purchase the equipment for the appropriate amount as shown in Schedule "H" upon certain defaults of the affected party to comply with the terms of the Operating Agreement.

The lease agreement (Schedule "C") has been disclosed to the appellant. I have not been provided with sufficient evidence to demonstrate that the equipment amortization schedule (Schedule "H") contains immutable terms and, therefore, was "supplied" to the City. Similarly, I have not been provided with sufficient evidence to establish that the terms of its provision to the City was in any way distinguishable from the terms of the already disclosed Appendix D to the lease. Accordingly, I find that all of the information in Schedule "H" was not supplied for the purposes of section 10(1).

Schedule "I" to the Operating Agreement

This schedule is described by the affected party as follows:

> Schedule "I" - Site Work and Building Construction …is directly related to the drawings we excluded from Schedule "B", which are trade secrets and technological information. Schedule "I" is a summary of how the company intended to construct the facility and perform the services, which includes methods and techniques, including architectural and engineering information about how the facility was to be built….

Schedule "I" lists the technical requirements for the site work and building construction for the pelletizing facility. I find that the information contained in Schedule "I" is immutable and that it has, therefore, been supplied by the affected party to the City for the purposes of section 10(1).

Record 2 is comprised of invoices from the affected party to the City with the rate charged per metric tonne of sludge cake and the amount charged severed. The number of metric tonnes of sludge cake has been disclosed. Therefore, by revealing the rate, the amount charged can be calculated and vice versa. Schedule "E" provides the formula for the calculation of the rate as it lists unit pricing, including price adjustment details. I found above that the information in Schedule "E" has not been supplied for the purposes of section 10(1). For the same reasons, I conclude that the severed items in Record 2, the invoice amounts and rate charged per metric tonne, as calculated by the formula set out in Schedule "E," has not been supplied, as well.

Record 3 is comprised of the summary sheets (invoice amounts severed) for the invoices in Record 2. For the same reasons as in Record 2, I find that the information contained in this record has not been supplied.

Record 4 is comprised of the yearly pricing correspondence (calculation of price and unit prices severed). This correspondence contains the pricing adjustment details by date as contemplated by Schedule "E". For the same reasons as in Record 2, I find that this information was not supplied for the purposes of section 10(1).

Record 5 is a Memorandum of Understanding, between the affected party and the City, dated December 16, 1999. The preamble to this record states:

> **Whereas** the parties hereto entered into an Agreement [consisting of an operating agreement and a ground lease agreement] effective August 11, 1997 whereby the [affected party] undertook to construct and operate a biosolids processing facility in Windsor, Ontario for the [City];
>
> **And Whereas** the parties hereto wish to clarify and resolve certain issues which have arisen in connection with the aforesaid Agreement;

The entire Memorandum of Understanding has been disclosed to the appellant, except for the unit and invoice amounts, which have been severed. The undisclosed portions of this record are

the amounts of the amended unit prices, amending the unit prices set out in Schedule "E". For the same reasons as in Record 2, I find that undisclosed portions of this record were not supplied for the purposes of section 10(1).

Accordingly, it is not necessary for me to address the "in confidence" component of part 2 of the section 10(1) test before concluding that this part has not been established with respect to all of the records, except for Schedule "I", which is part of Record 1. Since the remaining records which the City claims section 10(1) do not meet part 2 of the test, it is only necessary for me to consider the "in confidence" component in part 2 of the test for Schedule "I".

In Confidence

In order to satisfy the "in confidence" component of part 2, 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 affected party states

> In submitting our proposal, the company had explicitly in bold letters placed a notation on its covering pages, that the proposal was a "Confidential Proprietary Document", which indicated that it was "Proprietary Document Not to be Released". Although the final agreement between [the affected party] and the City of Windsor does not amount to information being supplied, Schedule … "I" to the Operating Agreement [was] created from the proprietary information supplied to the City of Windsor by way of the Schedule "B" proposal and therefore should also be protected by the company's inscription of confidentiality.
>
> The company has maintained the confidential nature of the information supplied to the City of Windsor in its proposal and the corresponding schedules to the

> agreement. It anticipated that because it supplied its proposal to the City in confidence, anything derived from the proposal would also maintain its confidentiality by the City of Windsor.

The City states that: "It is reasonable to expect that this information be held in confidence in the bidding process and afterward."

Analysis and Findings

Schedule "I" is a four-page document which describes the construction specifications of the pelletizing facility. This schedule does not contain diagrams, but lists the specifications for the site work and building construction. Upon review of this record, I cannot agree that the affected party supplied the information in Schedule "I" with a reasonable expectation of confidentiality. I do not find that this document was prepared for a purpose that would not entail disclosure [Order PO-2043].

