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

ORDER MO-2070

Appeal MA-050121-1

The Corporation of the City of Barrie

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NATURE OF THE APPEAL:

The Corporation of the City of Barrie (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

> All contracts and proposals with [named company #1], [named company #2], [named company #3] etc. that have to do with alternative voting methods for the City of Barrie from 1993 to present.

The City provided the requester with an index listing five responsive records and advised that it was granting partial access to them. The requester was granted access to Records 1, 3 and 4 as outlined on the index but was denied access to Records 2 and 5 pursuant to sections 10(1)(a), (b) and (c) of the *Act*.

The City also advised that it was charging a fee of $19.40 for searching and photocopying the records.

The requester, now the appellant, appealed the decision of the City to deny access to the requested records to this office.

During mediation the appellant advised that, in addition to appealing the application of section 10(1) of the *Act* to the records at issue, he feels that additional records should exist. Accordingly, the issue of whether the search for records was reasonable is an issue in this appeal.

In discussions with the Mediator regarding the search for records, the City referred to a draft unexecuted rental agreement which was not identified as a record in this appeal. The City takes the position that the record is not responsive to the request. The Mediator asked that the City provide a copy of this record, entitled "draft proposed Election Tabulation System Agreement", to this office for the purpose of the Inquiry so that a determination can be made as to whether it falls within the scope of the request. The City provided this office with a copy of the record and the issue of whether or not it consists of a record responsive to the request is included in this appeal.

Also during mediation, the appellant advised that he believes that there is a public interest in the disclosure of the records at issue. As a result, section 16 of the *Act* is at issue in this appeal.

The appellant advised the mediator that he is not appealing the fee.

Further mediation was not possible and the file was moved to adjudication.

A Notice of Inquiry was sent to the City initially, as well as to an organization whose interests may be affected by the disclosure of the records at issue (the affected party). There is only one affected party as named companies #1 and #2 merged and then later merged with named company #3.

Representations were received from both the City and the affected party.

In the City's representations, it advised that it is claiming that the additional discretionary exemption under section 11(d) (economic and other interests) applies to exempt the records at issue. The City did not specify whether it intended to apply section 11(d) to deny access to all or portions of the records at issue. I will address the City's ability to rely on the additional discretionary exemption as a preliminary issue below.

A Notice of Inquiry was sent to the appellant, along with a copy of the non-confidential portions of the City's representations and a complete copy of the affected party's representations. The appellant provided representations in response. The appellant's representations raised new issues which required that the City and the affected party be given an opportunity to reply, and accordingly, they were invited to submit reply representations. In response, both the City and the affected party provided reply representations.

In the affected party's representations, it claims that Attachment 8 of Record 2, which is comprised of résumés belonging to a number of its employees, contains the personal information of those employees. Both the City and the affected party have claimed that section 10(1) applies to exempt this information from disclosure. However, as it is more applicable, I will address these résumés under the mandatory invasion of privacy exemption at section 14(1). Because of the outcome of that analysis (set out later in this order) I will not be addressing Attachment 8 of Record 2 in relation to section 10(1).

RECORDS:

Records 2 and 5 are at issue in this appeal. They are described as follows:

Record 2: RFP #00-24 Response from [named company #2]

Record 5: RFP #97 Response from [named company #2]

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

On May 13, 2005, the Commissioner's office provided the City with a Confirmation of Appeal indicating that an appeal from the City's decision had been received. The Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the City had until June 17, 2005, thirty-five days from the date of the confirmation, to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period by the City.

The policy referred to in the Confirmation of Appeal was initially brought to the attention of the City in the form of a publication entitled "IPC Practices: Raising Discretionary Exemptions During an Appeal" which was sent by the Commissioner's office to all provincial and municipal institutions in January of 1993.

On September 1, 2005 this office received the City's representations dated August 31, 2005. In those representations, the City advised that it was claiming an additional discretionary exemption, section 11(d). The City did not provide any explanation as to why it did not claim the application of section 11(d) to the records before the expiration of the thirty-five day period.

