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

ORDER PO-2485

Appeal PA-050202-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any agreements or contracts between the Ministry and three named companies. Specifically, the request stated:

> I wish to obtain a copy of the agreement(s) and/or contract(s) between the Ministry of Natural Resources (or designated Provincial agency) and [named company 1], and/or [named company 2] and/or [named company 3] with specific reference to the use of Crown Lots in Prince Township adjacent and adjoining the following lots owned by the applicant [the name of the requester and his lot numbers].

The Ministry identified one responsive record, an Option Agreement dated August 13, 2003, which it decided to release to the requester. The Option Agreement is a contract entered into between the Ministry and named company 2 (the affected party) relating to the wind energy potential of the lands described in the agreement and an option to lease these lands on terms specified in the Option Agreement at the end of the option period. The requester claims to own land adjacent to and adjoining the lands described in the Option Agreement.

Before releasing the record, the Ministry notified the affected party to obtain its view regarding disclosure of the record.

The Ministry did not receive a response from the affected party. Subsequently, the Ministry issued a final decision letter in which it indicated its intention to grant full access to the responsive record. Notice of the Ministry's final decision was given to the affected party before releasing the record, indicating that it had the opportunity to appeal the Ministry's decision to this office.

The affected party (now the third party appellant) appealed the Ministry's decision to disclose the record to the requester on the basis that it contains commercial and financial information and its disclosure would adversely affect the company's economic interests. The third party appellant asserted that the mandatory exemptions at section 17(1)(a) and (c) of the *Act* would apply in this case.

Mediation did not resolve this appeal and the file was transferred to the adjudication stage of the appeal process for an inquiry.

This office began the inquiry by first sending a Notice of Inquiry to the third party appellant, which was invited to submit representations on the application of section 17 to the record at issue. The third party appellant submitted representations in response.

A Notice of Inquiry was then sent to the Ministry and the requester along with a copy of the non-confidential representations of the third party appellant. The Ministry and the requester were asked to submit representations on all of the issues set out in the Notice of Inquiry with particular

reference to the representations provided by the third party appellant. They submitted representations in response.

The third party appellant was then given an opportunity to reply to the representations of the Ministry and the requester. It chose not to do so.

The file was then re-assigned to me to complete the inquiry.

RECORDS:

The record at issue in this appeal is an Option Agreement between the Ministry and the third party appellant with attached schedules and amendments. Schedule A is entitled "Legal Description of the Lands", Schedule B is entitled "Calculation of Annual Fees" and Schedule C consists of two maps clearly identifying the lands described in the Option Agreement. Also attached to the Option Agreement is a document entitled "Amendment to Option Agreement" and "Amended Schedule 'A'".

DISCUSSION:

The third party appellant initially objected to disclosure of the Option Agreement in its entirety. Its representations refined this somewhat, and it now objects to the disclosure of specified portions of the Option Agreement. The specified portions are identified with a side-bar to its representations. Those portions can be described as follows: paragraphs 2, 8, 9, 10, 11, 22, Schedule A and Schedule B. In addition, the third party appellant objects to the release of any identifying information about it in the Option Agreement. It also objects to the disclosure of the second and fifth paragraphs of the preamble to the Option Agreement. Nevertheless, the Option Agreement in its entirety remains undisclosed.

For the purposes of this appeal, therefore, any reference to the record will include the Option Agreement in its entirety.

THIRD PARTY INFORMATION

The third party appellant states that the Option Agreement is exempt pursuant to sections 17(1)(a) and (c) of the *Act*. Those sections read:

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

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

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For a record to qualify for exemption under section 17(1), the party asserting its application must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

Representations

The third party appellant submits that the information contained in the Option Agreement is both commercial and financial information. The third party appellant states:

> The Option Agreement was entered into for the sole purpose of entering into a commercial venture - the right to use the wind energy potential of certain Crown lands and the option to lease the lands for the provision of wind energy in exchange for payment. The information in the Option Agreement would not have been provided to the Ministry otherwise than in the context of a commercial transaction. The information in the Option Agreement is not simply information that stems from a business venture: it constitutes the business venture itself - the right to use the wind energy potential of certain Crown lands and an option to lease lands for the provision of wind energy in exchange for payment. There is commercial value to [the third party appellant] in the exclusivity of its Option Agreement with the Ministry. The Option Agreement thereby satisfies the definition of commercial information.

