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

INTERIM ORDER MO-2103-I

Appeal MA-050162-1

Township of Georgian Bay

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NATURE OF THE APPEAL:

The Corporation of the Township of Georgian Bay (the Township) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Part one of the request identified clarification sought by the requester arising from her review of information disclosed as a result of a prior request. Part two requested information relating to a Request for Proposal (RFP) issued by the Township for the design and construction of new Township buildings. Specifically, in part two the appellant sought access to the following information:

1. Minutes of meetings or a record pertaining to the 17 companies who expressed interest in the design and build project;

2. Details of the pre-qualified companies, how the companies were selected and meeting minutes of the selection process;

3. Copy of the Request for Proposal documentation or any other information provided to the 17 companies;

4. Copies of the documentation regarding assessment of space needs and conceptual design of the proposed administration buildings;

5. Copies of any written reports submitted by [a specified company] resulting from its engagement concerning the administration building project.

The Township issued a decision letter, responding to each part of the appellant's request separately. The Township's response to part two of the request has been summarized below:

1. The Township advised that minutes of meetings for the opening of expressions of interest do not exist. The Township granted access to the record listing the 17 companies that submitted expressions of interest.

2. The Township sought clarification on what type of "details" relating the six companies the requester was seeking.

   - With respect to the selection process of the proposals, the Township advised the requester that since she had not specifically requested records but had simply asked a question it could not respond to the request.

   - In response to her request for the minutes of meetings pertaining to the selection process, the Township stated that no such records exist.

3. The Township requested clarification on the request for the design-build proposals and informed the requester that since the design-build process had not started yet that no records exist.

4. The Township advised that as of the date of the decision, no records exist related to the conceptual design of the administration buildings.

5. The Township advised that no written reports were received from the specified company and that therefore, no records exist.

Along with the decision letter, the Township provided the requester with an invoice for $55.20 for which it required payment before proceeding further. Based on the invoice, the fee represented the cost for 110 minutes of search time and a 1 page photocopy. The requester paid the required fees and the Township disclosed the record listing the companies that submitted expressions of interest.

The requester, now the appellant, appealed the Township's fees for preparing and processing the request and maintained that additional records responsive to the request must exist.

Early in the mediation process, the appellant provided further information to the Township to clarify the portions of the request that related to the design-build proposals and the details on the companies that made submissions. The appellant explained that a comment made publicly by the Mayor confirmed that some activity regarding the design-build of the project was underway and that her request included any design-build infrastructure information available to or from contractors regarding the project. The appellant also explained that based on another comment made by the Mayor, she requested copies of the "'design-build projects' which are 'out' to interested contractors" as well as the "policy" referred to in the referenced comment. Finally, the requester clarified that her request for the details about the companies selected to submit proposals included: "the name of the companies, details of their submissions to qualify for selection, the objective criteria/process use to select the companies; the terms set out for the service and the submissions to be rendered to the Township".

Upon receipt of the appellant's clarification letter, the Township advised the appellant that a time extension might be necessary. The Township notified the third parties and after considering their submissions, issued a supplementary decision letter to the appellant. In its supplementary decision letter, the Township provided the appellant with the following information:

Design/build infrastructure information provided to and received from the contractors

With respect to the request for information provided to or received from the contractors, the Township agreed to provide the appellant with a copy of the Proposal Call package including Addendum No. 1 and No. 2.

Access to the records received from the pre-qualified companies was denied in accordance with sections 6(1)(b) (closed meeting), 7 (advice or recommendations), 10(1)(a), (b) and (c) (third party information), 11(a) (valuable government information), 11 (a), (c), (d), (e) (economic and

other interests), and 11(g) (proposed plans, projects or policies of an institution), 38(b) in conjunction with section 14(1) and 14(3)(b) (invasion of privacy), 38(a) (discretion to refuse requester's own information) and 38(c) (evaluative or opinion material) of the *Act*.

Design/build projects/policy

In response to the request for the Township's procurement policy, the Township advised that it had previously provided a copy to the appellant.

Contractor/submission details

With respect to the names of the companies that submitted applications, the Township advised that a list of the companies was provided to the appellant at the request stage. Access to their submissions was denied in accordance with sections 6(1)(b) (closed meeting), 7(advice or recommendations), 10(1)(a), (b) and (c) (third party information), 11(a) (valuable government information), 11(a), (c), (d), (e) (economic and other interests), and 11(g) (proposed plans, projects or policies of an institution), 38(b) in conjunction with section 14(1) and 14(3)(b) (invasion of privacy), 38(a) (discretion to refuse requester's own information) and 38(c) (evaluative or opinion material) of the *Act*.

The Township advised that no records exist relating to the criteria/process used to select the pre-qualified companies.

The Township also advised that the terms and services to be rendered to the Township can be found in the Proposal Call package that was provided to the appellant.

With respect to a written submission on the six pre-qualified companies provided to Council at a closed session meeting, access was denied pursuant to sections 6(1)(b) (closed meeting), 7(advice or recommendations), 10(1)(a), (b) and (c) (third party information), 11(a) (valuable government information), 11(a), (c), (d), (e) (economic and other interests), 11(g) (proposed plans, projects or policies of an institution), 38(b) in conjunction with section 14(1) and 14(3)(b) (invasion of privacy), 38(a) (discretion to refuse requester's own information) and 38(c) (evaluative or opinion material) of the *Act*.

The Township agreed to provide the appellant with a copy of the one-page summary of the Design/build proposals submitted by two of the six pre-qualified companies, to the appellant.

The Township informed the appellant by email that her clarified request was responded to and that the decision letter and any records that were to be disclosed were ready to be picked up subject to a fee of $49.10 for 55 minutes of search time and 108 pages of photocopied records. The Township advised that as the appellant was overcharged $45.00 for 90 minutes of extra search time on the previous bill it would consider the over payment of $45.00 as credit. As a result, the fee for access to the package of records was $4.10.

The appellant paid the fee and the records were disclosed to her.

The appellant advised the mediator that she was appealing the Township's supplementary decision letter on a number of grounds.

First, the appellant confirmed that she wished to appeal the fee charged for the search and photocopying of all records released to her and be reimbursed for all fees she paid to the Township.

Second, the appellant confirmed that whether the Township conducted reasonable search for responsive records was an issue on appeal with respect to a number of records. The appellant takes the position that with respect to item 1 of part two of her initial request, minutes of the meetings pertaining to the receipt/opening of the expression of interest proposals, must exist despite the Township's position that they do not. The appellant also takes the position that records related to the design-build process and conceptual design of the buildings as detailed in item 4 of part two of her request must exist despite the Township's position that they do not.

Finally, the appellant confirmed that she was pursuing access to the two records located by the Township, the proposal package submitted by the successful bidder and the proposal and the 3-page summary (in chart form) of the evaluation results of the proposals received by 15 companies with respect to the design-build project.

With respect to item 2 of part two of the appellant's initial request which relates to the pre-qualified companies' submissions, the Township explained that having sent a request for submissions to six of the seventeen companies that had originally expressed interest in the project it received proposals from only two companies. The Township explained that it no longer has custody of one of the proposals, as one of the companies requested that all copies of their proposals be returned to it. The appellant advised that she continues to pursue access to the proposal submitted by the successful bidder and to the names of the six pre-qualified companies.