Previous orders issued by the Commissioner's office have held that the Commissioner or his delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to establish time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter, subject, of course, to a consideration of the particular circumstances of each case.

The objective of the policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant in the release of the information prejudiced. In my view, the objective of the policy is applicable to this situation. This approach was upheld by the Divisional Court in the case of *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995) Toronto Docket 220/89.

In adjudicating the issue of whether to allow the City to claim this discretionary exemption at this time, I must weigh the balance between maintaining the integrity of the appeals process against any evidence of extenuating circumstances advanced by the City [Order P-658]. I must also balance the relative prejudice to the City and the appellant in the outcome of my ruling.

The City has provided no such evidence of extenuating circumstances to explain why they were unable to raise the discretionary exemption earlier in the process. In my view, the City had ample time to review the records and consult with counsel to confirm the discretionary exemptions on which it wished to rely as the appeal proceeded through the mediation stage of the process.

Although the appellant was provided access to the City's representations in which it made the section 11(d) exemption claim and was given the opportunity to reply, the introduction of a new exemption at a late stage only gives the appellant the time allowed for providing representations to consider it. Earlier identification of an exemption claim permits the appellant time to consider and reflect on its application, consult on the issue if it deems it necessary and gives the appellant an opportunity to address the exemption claim in mediation. In some situations, as well, failure to claim a discretionary exemption in a timely manner may have an effect on whether all relevant evidence or information is retained by the appellant for use in the appeal. In my view, these considerations relate to the overall integrity of the appeals process and must be taken into account by an Adjudicator in deciding whether to grant a request for the late raising of a new discretionary exemption.

That being said, however, in the particular circumstances of this appeal, I have decided to permit the City to claim section 11(d) for the records at issue. The City's basis for the application of the exemption claim section 11(d) is similar in nature to their argument with respect to their claim that the exemption at section 10(1)(b) applies. I am not satisfied that any of the factors identified above as supporting the application of the rule are present in this case. Most importantly, I have

also concluded that the appellant will not be prejudiced in any way by the late raising of section 11(d) as the appellant has been given an opportunity to address the exemption claim and no delay has resulted from the additional claim.

Accordingly, I will allow the City's claim that the discretionary exemption at section 11(d) applies to the records at issue.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

In appeals involving a claim that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I].

Where a requester provides sufficient detail about the records that he or she is seeking and the institution indicates that further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the appellant must nevertheless provide a reasonable basis for concluding that such records may, in fact, exist.

A number of previous orders have identified the requirements of a reasonable search [Orders M-282, P-458, P-535, M-909, PO-1744 and PO-1920]. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. A reasonable search has been described as 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].

Therefore, if I am satisfied that the search carried out by the City was reasonable in the circumstances, I will uphold the City's decision. If I am not satisfied, I may order further searches.

Representations and position taken by the parties

During mediation, the appellant made it clear to the mediator that, contrary to what was communicated by the City, he believes that additional records responsive to his request exist. As a result of the mediator's discussions with the City it became clear that an additional record entitled "draft proposed Election Tabulation System Agreement" existed but that the City was taking the position that the record was not responsive to the request. The responsiveness of the "draft proposed Election Tabulation System Agreement" will be addressed below.

With respect to the existence of responsive records other than the "draft proposed Election Tabulation System Agreement", the City takes the position that it has met its obligation under the

Act and has conducted a reasonable search for records responsive to the request at issue in this appeal. It submits that "the search was conducted in the City Clerk's Office which is responsible for the administration and management of municipal elections as per the *Municipal Election Act* and the *Municipal Act*." The City explains that as the City Clerk's designate, the former Deputy City Clerk was responsible for the tendering process regarding the election equipment. The current Deputy City Clerk was therefore asked to conduct the search for the responsive records. The City submits that active records in the general file room as well as those in the offices of both the Deputy City Clerk and the City Clerk were searched and that inactive records were retrieved from the Inactive Records Centre and also searched. The City explains that the Request for Proposal document was not issued electronically and the submissions were not received electronically. The City also explains that "some of the requested records do not exist because a paper ballot system was used for the 1994 election" and that the "equipment from the 1995 By-Election was borrowed from the City of North York through a verbal agreement."