> More specifically, the side-barred portions of the Option Agreement contain detailed information about the terms and conditions of a contemplated land lease transaction, including the term of the Option Agreement and the potential lease, the formula for calculating rent on the lease, and the location of certain wind lands and turbine capacity, all of which is commercial information. Just as the purchase of land is a commercial transaction and information such as the purchase price and the identity of the purchaser constitute "commercial" information (Order PO-1786-I), so too is the option or lease of land a commercial transaction and information such as the identity of the purchaser, the rental price and other terms and conditions of the option or lease commercial information. Page 1 and Schedule "A" of the Option Agreement identifies the lands contemplated to be leased under the agreement and identity of the party. Pages 1, 2, 4 and Schedule "B" identify the price of the option, the price of subsequent extensions of the initial option period and the formula for calculation of the annual lease fee. This information is "commercial" information pursuant to the definition of the Information and Privacy Commission ("IPC").

The third party appellant also submits that the information contained in the record constitutes financial information.

The Ministry made no representations regarding the nature of the information contained in the record. The requester agreed that the record contains commercial information.

Analysis and Findings

The types of information listed in section 17(1) have been discussed in prior orders and I adopt those definitions for the purposes of this appeal. Those orders have defined commercial information and financial information as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Having carefully considered the parties representations and the contents of the Option Agreement, I am satisfied that it contains commercial and/or financial information. The information in the Option Agreement relates to the terms of a commercial relationship between the Ministry and the third party appellant for the exploration of specific lands by the third party

appellant as a potential electricity generating wind park as well as an option to lease those lands. The Option Agreement sets out the terms of the proposed lease of those lands and the amount that will be paid by the third party appellant during the option period and under the proposed lease.

Accordingly, I find that part 1 of the test under section 17(1) has been satisfied.

Part 2: supplied in confidence

Turning to part 2 of the test, the third party appellant must demonstrate that the information at issue was "supplied" to the Ministry "in confidence", either implicitly or explicitly.

Supplied

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

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. The Divisional Court recently upheld as "reasonable" this office's approach on this issue, finding that information in a negotiated contract had not been "supplied" to the institution in question [*Boeing v. Ontario (Ministry of Economic Development and Trade*), [2005] O.J. No. 2851, leave to appeal refused (November 7, 2005) Doc. M32858 (C.A.)].

There are two notable exceptions to this approach: the "inferred disclosure" and "immutability" exceptions. The inferred disclosure exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution [see Order MO-1706]. The immutability exception can arise where information in a negotiated contract is relatively "immutable" or not susceptible to change, such as the operating philosophy of a business, or a sample of its products. [see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.); applied in Orders PO-2371, PO-2384, PO-2433and PO-2467]

Third party appellant's representations

Although the third party appellant submits that the information in the Option Agreement was "supplied" to the Ministry, it also acknowledges that the information in this record was the product of a negotiation process. The third party appellant has not made any submissions to suggest that either of the two exceptions to the usual approach to the issue of "supplied" in the context of a contractual arrangement would apply in the circumstances of this appeal. The third party appellant makes the following additional submissions on this issue:

Part 2. Information supplied in confidence

The information in the Option Agreement reflects terms that were negotiated with the Ministry in a confidential negotiation and includes information that was supplied to the Ministry in the context of a confidential negotiation. It was [the third party appellant's] expectation that *the terms of the deal that it negotiated* with the Ministry would be kept confidential.