The specifications contained in Schedule "I" for the construction of the building and surrounding site would have been needed to be disclosed to various trades, sub-contractors and building and government officials involved in the construction of the pelletizing facility. I cannot find any reference in the Schedule "B" proposal, as claimed by the affected party, that "…Schedule "I" to the Operating Agreement (was) created from the proprietary information supplied to the City of Windsor by way of the Schedule "B" proposal."

Nor is there any reference in Schedule "B", as claimed by the affected party, that Schedule "B", or documents that flow therefrom, are confidential proprietary documents. Furthermore, Schedule "A" to the Operating Agreement, the proposal call document, contains the following statement:

> The *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) applies to all proposals submitted to the City. The City will consider all proposals confidential, subject to the provisions of the disclosure requirements of the *Act*. Please identify those portions of your proposals which contain scientific, technical, commercial or financial information which has been supplied in confidence, and which will, in the proponent's opinion, cause harm if disclosed.

There is no reference in Schedule "I", or even in any of the other records at issue in this appeal, that any portion thereof is confidential. Accordingly, I conclude that there exists no explicit expectation that the information in this document would be treated confidentially.

Therefore, I find that the "in confidence" component of part 2 of the test has not been established for the remaining record, Schedule "I".

Accordingly, it is not necessary for me to address the "harm" component of part 3 of the section 10(1) test before concluding that part 2 of the test has not been established with respect to all of the records. However, for the sake of completeness, I will consider the possible application of the "harms" component in part 3 for the records.

Part 3: Harms

General Principles

To meet this part of the test, the institution and/or 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].

Parties' Representations

The City states with respect to all of the records that:

> These records were provided to the City in the context of a bidding process relating to a specific project for the City…
>
> This information does nothing to shed light on the operations of the government and is information of the third party that could be exploited by a competitor in the marketplace. This information is the type of information which section 10(1) was created to protect. The City relies upon the third party request that this information not be disclosed because it is financial and commercial information used by the third party relating to the application of its process.
>
> Releasing the information does not shed light on government operations and, as above, this information is of the type that section 10(l) was meant to protect…
>
> An Order to release this type of information will have a chilling effect on other companies that tender on projects construction to municipalities. It is critical that municipalities be able to receive technical information in order to make sound and reasoned decisions when awarding contracts that have been tendered. It is important that tenderers feel protected when releasing sensitive information in the bidding process that involves proprietary trade secrets, processes, commercial and technical information.
>
> The person to whom the information relates has asked the City not to release the information.

The affected party states:

> The disclosure of Schedule "B" would present an opportunity to our competitors and others to acquire information about a patented process and the commercial

> terms respecting that process. Any such competitor would therefore have the ability to obtain otherwise confidential technological, commercial, scientific and financial information, that is only provided to potential clients requiring such process…
>
> We believe that the disclosure of our proposal, would give our competitors an opportunity to see what makes a successful bid and use that to their economic advantage. Our proposals have often by praised by our clients for its presentation, which a competitor may attempt to use in order to win future bids…
>
> We believe that we have set out the potential harm that the disclosure of such information would have on our business, in Part 1 above. Our business in its nature is competitive, and we would certainly not wish to give our competitors any advantage over us by having access to our proposals and corresponding information contained in the final agreement. To disclose this information would be paramount to drafting a proposal for submission on behalf of our competitors. We believe that any such disclosure would clearly have a prejudice on our competitive position in the submission and success of bids for future projects.
>
> As discussed above, disclosure could result in undue loss to our company and gain to the party seeking this information. The loss is in the possibility of our company losing future bids, with the gain to the information seeking party, in applying or using our information in their own bids in order to be successful. We cannot possibly quantify the loss or gain to us, as these are dependent on the value of the contracts for which each of the proponents, bid on. Part of this is determined by the financial information provided by each party, which is essentially their offer of how much they can perform the services for. The risk of loss is much greater than the value of Ontario contracts, as we compete for bids across North America. As being successful in the bid process allows our company to survive, disclosing information would risk undue loss to our business. This cannot be limited in time, since municipalities seem to be engaging the bid process more often as a means of obtaining the best party for the project….

Analysis and Findings

As stated above, I disagree with the submission of the affected party that disclosure of the proposal, Schedule "B", would result in the disclosure of information about a patented process. I also do not find that disclosure of the records would result in confidential technological, commercial, scientific and financial information being revealed.