In light of the Township's decision to disclose the Proposal Call package, the appellant agreed to withdraw the appeal with respect to item 3 of part two of her initial request. Item 3 relates to the Request for Proposals, to the Townships' procurement policy and to the terms of service. Much of this information was contained in the disclosed Proposal Call package.

With respect to the portion of the request related to the selection criteria used to evaluate the proposals, the appellant advised that she was satisfied with the Township's explanation that the project manager subsequently provided Council with a summary of the evaluation results and therefore, she is no longer appealing the Township's search for a record outlining the selection criteria.

Upon discussion of the exemptions with the mediator, the Township advised that it is withdrawing its claim that sections 38(a), (b) and (c) of the *Act* apply to the records at issue.

As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Township, and received representations in return. In its representations the Township advised that it was no longer relying on section 11(e) of the *Act*. Accordingly section 11(e) has been removed from the scope of the appeal.

I also sent the Notice of Inquiry to fifteen affected parties (the companies who submitted proposals with respect to the design-build project) as they might have an interest in the disclosure of the records at issue. Three of the fifteen affected parties responded. The first two affected parties are companies whose information is found only in Record 2 as described below. Both of these affected parties objected to the disclosure of the type of information found in Record 2. The third affected party that responded to the Notice of Inquiry was the successful bidder, who prepared the proposal that is Record 1 in this appeal. The successful bidder responded with brief representations objecting to the disclosure of Record 1 in its entirety as well as the disclosure of the portions of information in Record 2 that relate to its company.

I then sent a Notice of Inquiry to the appellant, together with a copy of the Township's complete representations and the non-confidential representations of the successful bidder. The appellant responded with representations.

As the appellant's representations raised issues to which I felt the Township should have an opportunity to reply I sent a copy of the appellant's non-confidential representations to the Township inviting it to provide a reply. The Township chose not to submit reply representations.

RECORDS/ISSUES:

The following issues remain to be determined in this appeal:

- Whether the fee charged by the Township for records already disclosed to the appellant was calculated in accordance with the *Act*.

- Whether the Township conducted a "Reasonable Search" for the following records which the appellant submits must exist:

  - Minutes of meetings or records pertaining to the companies who expressed interest in the design and build project.
  - Documentation regarding assessment of space needs and conceptual design of the proposed administration buildings.

- Whether access to the following records in their entirety has been properly denied pursuant to the exemptions at sections 10(1) (third party information), 14(1) (personal privacy), 6(1)(b) closed meeting, 7(1) (advice to government), and 11 (a), (c), (d), and (g) (economic and other interests):

  Record 1: the proposal package submitted by the successful bidder; and

Record 2: the 3-page summary (in chart form) of the evaluation results of the proposals received by 15 companies with respect to the design-build project.

DISCUSSION:

FEE

An institution is authorized to charge fees for processing requests pursuant to section 45(1) of the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in section 6 of Regulation 823 (as amended by O. Reg 22/96). This provision states:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Where the fee exceeds $25, the institution must provide the requester with a fee estimate.

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699]. The fee estimate can assist a requester to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I]. A fee estimate also protects an institution from expending undue time and resources on processing a request that may ultimately be abandoned [Order MO-1699]. In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

In the current appeal, the appellant paid the fees charged for the search and photocopying of the records already released to her. During mediation, the appellant advised that she would like to be reimbursed for the fees she paid.

Representations

Township's fee and representations

The Township provides a breakdown of the fee in its representations which were prepared by the Freedom of Information Co-ordinator (FOIC):

Search time: Myself, initially 10 minutes, with an additional 25 minute spent once the requester clarified her request.

My Assistant, initially 10 minutes, with an additional 10 minutes spent once the requester clarified her request.

The CAO [Chief Administrative Officer], 20 minutes after the requester clarified her request and I was required to consult with the CAO in order to request copies of any records she had that were responsive to the request.

Total of 75 minutes at $.50 per minute = $37.50

Photocopies: A total of 109 photocopies were made and provided to the requester at a total cost of $21.80.

Total payable: $59.30

The Township also submits the following explanation for the time taken to search:

> The records in question are kept in locked filing cabinets in my office, locked filing cabinets in the CAO's office, in boxes kept in the CAO's office, in the Township's main filing system, and in the office of the Project Manager in Acton.

The appellant makes a number of points with respect to the fee charged by the Township, including the following submissions:

- No fee estimate was provided in this matter. The first bill ($55.20) presented in response to this FOI request for records was excessive for 1 page of information. This was later revised to include approximately 120 pages of information subsequently released during the mediation process for an adjusted charge of further $4.10. However, I was not notified in advance of the projected cost for either the first or second response by the Township to this request for records. I was required to pay the bill before examining the response that was provided by the Township. I note that on the Township's request form there is an option to "Examine Original". This may have been a more cost effective method for access to these records due to the expense of photocopying and the total bill submitted by the Township, however, this option was neither offered nor discussed.

- The duplication of workload in the search for these records was unnecessary in our opinion. Clarification of the first request for records (dated March 18, 2005) was possible through a phone call discussion and would have eliminated significant delays in providing the information requested. The clarification request from the Township dated April 29, 2005 was not received until May 3, 2005. Our clarification was provided by fax on May 3, 2005 and was not responded to until June 3, 2005. It is our belief that this was an intentional delay tactic to prevent timely access to important information about the Administration Building Project.

- Any increased work load represented by the Township was unnecessary for the search and release of these records since the information requested was current and immediately available in the Township office since the RFP process was underway, and in fact closed on May 5, 2005 according to Township correspondence with us.

Analysis and finding

As outlined in section 45(1) of the *Act* the Township is entitled to charge fees for certain components of the processing of a request. In the current appeal the Township has charged the

appellant for a total of 75 minutes of search time to locate 109 pages of responsive records and for photocopying those pages.

Search time

The Township's representations on search time are clear and comprehensive. Based on the representations, 20 minutes of search time were spent searching for records responsive to the appellant's original request and an additional 55 minutes were spent searching for responsive records once the request had been clarified by the appellant. The searches were conducted by the FOIC herself, her assistant and the Township's CAO, all individuals familiar with the types of potentially responsive records and knowledgeable about the way in which records are kept at the Township. Given the detail and complexity of both the original request and the subsequent clarified request, I accept that 75 minutes for locating 109 pages of responsive records is reasonable in the circumstances.

As the Township is required to charge $7.50 per 15 minutes of search time pursuant to section 6 of Regulation 823, I uphold the Ministry's search time in the amount of $37.50.

Photocopying

Allowable photocopy charges are based on the actual number of hard copy records copied for disclosure. The Township charged the appellant a total of $21.80 for 109 pages of records disclosed to her. Pursuant to section 6 of Regulation 823, the Township is entitled to charge $. 20 per page for photocopies. Accordingly, I uphold the Township's fee for photocopies.

View originals

The appellant submits it would have been more cost effective for her to examine the originals of the records that were provided to her rather than to receive photocopies of the requested information. I note that the appellant's request and clarified request specify that she is requesting "copies" of various documents containing the information sought. As such, I accept that it was reasonable for the Township to provide her with photocopies of the responsive information.

Fee estimate

The appellant also submits in her representations that she was not provided with a fee estimate for either of the two invoices despite the fact that both invoices issued to the appellant detailed a fee of over $25.00. As the appellant did not specifically raise the issue of the lack of fee estimate until her representations, the issue was not before me in this inquiry. Accordingly, I will not make a determination on the issue of fee estimate.