Information was "supplied"

Information is "supplied " if it is 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 (Order PO-2020, PO-2043). *[The third party appellant] supplied confidential information to the Ministry in the context of a confidential negotiation.* This confidential information is reflected in the Option Agreement, the terms of which [the third party appellant] also expected was to be kept confidential. (emphasis added)

Ministry's representations

The Ministry submits that the information contained in the Option Agreement was "supplied" by the third party appellant, but also appears to acknowledge that the terms of a negotiated contract do not fall within the definition of "supplied" as that term is used in section 17(1). The Ministry states:

> The second part to the test as [to] whether section 17 applied can be subdivided into two parts, i.e., whether or not it is reasonably demonstrable that the information was supplied … from the affected party to the institution and that it was done on a confidential basis. The information was supplied by the affected parties to the Ministry.
>
> ….
>
> The issue of whether or not information contained in an agreement was supplied in confidence was dealt with in Order MO-1706. That order found that as the contents of an agreement [were] usually the product of negotiations between the parties; the contents would not normally fall within the *Municipal Freedom of Information and Protection of Privacy Act* equivalent to section 17. There was an exception to that rule which only applied where the information in the agreement would permit an accurate inference to be made of underlying confidential information, such as a contractors cost of material, labour administration, etc. In such situations, the exemption could be applied to the contents of an agreement.
>
> ….

> As the appellants do not appear to fall within the exception articulated in MO-1706, the Ministry could only conclude that section 17 did not apply to the record, as it was not supplied in confidence and make the decision to release the record.

The requester did not make representations on the "supplied" issue.

Analysis and findings

As stated above, past decisions of this office have established that the terms of a contract between an institution and affected party will not normally be considered to have been "supplied" within the meaning of section 17(1) as contracts are viewed as the product of a negotiation process and, therefore, their terms are not "supplied" as that term is used in the *Act*.

In this appeal, the third party appellant clearly acknowledges, and makes repeated references to the fact that the terms of the Option Agreement were negotiated between the Ministry and the third party appellant. For example, it states: "The information in the Option Agreement reflects terms that were *negotiated* with the Ministry.." and "It was [the appellant's] expectation that the terms of the deal that it *negotiated* with the Ministry.." and "[The appellant] invested significant time, resources and expertise into the *negotiation* of the Option Agreement."

The representations of the Ministry are not clear on this issue and it is for that reason that I have quoted from them at length. While the Ministry's submissions appear to imply that it believes that the information was "supplied", it also states that it concluded that section 17 did not apply in the circumstances of this appeal. In my view, the Ministry's reliance upon Order MO-1706, to support the proposition that contracts that are the product of a negotiated process are not "supplied" as that term is used in section 17(1), provides the clearest statement of its position.

I note that there is no evidence in the record itself to suggest that it was other than the product of a negotiated process.

Neither the third party appellant nor the Ministry have adduced any evidence in their representations that would support the application of the two exceptions referred to above, namely, the "inferred disclosure" and "immutability" exceptions.

On my review of the Option Agreement, with the exception of some information contained in Schedule B, discussed below, I am not satisfied that there is sufficient evidence to support the application of the two exceptions to the remaining information in the record.

Schedule B contains two formulas for the calculation of payments due during the period of the option and under the proposed lease. The first formula, "A", relates to the fees owing during the option period and there is nothing in that formula that would give rise to the application of the exceptions. The second formula, "B", relates to the amount owing under the lease and it includes a percentage figure that reveals the "installed capacity factor" of the wind energy project. I find that this information could not change as a result of negotiations, and it falls within the immutability exception to the rule regarding negotiated contracts. It is non-negotiated

information about the operation of the third party appellant's wind turbine facility. This information is not caught within the definition of supplied and does meet this component of part 2 of the test under section 17(1) of the *Act*.

To conclude, having carefully reviewed the parties' representations and the contents of the Option Agreement, and I am not persuaded that the information contained in the record was "supplied" to the Ministry within the meaning of part 2 of the test under section 17(1) of the *Act*, with the exception of the information relating to the "installed capacity factor" in Schedule B, discussed above.