The affected party appears to be relying on section 10(1)(a) and (c) concerning part 3 of the test. I disagree with the affected party's submission that disclosure of the records would significantly prejudice its competitive position. The affected party submits that it would lose "future bids, with the gain to the information seeking party, in applying or using the information [in the records] in their own bids in order to be successful". The originating document, the proposal (Schedule "B"), is dated October 15, 1996. The records concern the disposal of bio sludge and

the construction and operation of a pelletizing facility. The undisclosed information in the records concerns the building and site specifications, the contract amounts and the unit pricing for the disposal and processing of bio sludge cakes, all of which relates to the August 11, 1997 Operating Agreement. In my view, it is not reasonable to conclude that a competitor would be able to make use of the undisclosed information to significantly prejudice the affected party's competitive position or to receive an undue gain.

Even if I were to find that the undisclosed portions of the records could be used by the affected party's competitors, thereby reducing their negotiating costs and possibly increasing the affected party's costs, I am not satisfied that this amounts to "significant" prejudice or "undue" loss or gain under section 10(1)(a) and (c) of the *Act*. In that regard, I adopt the findings of Assistant Commissioner Beamish in Order PO-2435:

> 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.
>
> I have also reached this conclusion because I am not convinced that there is any inherent value in the information at issue in this appeal. The information contained in the bid is now some years old, and I accept the appellant's argument that the pricing in the computer and notebook supply business changes over time. I am satisfied that the amounts listed, including the discounts granted, would be of little value to any competitor now.
>
> Furthermore, in my view, neither the City nor the affected party have provided sufficient evidence to demonstrate how disclosure …could cause the type of harms described in section 10(1)(a) or (c).

The City has raised the possible application of paragraph (b) of section 10(1) to Schedule "B" of Record 1. The City states:

> An Order to release this type of information will have a chilling effect on other companies that tender on construction projects to municipalities. It is critical that municipalities be able to receive technical information in order to make sound and reasoned decisions when awarding contracts that have been tendered. It is important that tenderers feel protected when releasing sensitive information in the bidding process that involves proprietary trade secrets, processes, commercial and technical information.

Based on the type and age of the information, as discussed above, I find that the City has not satisfied me that section 10(1)(b) is applicable. I do not agree with the City that release of the undisclosed information in the records would result in similar information no longer being supplied to the City.

It is not enough to provide generalized statements of possible harm, which is all that the City and the affected party have provided. Their submissions lack the requisite degree of specificity in

describing the anticipated harms they allege will flow from the disclosure of the information. Accordingly, I find that the part 3 harms test has not been met with regard to the undisclosed information in the records.

As none of the information in the records at issue has met all three parts of the test, as required under section 10(1), I find that this exemption does not apply.

ECONOMIC AND OTHER INTERESTS

The City relies on section 11(c) to exempt Records 2, 3, 4 and 5. This section reads:

> A head may refuse to disclose a record that contains,
>
> > information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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.)].

Analysis and Findings

This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].

The City states that with respect to Records 2 to 5:

> Releasing these documents into the public domain would reasonably give rise to an expectation that the economic interests and competitive position of the City would be prejudiced**.**

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

I find that the City has failed to provide sufficiently detailed and convincing evidence to demonstrate that disclosure of the information in the records could reasonably be expected to prejudice its economic interests or competitive position. I adopt the findings of Adjudicator Catherine Corban in Order MO-2103-I, where she stated:

> In my view, disclosure of the records at issue in this appeal would not prejudice the Township from earning money in the marketplace. In the circumstances of this appeal, the Township is not in a position where it is earning money or competing for business with other public or private entities but is rather soliciting business from such entities. Accordingly, I find there is no reasonable expectation of prejudice to the Township's competitive position as contemplated by the exemption at section 11(c). …I do not accept that the Township's economic interests would be prejudiced by disclosure of the information because in the circumstances, the Township is not soliciting proposals but receiving them and I am not satisfied that disclosure of the information could reasonably be expected to result in future vendors refusing to do business with the Township.
>
> Therefore, I do not accept that disclosure of the information at issue could reasonably be expected to prejudice the Township's economic interests or competitive position. Accordingly, I find that section 11(c) does not apply in the circumstances of this appeal.

As stated above, the City entered into the original agreement in 1997, which agreement was to span a 20 year period. The undisclosed records provide the cost information concerning the disposal and treatment of bio sludge and the technical specifications concerning the construction of a building. Even if the City found it necessary now to seek proposals for the same type of building or process, I find that disclosure of the information in the records could not reasonably be expected to prejudice the City's economic interests or competitive position.

Therefore, I find that section 11(c) does not apply to exempt from disclosure the undisclosed information in Records 2 to 5.

ORDER:

1. I uphold the City's search for responsive records.

2. I order the City to disclose the records in their entirety to the appellant by **December 12, 2006,** but not before **December 7, 2006.**

3. In order to verify compliance with provision 2 of this Order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant.

Original signed by: November 7, 2006
Diane Smith
Adjudicator