The Township, however, is reminded that, as outlined above, when a fee exceeds $25.00 the Township must provide the requester with a fee estimate. Where the fee is over $25 and under $100, the fee estimate must be based on the actual work done by the Township to respond to the request and must include a detailed breakdown of the fee and a detailed statement as to how the

fee was calculated. The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access.

In conclusion, I am satisfied that the fee charged by the Township for searching and photocopying the records disclosed to the appellant is appropriate and has been calculated in accordance with the *Act*. Accordingly, I uphold the Township's total fee of $59.30.

REASONABLE SEARCH

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act* [Orders P-85, P-221, PO-1924-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.

A number of previous orders have identified the requirements in reasonable search appeals [Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920]. Generally, 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 [Order M-909]. 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 [Orders P-624, M-909, PO-1744].

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.

Representations

The appellant submits that the Township did not conduct a reasonable search for responsive records and that additional responsive records must exist. In particular, the appellant submits that minutes pertaining to the receipt or opening of the expressions of interest proposals must exist and also, that records related to the design-build process and conceptual design of the administration buildings must exist.

Township's representations

The Township submitted three affidavits in support of its position that the searches conducted for responsive records were reasonable. The affidavits were sworn by the Township's CAO-Clerk/Treasurer, and the Deputy Clerk (who is also the FOIC) and the FOIC's assistant.

The FOIC attests to the fact that she contacted the appellant in an attempt to clarify the request. She states that she then provided copies of both the original request and the subsequent clarifying correspondence to her assistant and to the Township's CAO requesting that they both perform a thorough search for any files or documents related in any way to the records being requested. She advises that she also performed searches and lists the locations that she searched. She also

advises that other than the CAO and her assistant, no individuals were contacted about the request.

The Township's CAO attests to the fact that she searched her three locked filing cabinets and four boxes of files in her office and provided all files related to the request to the FOIC.

The FOIC's assistant attests to the fact that she searched the mail filing system for any files relating to both the original request and the subsequent correspondence which clarified the request. She attests to the fact that no responsive records were located in the Township's main filing system.

However, at the end of the Township's representations on the issue of fees, the Township suggests that additional records responsive to the request may be held by the "Project Manager". The Township submits:

> If an Order to provide access to all documents requested by the appellant is set down, I estimate that it will take an additional hour to re-search for all records and perhaps two hours of severance time, plus an additional 400 photocopies, or more (I can only approximate this number as all the records in this matter are not currently in our possession (care or control); we would have to request them from the Project Manager). The Township would incur shipping or mileage costs by the Project Manager in order to have the records in his possession delivered to us, should he be willing and/or able to produce them.

Appellant's representations

The appellant takes the position that "the Township failed to conduct a reasonable search to fairly, fully and accurately inform the appellant's request for public information". The appellant submits that the RFP confirms that the Project Manager was authorized to have full access to the proposals. She submits:

> We question the completeness of the search represented in the Affidavit of [the FOIC] when she states in #3, line 9 that "no other people were contacted". We submit that the search could not have been complete without contact with the Project Manager employed by contract with the Township of Georgian Bay, who was fully acknowledged by the Township as in charge of this project as the Town's representatives. To not include the Project Manager in the search for the records requested in unreasonable and not responsive to the request for records on March 18, 2005. Our March 18 letter clearly references the implication of the Project Manager in full and thorough search for the records requested. Further, [the FOIC] confirms in the last paragraph of page 1 [of the representations], (Issue B: Search), that … *"all the records in this matter are not currently in our possession (care or control); we would have to request them from the Project Manager).* A copy of the Contract with [named company] signed February 28, 2005, is attached as Appendix 3, and clearly defines the Project Manager's integral responsibilities regarding all of the records requested…

> The Township did not contact the requester until April 29, for additional clarification until the Appeal had been filed and the mediation process was underway. The letter of clarification in our view was provided but was unnecessary to the search for responsive records. Rather the Township's first search was incomplete, inaccurate and misleading in denying the existence of records that were available. Since the Township did not contact the requester for clarification until 15 days after the first denial of records, the scope of the request was defined "unilaterally". It is clear in the Township's letter of April 14, that the limits of the scope of the search were not outlined. The requester learned of the limited search upon receipt of the Township's affidavits, submitted with the October 6, 2005, Notice of Inquiry.

Analysis and finding

As noted above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist but it does require that the Township provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Orders P-624, M-909, PO-1744].

In the circumstances of this appeal, in my view, the Township has not provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all responsive records.

From the affidavits submitted with the Township's representations, it is clear that the Township has expended considerable time and effort in attempting to respond to the request for records. Indeed, as a result of its effort, the appellant was provided with two responsive records, as well as a number of explanations regarding the information requested by way of complex and comprehensive requests.

However, the Township has not provided evidence to demonstrate that it has specifically searched for the minutes pertaining to the receipt or opening of the expressions of interest proposals and/or records relating to the design/build process or the conceptual design of the building project, nor has it provided any explanation as to why such information does not exist despite the appellant's belief that it must.

Moreover, in its representations, the Township indicates not only that it would take an estimated hour to "re-search" for all records but also that a search might possibly result in two hours of severance time, as well as an additional 400 photocopies. To me, these representations suggest that not only might additional records of the type detailed by the appellant exist but that additional records generally responsive to the request might also be located among the Township's records with a further search.

Additionally, both the Township's representations and those submitted by the appellant suggest that additional responsive records may be held by the Project Manager hired by the Township for the purposes of this project. Without making a determination on whether such records are in the

custody or under the control of the Township, in my view, the representations present sufficient evidence to conclude that a search of the Project Manager's records might result in the location of additional responsive records.

In my view, the Township has not provided sufficient evidence to demonstrate that the Township has conducted a reasonable search for responsive records. On the contrary, the evidence suggests that additional responsive records might exist. Accordingly, I will order the Township to conduct an additional search of its own records for records responsive to the request and I will also order the Township to conduct a search for responsive records among those held by the Project Manager.

THIRD PARTY INFORMATION

The Township submits that sections 10(1)(a), (b), and (c) of the *Act* apply to exempt both Records 1 and 2 from disclosure.

The potentially relevant portions of section 10(1) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (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; or
>
> …

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the parties resisting disclosure 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), or (c) of section 10(1) will occur.

Part 1: type of information

The Township submits that "the proposals submitted contain, to some extent, trade secrets, technical information, commercial information, and financial information".

The appellant responds that the Township's response to this issue "fails to provide a reasonable or acceptable explanation of the trade secrets, technical information, commercial information and/or financial information the Township is protecting".

None of the affected parties specifically address whether the information that relates to them contains the type of information contemplated by section 10(1) of the *Act*.

The types of information listed in section 10(1) have been discussed in prior orders. Those that are potentially relevant have been described as follows:

> *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].
>
> *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].

Consistent with many past orders dealing with similar records, I find that Record 1, the proposal package submitted by the successful bidder, qualifies as "commercial information", for the purposes of section 10(1) [Orders M-288, M-759, P-367]. This record was submitted to the Township in response to a competitive selection process for the construction of new buildings for the Township. This process is clearly a commercial undertaking to which Record 1 is directly related. In my view, the record can therefore be considered to be commercial information. I also find that some portions of this record contain "financial" and technical" information, as those terms are used in section 10(1).