In confidence

In light of my findings on the "supplied" element, I need only consider the "in confidence" element of part 2 of the test with regard to the "installed capacity factor" in Schedule B of the Option Agreement. However, the third party appellant has made extensive representations on "in confidence" component with regard to the contents of the entire Option Agreement. Therefore, for the sake of completeness, I will consider the application of the "in confidence" element to the entire record.

In order to satisfy the "in confidence" component of part 2, a party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Third party appellant's representations

The third party appellant submits that it has a reasonable expectation of privacy with respect to the information contained in the Option Agreement. It submits that representatives from the Ministry "expressly communicated" to its representatives that the Option Agreement would not

become public and that it gave assurances to its representatives that it would be treated as confidential.

The third party submits that it has consistently treated the Option Agreement as confidential and refers to its internal non-disclosure practices and procedures regarding confidential information. The third party appellant attached to its submission a copy of a confidentiality agreement that it asks its employees, subcontractors and consultants to sign.

The third party appellant submits that the Option Agreement and its contents, in particular the formula for calculating rent, the location of certain wind lands and the terms of the lease, are not available to the general public and that it will not become public until the lease is registered against the land.

The third party appellant cites Order PO-1688 and submits:

> The mere possibility that disclosure could be compelled under the *Act*, in the event the test for exemption under s. 17 is not met, is insufficient to neutralize a reasonable expectation of confidentiality.

Ministry's representations

The Ministry makes the following four points in response to the third party's representations:

1. It denies that the information was communicated to the Ministry by the affected party on the basis that it was confidential and should remain confidential.

2. Its staff made it clear to the third party appellant that the information would only be kept as confidential as the *Act* would permit.

3. It conducted a review of its files and was not able to find any written correspondence or file notes evidencing the express communication that is alleged by the third party appellant.

4. It notes that the appellant has held public information sessions on the wind farm proposal and published a public notice in the *Sault Star*.

Requester's representations

The requester submits that the information contained in the Option Agreement is not confidential. In particular, the requester submits that the "location of the wind lands and turbine capacity" have been publicly identified in an environmental assessment report that was released in 2003. The requester adds that he has had meetings with the Ministry and discussions about the location of the "wind lands" and the safety of the turbines that are located adjacent to his property and, therefore, the location of these lands cannot now be seen as confidential. The

requester adds that information about the capacity and sound levels of the turbines, density, size, royalties paid to landowners and payment options is also publicly available. As explained in more detail below, the requester also provided evidence to support this position.

The requester also makes reference to the wording of a "Confidentiality Statement" in a Request for Proposals (RFP) that he speculates would have been issued by the Ministry and responded to by the third party appellant. The Confidentiality Statement reads:

> Information provided by a Proponent is subject to, and may be released in accordance with, the provisions of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F. 31, as amended. The Proponent will clearly indicate in a separate confidentiality statement, in a form provided by the Proponent, any portion of the Proposal that contains proprietary or confidential information for which confidentiality is to be maintained by the Ministry and its technical advisors. Such portions of the Proposal will be clearly marked "Proprietary and Confidential" by the Proponent. In the event that no confidentiality statement is provided, the Proponent will be automatically deemed to certify to the Ministry that no portion of the Proposal contains proprietary or confidential information for which confidentiality is to be maintained by the Ministry or its technical advisors.

In light of this Confidentiality Statement, the requester submits that the third party appellant had an understanding of the steps it needed to take to protect proprietary and confidential information from public disclosure and he challenges the third party appellant's assertion that it had a reasonable expectation of confidentiality.

Analysis and Findings

Having carefully reviewed the parties' representations and the record at issue, I am not satisfied that any part of the Option Agreement was supplied "in confidence" by the third party appellant to the Ministry.

The submissions of the third party appellant and the Ministry are in direct conflict regarding any alleged "express communication" of confidentiality.