Record 2, the 3-page summary (in chart form) of the evaluation results of the proposals received by 15 companies with respect to the design-build project, is a record that was produced in the context of selecting the successful bidder. The information that comprises this record directly relates to bid documents submitted by various bidders and I find that this information qualifies as commercial information for the same reasons as Record 1.

In summary, having carefully considered the contents of Records 1 and 2, I find that the first part of the section 10(1) test has been established.

Part 2: supplied in confidence

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

Supplied

The requirement that information be supplied to an institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

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

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

In 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 light of my determination below with respect to part 3 of the three-part test for section 10(1), it is not necessary for me to consider whether any of the information in either Record 1, the successful proposal, or Record 2, the summary of the proposal evaluations, was supplied in confidence to the Township by an affected party.

Part 3: harms

To meet this part of the test, the Township and/or the third 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 Township submits that sections 10(1)(a), (b), and (c) are relevant in the circumstances of this appeal.

Representations

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

The Township submits:

> The disclosure of the records which contain financial information and methods utilized by those companies that is specific only to them, if released, would allow any other company to "steal their ideas" and produce an identical, similar, or lower bid and cause financial harm to the companies in question.
>
> Even though the requester is not a competitor company, there is an absolute certainty that this information will be published on the web and/or in local publications and also shared with many other individuals which would in effect provide the same opportunity as if the information had been supplied directly to a competitor.

In its representations, the company that was the successful bidder requests that the information remain confidential to protect its methods and practices from its competitors. It states:

> The construction industry is very competitive and if our proposal is made public information out competitors will learn our methods and trade practices which will in turn give our competitors a possible advantage over us when we bid on other projects.
>
> [Named company] does not want unqualified people of groups outside the contract reviewing our work. [Named company] fears that if the proposal and contract are deemed public information unqualified people not involved in the construction process will have unfounded critical review which will create added work defending for both [named company] and the Township of Georgian Bay. [Named company] has hired professional engineers and third party consultants to review our work to ensure the quality and that contract obligations are met.

The appellant responds:

> We note that the letter from the affected party states that *"if the proposal and contract are deemed public information unqualified people not involved in the construction process will have unfounded critical reviews which will create added work defending for both..."* We submit that this statement is unwarranted speculation that is contrary to the intent of the legislation *"to shed light on the operations of government"*. It is impossible for the public to be informed about the publicly funded construction project without details of the design proposal and projected costs.
>
> We do not accept the affected party's statement in the same letter that either "methods" or "practices" are a risk to exploitation by competitors since the RFP

> clearly provides for copyright protection, as follows: "Section 1.1.11, *Copyright for the design and drawings prepared by or on behalf of the Design-Builder belongs to the Consultant or other consultants who prepared them."* Section 5 of the RFP confirms the definition of "Consultant"
>
> We do not accept the Township's reiteration regarding risks that other companies will *"steal their ideas", "produce an identical, similar, or lower bid", or "cause financial harm to the companies in question".* We are dealing with a one of a kind project for construction of two buildings unique to the Township. Once the proposals are opened and a firm is selected, the proposal process is closed. Therefore, we believe that the theft of ideas; the production of a lower bid; or the possibility of financial harm is no longer applicable to the successful company. As well, we maintain that copyright protection addresses all of these issues.
>
> …

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

The Township submits:

> Disclosure of the record(s) in question would most certainly ensure that those companies would not submit any future calls for proposal as they would see this as a security breach. This concern has been expressed to us both verbally and in writing. There is correspondence …that specifically states a company's concern that their information would be misused (released) and they requested all their submitted material be returned to them to ensure this did not occur.

The appellant responds:

> It is unlikely that this Township will require such a large construction project anytime in the near future. The budget of the Township would not permit such a venture.
>
> It is further unlikely that Design Build bids would not be forthcoming in the highly competitive market that the Township refers to elsewhere in their representation.

The successful bidder makes no submissions on the application of this section.

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

The Township submits:

> Disclosure would cause undue financial/business/methodology loss to successful and unsuccessful bidders and the project manager in that any future calls for

> proposal could be undermined by other companies that would have access to the methods and pricing utilized by the successful bidder.

Although the affected party makes no specific representations on the application of this section, its representations reproduced above under section 10(1)(a) are also applicable for section 10(1)(c).

The appellant submits:

> The letter from the affected party references *"possible advantage"* for their competitors. This comment is speculative. There is no proof or evidence of such an issue occurring from disclosure of other public projects. Each building proposal is unique to the requirements set out in the Request for Proposal and it must be noted that, the contract has been signed therefore negating any "possible advantage".
>
> The Township's comment about *"undue financial /business/methodology loss"* is also speculative and unsubstantiated.

Analysis and findings

Having carefully reviewed the representations of the parties and the records at issue I do not accept the position of the Township and the affected parties, including the successful bidder that disclosure of either Record 1 or 2 could reasonably be expected to result in any of the harms listed in sections 10(1)(a), (b), or (c).

Recently, in Order PO-2435 Assistant Commissioner Brian Beamish discussed this office's approach to the harms issue. Assistant Commissioner Beamish stressed the need for detailed and convincing evidence to support the reasonable expectation of harm, particularly with regard to government contracts in which the expenditure of public funds is at issue. Assistant Commissioner Beamish stated:

> The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sough relates directly to government expenditure of tax payer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian order 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.
>
> …
>
> 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.
>
> ...
>
> 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 been actually 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.

Asssistant Commissioner Beamish's comments were recently echoed by Commissioner Ann Cavoukian in her 2005 Annual Report, issued in June of this year. In her recommendations to government, she made the following comments:

> The right of citizens to access government-held information is essential in order to hold elected and appointed officials accountable to the people they serve. This is particularly true for details of government expenditures and the right of the public to scrutinize how tax money is being spent. When government organizations use individuals or companies in the private sector to help develop, produce or provide government programs or services, the public should not lose its right to access this information.
>
> Any government office planning on hiring a consultant, contractor, etc., should make it clear to that future agent that the default position is that the financial and all other pertinent information related to the contract will be made available to the public, except in rare cases where there are very unusual reasons not to do so.

The conclusion that can be taken from both of those excerpts is that while the section 17 exemption seeks to protect the informational assets of businesses, the details of agreements

between the government and those who partner with it in providing public services will usually be available for public scrutiny. Only in rare cases, where a third party or an institution denying disclosure can provide "detailed and convincing" evidence to support the harms outlined in section 17(1), will disclosure not be ordered.

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

Section 10(1)(a) requires that disclosure could reasonably be expected to "…prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization". In my view, the parties have not provided the requisite "detailed and convincing" evidence required to establish that such harm could reasonably be expected to occur.

Dealing first with the application of section 10(1)(a) to Record 2, the summary of the evaluation of the bid proposals, the information contained in that record is divided into the following columns: company names and address, consultants, consultants' experience (in relation to the Township's project), company information and company experience. The Township and the affected parties have not made any specific submissions on how disclosure of the specific information in this record would reasonably be expected to result in any of the harms in section 10(1) and on my review, this information does not reveal any type of methods or trade practices intended to be relied upon by the bidders. In my view this information also does not reveal anything that would "allow another company to 'steal their ideas' and produce an identical, similar or lower bid causing harm to the companies in question" as submitted by the Township. In my view, the Township and affected party have not provided the detailed and convincing evidence required to demonstrate that the reasonable expectation of the harm in section 10(1)(a) could reasonably be expected to occur were Record 2 disclosed.

I now turn to Record 1, the successful bidder's proposal for the construction of the Township buildings. In the current appeal, the project to which the proposal relates has been completed and the competitive process has terminated. Although both the Township and the successful bidder assert generally that disclosure of the records would reveal the successful bidder's methods and trade practices thus prejudicing their competitive position in future bids, they provide no description of which information in the record this refers to and no explanation of the nexus between the disclosure of the information in the record and the contemplated harm. Nor does a review of the records themselves reveal this to me. Moreover, following Assistant Commissioner Beamish's reasoning in Order PO-2435, even if disclosure of the information were to subject the successful bidder to a more competitive bidding process for future contracts, this does not, in and of itself, significantly prejudice that company's competitive position.

As I have not been provided with the requisite detailed and convincing evidence to establish that disclosure would result in the harm identified in section 10(1)(a), I find that section 10(1)(a) has not been established.

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

In order to meet the requirements of section 10(1)(b) of the *Act*, the Township and/or the affected parties must demonstrate that:

1. the disclosure of the information in the records could reasonably be expected to result in similar information no longer being supplied to the institution; and

2. it is in the public interest that similar information continue to be supplied to the institution in this fashion.

In my view, the Township and the affected parties have not provided the requisite detailed and convincing evidence to demonstrate that disclosure of the records at issue could reasonably be expected to result in similar information no longer being supplied to the Township.

In support of its argument that the harms outlined in section 10(1)(b) could reasonably be expected to occur, the Township has provided me with a copy of the letter that they reference in their representations. In that letter an affected party advises that it has come to the conclusion that its proposal is not being seriously considered and to eliminate the possible misuse of the information contained in its proposal, it requests that it be returned. In my view, this letter does not provide convincing evidence that demonstrates that the affected party company, or others for that matter, would not respond to any future RFPs issued by the Township or participate in future bid for proposal process. Additionally, the successful bidder whose proposal is at issue in this appeal makes no submissions on the potential application of section 10(b).

As explained in greater detail later in this order in my analysis of the application of section 11(d), I do not accept that disclosure of the information at issue in this appeal would ultimately deter vendors from responding to RFPs issued by the Township. Vendors compete for the Township's business and not the other way around. The Township has not provided the detailed and convincing evidence to show that disclosure would deter vendors from doing business with the Township or provide information to it in the form of an RFP or tender, for example. In my view, the concern expressed by the Township is speculative in nature and is not supported by the necessary detailed and convincing evidence required to support the harm contemplated by section 10(1)(b).

Accordingly, I find that the harm under section 10(1)(b) has not been established.

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

Section 10(1)(c) requires that there be a reasonable expectation that disclosure would "result in undue loss or gain to any person…" Like sections 10(1)(a) and (b), "detailed and convincing evidence" is required to support the application of this section.

For the same reasons as I have outlined above in my discussion on the application of section 10(1)(a), I do not accept the position of the Township and the successful bidder that disclosure of either Record 1 or 2 could reasonably be expected to result in the harm listed in section 10(1)(c).

Again, addressing Record 2 first, I have not been provided with the requisite detailed and convincing evidence required to conclude that disclosure of the specific information in that record could reasonably be expected to result in an undue loss or gain as contemplated in section 10(1)(c). As previously noted, in my view, disclosure of the specific information would not reveal any of the affected parties' methods, trade practices or anything that would permit another company to produce an identical, similar or lower bid causing prejudice to the competitive position of the companies in question. Similarly, I do not find that disclosure would result in an undue loss or correlative undue gain for any of those parties.

As for Record 1, while I do accept that, in some circumstances, disclosure of information contained in a proposal submitted in response to an RFP might reasonably be expected to result in an undue loss or gain as identified in section 10(1)(c), in the circumstances of this appeal the parties have not provided me with detailed and convincing evidence to show how disclosure of the specific information contained in Record 1 would result in such harm. In the circumstances of this appeal the relevant project has been completed and the simple fact that disclosure of the information would subject the successful bidder to a more competitive bidding process for future contracts, does not necessarily in and of itself give rise to an undue loss or gain to any person.

Accordingly, I find that the harm under section 10(1)(c) has not been established

Conclusion

In the current appeal, the Township and all three affected parties, including the successful bidder, argue very generally that disclosure of the information would allow competitors to undercut future bids on proposals issued by the Township which in turn would result in prejudice to the competitive position of those companies whose information would be disclosed (section 17(1)(a)) and/or an undue loss on the part of the affected parties (section 17(1)(c)), particularly for the successful bidder, whose information would be disclosed. Additionally, the Township argues that were the information at issue in this appeal disclosed, similar information would no longer be supplied by companies in response to future RFPs (section 17(1)(b)). Having reviewed the representations and the information at issue, in my view, the parties have not provided the type of detailed and convincing evidence to demonstrate that disclosure of the records at issue could reasonably be expected to result in any of these harms. Accordingly, part 3 of the section 10(1) test has not been established.

I have found that part 3 of the section 10(1) test has not been met. As all three parts of the test must be established for section 10(1) to apply, the third party information exemption has no application in the current appeal and the records are not exempt under section 10(1).

PERSONAL INFORMATION

The Township submits that the Appendix E to Record 1 entitled "Qualification of Key Personnel" contains personal information. Additionally, column 2 of Record 2 lists the names of the consultants that are to work with the companies that submitted the proposal. Some of these include the names of individuals. Although the Township has not claimed that the section 14(1)

exemption applies to the information in Record 2, because the exemption is mandatory in nature, I will include this information in my analysis.

The section 14(1) personal privacy exemption only applies to "personal information". "Personal information" is defined in section 2(1) of the *Act*, in part, to mean recorded information about an identifiable individual, including information relating to the employment history of the individual [paragraph (b)] and the individual's name where it appears with other personal information relating to the individual [paragraph (h)].

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

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

As stated above, Record 2, the summary of the proposal evaluations, contains a column that lists the consultants that the various companies propose to work with if they are awarded the contract. The consultants are identified by name and by their professional specialty, such as "arch" presumably for "architect" or "mech" presumably for "mechanical engineer". In some circumstances the consultants are listed by individual name, in others by company. In my view, this information does not qualify as "personal information" within the meaning of section 2(1) of the *Act*. Clearly, the company names are not personal information. As for the individual names, as stated above, information associated with an individual in a professional or business capacity will not be considered to be "about" the individual. As the consultant names are clearly listed in a business capacity and the record does not reveal anything of a personal nature about the individuals, this information does not qualify as personal information and therefore cannot be considered exempt under section 14(1) of the *Act*.

On the other hand, in my view, Appendix E of Record 1 does contain personal information as that term is defined in section 2(1) of the *Act*. As stated by the Township, Appendix E of Record 1 contains "information … about people in their professional capacity and provides employment history of the individuals by revealing their length of service with the identified companies." Although generally speaking an individual's name, together with his or her title or employment position, would not qualify as personal information in and of itself, the length of service of each identified employee with the particular companies listed as well as each individual's years of experience in their profession relates to the employment history of an individual as contemplated by paragraph (b) of the definition of "personal information". Accordingly, this information in Appendix E of Record 1 qualifies as the personal information of individuals other than the appellant.