The third party appellant relies upon a template copy of a Confidentiality Statement that it says it routinely uses with employees, contractors and subcontractors to protect its confidential information.

While confidentiality agreements of this nature may be commonly used as a condition of employment or as a pre-condition to the signing of a contract or sub-contract for the delivery of services, I am not persuaded, on the evidence before me, that the third party appellant asked the Ministry to execute this agreement or one of a similar nature in this case.

The Ministry denies providing any express assurance regarding confidentiality, in writing or otherwise, to the third party appellant and it takes the position that it could only safeguard confidentiality within the parameters of the *Act*.

The third party appellant was provided with an opportunity to reply to the Ministry's submissions on this point but declined to do so. I can only conclude from its decision not to respond that it did not have anything further to add.

In addition, the third party appellant has submitted that the information contained in the Option Agreement is not available to the public and will not become available until a lease is registered on title. The requester disagrees with this view and has attached to his submission a copy of a presentation purported to have been given by the appellant at a public meeting. The requester states that the presentation to the public included the general location of the proposed wind park, the number, size and density of the turbines, sound levels, and location of the wind turbines relative to residential areas. The requester also suggests that he has had meetings and discussions with the Ministry about the location of the wind lands so that this information can not be seen as confidential.

Finally, I would like to comment briefly on the possible significance of the Confidentiality Statement raised by the requester. The RFP is not a record before me in this appeal and I am not in a position to confirm that the RFP referred to by the requester relates to the Option Agreement entered into between the Ministry and the third party appellant. That said, I find the requester's representations on this point and the third party appellant's decision not to respond to them noteworthy. If this is, in fact, the RFP that gave rise to the creation of the Option Agreement, there is no any evidence before me to suggest that the third party appellant identified, by way of a signed Confidentiality Statement, any portion of its proposal (which ultimately may have found its way into the Option Agreement) as confidential.

On a related note, the third party appellant argues that the possibility of disclosing under the *Act* is not sufficient to negate an expectation of confidentiality. In my view, where an RFP raises this possibility, it can be a relevant factor to consider, especially where the third party fails to identify any information as confidential when invited to do so in its proposal submitted in response to the RFP.

That said, in the face of all of the evidence before me, I find that the third party appellant has not established that it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. Accordingly, I find that the third party appellant has not satisfied the "in confidence" portion of part two of the test under section 17(1).

Part 3: harms

Having found that the Option Agreement does not meet part 2 of the test under section 17(1), I am not required to consider the part 3 "harms" test. However, for the sake of completeness, I have decided to do so.

General principles

To meet this part of the test, the Ministry and/or the third party appellant must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

In this appeal, the third party appellant has raised the application of section 17(1)(a) (prejudice to competitive position) and section 17(1)(c) (undue loss of gain) to the record at issue.

Third party appellant's representations

The third party appellant submits that the wind energy business is highly competitive and that information regarding its business, including wind energy locations, facilities, pricing, and options to explore wind energy potential, is highly sensitive and confidential. It submits that its clear competitive edge makes it a target of competitors who stand to benefit tremendously from access to its proprietary and confidential information.

The third party appellant further states:

> [The third party appellant's] competitors stand to benefit tremendously from access to [the third party appellant's] proprietary and confidential information. It is our understanding that there are no less than 46 developers in or around the Great Lakes region, including 4 competing wind projects on Crown lands in the Algoma district. Disclosure of the Option Agreement would provide details of the form and structure of the option (terms of which are unique and were hard-fought during negotiations) and the lease contemplated in the Option Agreement. This could allow [the third party appellant's] competitors to assess the capacity factor of the appellant's wind farm, [the third party appellant's] turbine selection criteria and the location of lands with similar resources. This in turn will enable [the third party appellant's] competitors to interfere with the development of this project and to use confidential information of [the third party appellant] to compete in the development of other similar projects in future.