INVASION OF PRIVACY

Where a requester seeks the personal information of another individual, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception with potential application in the circumstances of this appeal is section 14(1)(f) which reads:

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

Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the institution to consider in making this determination; section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure under section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2). A section 14(3) presumption can be overcome, however, if the personal information at issue is caught by section 14(4) or if the "compelling public interest" override at section 16 applies (*John Doe* v. *Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Section 14(4) has no application in the current appeal.

Under the circumstances, section 14(3)(d) may apply. That provision reads:

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

Having reviewed the information that makes up Appendix E of Record 1, I find that the number of years that identified "key staff" have been with their respective companies and their number of years of experience in general constitutes the employment history of the individuals to whom this information relates, disclosure of which would constitute a presumed unjustified invasion of privacy under section 14(3)(d) of the *Act*. This finding is consistent with previous orders issued by this office [see Orders M-7, M-319 and M-1084].

However, as noted above, an individual's name and position title alone qualifies as professional information rather than personal information. In the record at issue it is only because this information is coupled with the years that the individual has been with the company and the individual's years of experience that such information is brought within the realm of personal information. Therefore, if the number of years the individuals have been with their respective

companies and their overall years of experience are severed, the remaining information does not constitute personal information.

Accordingly, I find that section 14(3) applies to exempt only the individuals' years with the company and years of experience as listed in Appendix E of Record 1. I find that section 14(3) does not apply to the individuals' names and position titles. Accordingly, the individuals' names and position titles qualify as professional information and should be disclosed to the appellant.

As section 14(3) cannot be rebutted by one or a combination of factors listed in section 14(2) I will not go on to consider whether the factors claimed by the Township in section 14(2) are relevant. Additionally, as I have found that section 14(4) has no application in the circumstances of this appeal and as the "compelling public interest override" at section 16 has not been raised, the presumption at section 14(3) has not been overcome. Therefore, I find that disclosure of the years with their respective companies and the years of overall experience of the "key personnel" listed on Appendix E of Record 1 would result in an unjustified invasion of the personal privacy of those individuals to whom the information relates. Accordingly, this information qualifies for exemption under section 14(1) of the *Act*.

CLOSED MEETING

The Township submits that both Records 1 and 2 are subject to exemption pursuant to section 6(1)(b) of the *Act*.

Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

Under part 3 of the test

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

Representations

The Township takes the position that section 6(1)(b) applies to exempt the records at issue. The Township submits:

> As a result of consultation with the Township's solicitor and a second opinion received by an independent municipal lawyer, both advised the Township to hold meetings about the acquisition of a new buildings in accordance with section 239(2)(c) of the *Municipal Act, 2001*, where the definition of "land" includes buildings.
>
> Meetings were held in the absence of the public, as evidenced by agendas prepared and circulated to members of Council in their agenda packages.
>
> The applicable statute is section 239(2) of the *Municipal Act, 2001,* as amended. A resolution is passed at the outset of each meeting that is closed to the public quoting the applicable sub-section of section 239(3) of the *Municipal Act, 2001*. A copy of the resolution utilized for this purpose is attached hereto as Schedule A. As there are many meetings at which this topic was discussed there are several resolutions that were passed which are recorded in the minutes of the meeting of Council and appear on our webpage at: http://www.township.georgianbay.on.ca/minage/agenda.html.

The appellant responds:

> We question the interpretation of *"land"* includes buildings. The acquisition or disposition of land may include buildings existing on the land, such as in the case of a tax sale. However, in this case the Township has used currently owned Township property and demolished the Township owned building that existed on the land to replace it with new buildings fulfilling the same functions. This project is a capital expenditure of some significance but does not involve sensitive negotiations or manipulation of land purchases beyond the scope of a legitimate and fair tender process for a capital construction project.

> We do not accept that all closed meeting discussions relating to the capital project for new administration buildings were legal under section 239(2)(c) of the *Municipal Act, 2001*. It is not true that all meetings where the capital project was discussed recorded "a proposed or pending acquisition of disposition of land by the municipality" as the statute authorizing the holding of the meeting in the absence of the public. …

Analysis and finding

Having reviewed the minutes of several meetings of Council listed on the Township's website including those of August 2, 2005 provided to me with the Township's representations, I am satisfied that meetings of Council took place with respect to the proposed building project and that they were held *in camera*. I am also satisfied that statutory authority exists in section 239(2)(c)of the *Municipal Act, 2001* for the holding of meeting of this nature in the absence of the public. Section 239(2)(c) permits meetings to be held *in camera* if the subject matter being considered is a proposed or pending acquisition or disposition of land by the municipality or local board. I accept the Township's position that the interpretation of the phrase "acquisition of land" includes "building" and therefore fits within the scope of section 239(2)(c) of the *Municipal Act, 2001*. Accordingly, I find that the first two parts of the test under section 6(1)(b) have been met.

In order to meet the third part of the test under section 6(1)(b), the Township must show that disclosure of the records at issue, the proposal of the successful bidder itself and the summary of the evaluations of the proposals, would reveal the actual substance of the deliberations at a closed meeting. Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting.

In Order MO-1344, former Assistant Commissioner Tom Mitchinson addressed the application of section 6(1)(b) as follows:

> To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations on this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the **subject** of the deliberations and not their **substance** (see also Order M-703). "Deliberation" in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).
>
> …
>
> It is clear from the wording of the statute and from previous orders that to qualify for exemption under section 6(1)(b) requires more than simply the authority to hold a meeting in the absence of the public. The *Act* specifically requires that the record at issue must reveal the substance of deliberations which took place at the meeting.

The Township has provided no representations to explain how the disclosure of Record 1, the successful bidder's proposal itself, or Record 2, the summary of the evaluation of the proposals submitted, would reveal the substance of deliberations at the August 2, 2005 meeting, or at other similar closed meetings about the proposed building project that the Township has not specifically identified. I have no evidence before me to suggest that the specific records at issue in this appeal were before council and therefore, nothing to assist me in determining whether information contained in the records would reveal the substance of deliberations. Accordingly, I find that part three of the test has not been met.

As all three parts of the test must be met, I find that the information contained in Records 1 and 2 is not exempt under section 6(1)(b).

ADVICE TO GOVERNMENT

The Township takes the position that the exemption at section 7(1) of the *Act* applies to exempt both Records 1 and 2 from disclosure.

Section 7(1) of the *Act* states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7(1) is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1393, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found not to qualify as advice or recommendations include:

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

Representations

The Township submits:

> The advice and/or recommendations comes in the form of suggested materials, services, layouts, and timelines proposed to be utilized in the construction process and it is recommended that the Township (Council) adopt those recommendations as part of accepting the proposal. Council has been advised directly by the company why the recommendations proposed are most suitable. Council was also advised directly by the project manager which company's he was recommending to qualify for pre-qualification. If either the proposal or the pre-qualification summary were to be disclosed it would most certainly cause the companies making the recommendations to not provide similar advice or recommendations in the future as they would see disclosure as a breach of their confidential submissions.
>
> The advice and/or recommendations contained in the records at issue were provided by consultants retained by the municipality through a request for proposal process.

The appellant takes the position that the records at issue "were not provided by consultants but by "bidders" in an RFP process and therefore do not fit the scope of the section 7(1) exemption". Responding to the Township's argument that were the records disclosed it would cause the companies making the recommendations to refuse to provide similar advice or recommendations in the future, the appellant submits that this argument is speculative.

Analysis and finding

With respect to the Record 1, the proposal package submitted by the successful bidder, I do not accept that this record would reveal advice or recommendations of a consultant retained by the Township. At the time the proposal was prepared and submitted to the Township, the successful bidder had not yet been retained by the Township and therefore was not a consultant within the meaning of section 7(1) of the *Act*.

With respect to Record 2, the summary of the evaluation results of the proposals, I am not convinced that the scores found in this record represent the judgment of the scorer for the purpose of providing advice or making a recommendation to the Township within the meaning of section 7(1) of the *Act*.

In Order PO-1993 (upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563), Adjudicator Laurel Cropley examined the application of section 13(1) (the municipal equivalent of section 7(1) of the *Act*) to summary score charts for proposals submitted in response to several RFPs issued by the Ministry of Transportation. In that appeal, the Ministry argued that each "score" represented "the judgment of a scorer with respect to on aspect of a consultant's RFP submissions" and that "the individual scores and totals convey to senior staff the scorer's recommendations as to which consultant the contract should be awarded". In Order PO-1993 Adjudicator Cropley rejected the Ministry's argument and found that the score charts did not qualify for exemption under section 13(1). She outlined her reasoning for making that finding as follows:

> It appears that the awarding of a contract … is based on a non-discretionary application of an established formula or pre-set criteria. If, as the Ministry suggests, after totaling up the scores, there is no further assessment of the information contained therein, no balancing or options of opinion to put forward, I am somewhat at a loss to understand the nature of the advice being given. In other words, rather than the selection panel putting the consultant forward to the Chairperson (or any other senior management for that matter) with a recommendation that this party be awarded the contract, it appears that the process is designed such that, once the mechanics of the assessment are completed, based on the application of established criteria, there is no discretionary decision to be made; there is no advice to be accepted or rejected during the deliberative process.

> Even if there is an element of discretionary decision making, that is, an ability of the recipient to accept or reject the awarding of the contract to a particular consultant, in my view, the development of the advice or recommendations would only occur once the completed scores for the technical component are given to the Chairperson (or Manager) and the remaining calculations are made based on the overall compilation of all the variables.
>
> I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed. Broadly viewed, the Ministry's approach could be taken to mean that every time a government employee expresses an opinion on a policy-related matter, or sets pen to paper, the resultant work is intended to form part of that employee's recommendations or advice to senior staff on any issue.

I agree with Adjudicator Cropley's reasoning in Order PO-1993 and find it relevant to the current appeal.

In this appeal, the Township has not provided representations on how section 7(1) applies specifically to Record 2 and has not explained who prepared the evaluation sheet, what criteria were applied, what the advice or recommendation made was, or to whom this advice or recommendation was provided. Despite the lack of representations on the application of this exemption to the Record 2, from my review of the record it appears that an evaluator applied a numerical score to various different types of information provided by each of the bidders in their proposals. In my view, while the scores detailed in this record may be considered in arriving at a recommendation as to which consultant should be awarded the contract the scores do not, in and of themselves, consist of a recommendation. In other words, the scores detailed in the record, the summary of the evaluation results, provide the factual basis upon which any advice or recommendations would be developed but does not, in and of itself, "advise" or "recommend" anything that can be perceived as a suggested course of action that will ultimately be accepted or rejected by any person who is being advised.

In conclusion, I find that section 7(1) does not apply to exempt any of the information contained in either Record 1 or 2 from disclosure.

ECONOMIC AND OTHER INTERESTS

The Township submits that section 11 (a), (c), (d) and (g) apply to both Records 1 and 2.

Those sections read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> …
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> …
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

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), (d) or (g) 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.)].

Section 11(a): monetary value

For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

Part 1: type of information

The Township submits that

> [T]he records at issue contain commercial information relating to the buying of materials and services to be utilized during the construction projects. The records at issue also contain technical information in the form of engineering and architectural recommendations for the construction projects.

The appellant does not specifically address the type of information contained in the records for the purposes of section 11(a) but states, in representations on section 10(1), that the Township's response to this issue "fails to provide a reasonable or acceptable explanation of the trade secrets, technical information, commercial information and/or financial information the Township is protecting".

The types of information listed in section 11(a) have been discussed in prior orders. These types of information are also the same as those discussed above in my analysis on the application of the third party information exemption in section 10 (1).

For the same reasoning as that outlined above in my analysis of the first part of the three-part test of section 10(1), I find that records at issue contain the type of information contemplated by part 1 of the three-part test for the application of section 11(a). I find that Record 1, the proposal package submitted by the successful bidder qualifies as "commercial information", for the purposes of section 11(a), as well as contains financial and technical information as those terms have been defined in previous orders. I also find that Record 2, the 3-page summary (in chart form) of the evaluation results of the proposals received by 15 companies with respect to the design-build project contains information directly relating to bid documents submitted by various bidders qualifies as commercial information as contemplated by section 11(a).

Accordingly, I find that the first part of the section 11(a) test has been established.

Part 2: belongs to

The term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense (such as

copyright, trade mark, patent or industrial design) or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

Examples of the latter type of information may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information.

In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others [Order PO-1805 and Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.)]

The Township submits:

> [T]he information in the records was compiled through the use of skill and effort of professional in the design/build firm and was provided to the Township as a result of a call for proposal process. The information belongs to the Township in that it forms the basis of the construction projects that will ultimately be owned by the Township. The Township has not revealed the information to any other party other than Township officials and has at all times been stored in locked cabinets. There is an interest in protecting the records as there is some concern as to potential misuse as identified in the correspondence by the company who asked for their proposal to be returned to them. The proposal by the successful bidder has been accepted and adopted by the Township and is therefore owned (belongs to) the Township.

The appellant submits that the Township does not have a proprietary interest in the records in a traditional intellectual property sense such as copyright trademark, patent or industrial design.

Having considered the records at issue, I agree with the appellant that the Township does not have a proprietary interest in them, either in a traditional intellectual property sense or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Although the Township submits that the information has been treated in a confidential manner, I do not accept that the Township's reasons for keeping it confidential result from a fear of misappropriation of the information by others. Also in my view, none of the information contained in the records has inherent monetary value to the Township. Any interest that exists in these records in the traditional intellectual property sense or in law as required by section 11(a) could only belong to the bidders, the affected parties, not the Township, and whether the disclosure of that information would result in harm to those affected parties, has been determined in my discussion on the application of the mandatory exemption at section 10(1).

Accordingly, I do not accept that the information at issue "belongs" to the Township within the meaning of part 2 of the test for section 11(a).

As all three parts of the test must be met for section 11(a) to apply, it is not required for me to determine whether part 3 has been met.

Section 11(c): prejudice the economic interests or competitive position

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. The exemption 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].

As noted above, to qualify for exemption under section 11(c), the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm", the harm being prejudice to the institution's economic interests or competitive position. 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 Township submits:

> [D]isclosure of the records at issue would prejudice the Township's economic interests in that the companies that bid on the current projects would not likely want to be involved with any future projects with the Township because they would fear their submissions would be released and subject to misuse by competitors or other members of the public. This would have an impact on the Township's ability to have broad range of companies to choose from for future projects and as a result limit the Township's ability to obtain competitive pricing with the Township being required to accept potentially higher estimates for future projects.

The appellant responds:

> We fail to see how disclosure of the records would prejudice the Township from earning money in the marketplace or reduce its economic interests or its competition for business with other public or private sector entities.