The third party appellant relies upon Order PO-1791 and states that:

> The details of the Option Agreement would serve as a guide to competitors, thereby reducing competitors' negotiating costs and increasing [the third party

> appellant's] costs, requiring it to modify its negotiating strategy to maintain its advantage over competitors in future projects.
>
> [The third party appellant] is working on numerous wind farm opportunities in Ontario. If any leases or option agreements were disclosed it would detrimentally affect ongoing negotiations.

The third party appellant submits that the disclosure of the Option Agreement will result in undue loss to it and undue gain to its competitors in the completion of this project and in the negotiation for options to lease crown lands for the provision of wind energy in the future. The third party appellant states that it has a reasonable expectation that its competitive advantage will be damaged by the release of the Option Agreement and that this would result in undue loss to it and undue gain to its competitors.

Requester's representations

Although the requester did not specifically address the harms issue, he made the following general submissions:

> I am also concerned that the very general nature of the appellant's objections to the release of the requested information may, if upheld, establish a dangerous precedence [*sic*] that would preclude any Ontario citizen from having the opportunity to review any substantive contract between their government and private sector corporations. This would not be consistent with any goal of open and transparent government and I believe would be of great concern to many others as well. I am frankly surprised that the appellant would believe that they could enter into a secret contract with the Crown related to the use of natural resources.

The Ministry did not make representations on the harms issue.

Analysis and findings

Having carefully reviewed the representations of the parties and the record at issue, I am not persuaded that disclosing the Option Agreement could reasonably be expected to result in any of the harms outlined in sections 17(1)(a) or (c) of the *Act*.

The recent comments of Assistant Commissioner Beamish in Order PO-2435 are instructive in understanding this office's approach to the harms issue, particularly with regard to government contracts in which the expenditure of public funds is at issue. Assistant Commissioner Beamish states:

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given

that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

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

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

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to

disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal.

…..

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 message is clear: while the section 17 exemption seeks to protect the informational assets of businesses, the details of contracts 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.

In my view, this is not one of those rare cases.

While I understand that the disclosure of the Option Agreement may provide details of the "form and structure" of the option to lease and insight into the third party appellant's design methodologies and wind capacity output potential, the third party appellant has not provided detailed and convincing evidence that disclosure of this information could reasonably be expected to lead to the harms set out in sections 17(1)(a) or (c).

In Order PO-2478, Adjudicator Frank DeVries considered a similar argument and rejected it. In that appeal, the record at issue was a proposal provided to the Ministry of Energy in response to an RFP that also related to a wind energy farm development. In finding that harms had not been established with regard to portions of the record at issue, Adjudicator DeVries states:

> In my view, the arguments put forward by the Ministry and the affected party regarding their concerns that disclosure of the "form and structure" of the bid, or its general format or layout, will allow competitors to modify their approach to preparing proposals in the future would not, in itself, result in the harms identified in either section 17(1)(a) or (c).

While I acknowledge that the nature of the record in that case is different from the one at issue in this case, I find Adjudicator DeVries' comments applicable here. In my view, the third party appellant has simply put forward concerns of a general nature without specifying how the harms identified would come to pass as a result of disclosure. The third party appellant has not provided detailed and convincing evidence that disclosure of the form and structure of the Option Agreement and the proposed lease referred to in the Option Agreement could reasonably be expected to result in the harms identified in either section 17(1)(a) or (c).

I also accept that disclosure of the details of the Option Agreement could serve as a guide to competitors, thereby reducing competitors' negotiating costs and possibly increasing the third party appellant's costs. However, as in Order PO-2435, 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. As in Order PO-2435, the competitive process has been completed and the details of a signed contract are at issue. I,

therefore, concur with comments made by Assistant Commissioner Beamish comments in Order PO-2435:

> The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

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

Because parts 2 and 3 of the section 17 test have not been met, I will order the Option Agreement disclosed.

ORDER:

I order the Ministry to disclose to the appellant the Option Agreement with all of the attachments no later than **August 25, 2006** but not before **August 21, 2006**.

Original Signed by: July 19, 2006
Bernard Morrow
Adjudicator