The Township has failed to provide the detailed and convincing evidence required to demonstrate that disclosure of the information contained in the records could reasonably be expected to prejudice its economic interests or competitive position. 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). Additionally, for reasons that I will discuss in more detail below, in section 11(d) 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.

Section 11(d): injury to financial interests

As noted above, and similarly to section 11(c), for section 11(d) 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)* (1988), 41 O.R. (3d) 464 (C.A.)].

In support of its claim that section 11(d) applies, the Township submits exactly the same arguments as it did for the application of section 11(c):

> Disclosure of the records at issue would prejudice the Township's financial interests in that the companies that bid on the current projects would not likely want to be involved with any future projects with the Township because they would fear their submissions would be released and subject to misuse by competitors or other members of the public. This would have an impact on the Township's ability to have a broad range of companies to choose from for future projects and as a result limit the Township's ability to obtain competitive pricing with the Township being required to accept potentially higher estimates for future projects.

The appellant responds that the Township's concerns that disclosure of the information at issue would result in injury to its financial interests, are speculative.

I agree with the appellant. In my view, the Township's arguments with respect to the application of section 11(d), in the circumstances of this appeal are speculative in nature. I have not been provided with the requisite "detailed and convincing" evidence to establish that the disclosure of the information at issue "could reasonably be expected to" result in injury to its financial interests.

The Township argues that disclosure of the information at issue would result in the companies that bid on the current project not wanting to bid on any future Township projects based on the fear that their submissions might be released and misused by competitors or members of the public. In Order MO-1706, Adjudicator Bernard Morrow addressed a similar argument made by

a school board with respect to the disclosure of information contained in a proposal and contract for cold beverage vending between the school board and an affected party. In that order, Adjudicator Morrow found that section 11(d) did not apply to exempt the information at issue. He stated:

> The Board suggests that disclosure of the information at issue will cause prospective venders to not participate in tender, request for proposal or invitation to propose processes and a subsequent contracting process. In making this argument the Board asserts that the tender, request for proposal or invitation to propose process is understood to be a confidential process. The Board only discloses the final cost, price or revenue-generating amount submitted by the successful bidder to the public. The Board suggests that if the information at issue is disclosed potential vendors will not participate in the process, in turn, reducing the number of potential partners and driving up its cost of entering into purchase agreements.
>
> The Board presents a conclusion that is laden with speculation. I have no evidence that prospective vendors will not provide this information to the Board in the future or that they will not submit proposals in the future. … In addition, the suggestion that the pool of potential vendors would be reduced, thus increasing the Board's costs of entering into similar arrangements, is self-serving at best. In this type of vending and pouring agreement it is the vendors that are competing for the Board's business and absorbing the costs, not the Board. The Board does not incur any costs; on the contrary, it only reaps the financial benefits of the relationship.

As Adjudicator Morrow found in Order MO-1706, I find the Township's arguments in this appeal are speculative and entirely lacking in substance and supporting evidence. The Township suggests that the companies that bid on the current project, and perhaps others, would refuse to negotiate or enter into future arrangements with the Township if information like that at issue is disclosed. I do not accept this argument. As stated in Order MO-1706, vendors are competing for the Township's business, and not the other way around. I am not satisfied that disclosure of the information could reasonably be expect to result in these vendors refusing to do business with the Township, and thus result in injury to the Township's financial interests.

Accordingly, I find that section 11(d) does not apply to exempt any of the information at issue from disclosure.

Section 11(g) – proposed plans, policies and projects

In order for section 11(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

> 2. disclosure of the record could reasonably be expected to result in:
> (i) premature disclosure of a pending policy decision, or
> (ii) undue financial benefit or loss to a person.
>
> [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For this section to apply there must exist a policy decision that the institution has already made [Order P-726].

The Township submits:

> The record submitted by the successful bidder contains proposed plans for projects and their release could be financially beneficial to a person who could use them as his/her own plans without having to have paid for them. A person could also sell the plans for the project under the guise that the plans for the project belong to that person or was authored by them.

As far as the first part of the test is concerned, in Order P-229, Commissioner Tom Wright defined the word "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". I adopt this definition for the purposes of this appeal. The records at issue contain information related to a RFP issued by the Township.

In my view, Record 2, the evaluation of proposals submitted in chart form, clearly does not constitute the "proposed plans, policies or projects of an institution" and therefore, cannot qualify for exemption under section 11(g). Record 1, the proposal of the successful bidder, however, does contain the proposed manner in which, the company that prepared the proposal would choose to undertake the building project were it successful with its bid. Given that the proposal was indeed successful and ultimately accepted by the Township, it might qualify as a plan within the established definition of that term in that it is a "formulated and especially detailed method by which a thing is to be done", that is the Township's plan to build two new buildings.

Even though Record 1 might be considered to contain a "plan, policy or project", and even if Record 2 could be said to contain a "plan, policy or project", which I have specifically rejected, I have not been provided with "detailed and convincing" evidence from the Township that the harm contemplated in section 11(g) could reasonably be expected to occur should the information in either of the records be disclosed. The Township's concern regarding the disclosure of the records appears to be based on possible "misuse" of the information by others, and the ensuing potential of harm to its interests. Former Commissioner Sidney B. Linden made the following comments regarding section 18(1)(g) of the Freedom of Information and Protection of Privacy Act, which is the provincial equivalent of section 11(1)(g):

> Any harm that may accrue to the affected party must result from the disclosure of the records themselves rather than any potential harm as a result of the information in the records being misused.

[Order 154]

I agree and find this reasoning applicable in the circumstances of this appeal.

The representations provided by the Township in support of its claim that section 11(g) applies are speculative in nature, lacking any supporting evidence, and in any event, do not support a finding that disclosure of the records themselves could result in an undue financial benefit or loss to any person. Therefore, I find that the records do not qualify for exemption under section 11(g) of the *Act*.

ORDER:

1. I uphold the Township's fee for the search and photocopying of the records already disclosed to the appellant.

2. I order the Township to conduct a further search of its records for records responsive to the appellant's request and to provide me with an affidavit sworn by the individual who conducts the search within 30 days of the date of this Interim Order. At minimum, the affidavit should include information relating to the following:

   (a) information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;
   (b) a statement describing the employee's knowledge and understanding of the subject matter of the request;
   (c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
   (d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
   (e) the results of the search.

3. I order the Township to conduct a further search of the records held by the Project Manager for records responsive to the appellant's request and to provide me with an affidavit sworn by the individual who conducts the search within 30 days of the date of this Interim Order. At minimum, the affidavit should include the information outlined above in Provision 2.

4. The affidavits referred to in Provisions 2 and 3 should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 2 Bloor Street East, Suite 1400, Toronto, Ontario, M4W 1A8. The affidavits provided to me may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in IPC *Practice Direction 7*.

4. If, as a result of the further searches, the Township identifies any additional records responsive to the request, I order the Township to provide a decision letter to the appellant regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*, considering the date of this order as the date of the request. The Township should also provide me with a copy of the decision letter sent to the appellant.

5. I uphold the Township's decision not to release the number of years the "key personnel" listed in Appendix E of Record 1 have been with the identified companies and the number of their years of experience.

6. I order the Township to disclose Record 1, with the exception of the information identified in Provision 5, and Record 2, in its entirety, to the appellant by **November 24, 2006** but not before **November 20, 2006**.

7. I remain seized of these matters with respect to compliance with this interim order.

Original signed by: October 19, 2006
Catherine Corban
Adjudicator