To support its submissions on this issue, the City enclosed, with its representations, an affidavit sworn by the current Deputy City Clerk of the City who conducted the search for the responsive records. The affidavit outlines the active and inactive files that were searched, and states that in addition to the specific agreement files and RFP submission files, a variety of other election files were checked to ensure that there were no other applicable records, and also that records no longer in the City's possession were disposed of in accordance with the scheduled retention periods established by specific by-laws.

During the inquiry stage of the appeal process the appellant was provided with copies of the City's representations and the affidavit that addresses the reasonable search issue, and was invited to address both the issue of reasonable search and respond to the City's representations and affidavit. The appellant provided representations but did not specifically address the issue of reasonable search or explain why it would be reasonable to conclude that additional records responsive to his request likely exist.

Analysis and finding

As identified above, the issue that I must address is not whether additional records exist with absolute certainty or even that additional records ought to exist, but rather whether the City has conducted a *reasonable* search for records, as required by section 17. In this appeal, despite the fact that I acknowledge that the City failed to identify the "draft proposed Election Tabulation Agreement" to the appellant as it takes the position that it is non-responsive, I am satisfied, based on the City's representations and the affidavit provided to me, that the City has provided sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the appellant's request.

In my view, the City has provided a clear and sufficiently detailed explanation of the efforts it took to locate records responsive to the appellant's request. Moreover, in my view, the appellant has failed to provide any evidence or explanation that would suggestion or point to the existence of further responsive records. The appellant's belief, however sincere, that more records must exist does not constitute a reasonable basis for believing additional responsive records may exist, or that the City has failed to conduct a reasonable search for relevant records. Accordingly, I

find that the City has discharged its obligations under section 17.

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

As noted above, the City claims that a record that it refers to as "the draft proposed Election Tabulation System Agreement" is not responsive as it does not fall within the scope of the appellant's request.

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose or spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Representations

The City takes the position that "the draft proposed Election Tabulation System Agreement" does not fall within the scope of the request and is therefore, not responsive. The City submits:

> The requester indicated in writing that he wanted all contracts and proposals with [three named companies] that have to do with alternative voting methods for the City of Barrie from 1993 to the present.
>
> He verbally indicated that by proposals, he specifically wanted the Request for Proposal submissions received by the City of Barrie as a result of the RFP being issued and agreements entered into as a result of the RFP.

> In addition, he did not request correspondence or other types of information in regards to electronic voting tabulation equipment. Subsequent to his request he asked for information not within the scope of his request.
>
> All formalized contracts and proposals were considered for this request.
>
> The draft proposed Election Tabulation System Agreement provided to the City of Barrie by [the affected party] for the rental of an additional 15 Touch Screen Voting Units for the purposes of the 2003 and 2006 Municipal Elections was not considered. As the document is still under review by the City of Barrie and has not been executed to date, it has no formal standing with the Corporation of the City of Barrie. This document was provided to the City of Barrie by [the affected party] subsequent to the 2003 Municipal Election and portions of the agreement contain information which the City of Barrie is not in agreement, and negotiations continue.

Analysis and findings

In Order P-880, former Adjudicator Anita Fineberg considered the issue of relevancy of records and responsiveness:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> In my view, an approach of this nature will in no way limit the scope of requests as counsel fears. In fact, I agree with his position that the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant.

I have reviewed the "draft proposed Election Tabulation System Agreement" and I disagree with the City's characterization of this record as being non-responsive to the request. The appellant's original request clearly sought access to "all contracts and proposals" relating to alternative voting methods. Clarification of the request led the appellant to specify that he wanted the Request for Proposal (RFP) submissions received by the City of Barrie as a result of the RFP for

alternative voting systems being issued, as well as any agreements entered into as a result of the RFP. In my view, this clarification of the request would not necessarily exclude the record entitled "draft proposed Election Tabulation System Agreement" which by its very nature, having reviewed its contents, arguably falls squarely within the parameters of the appellant's written request as a draft contract or proposal. Following the philosophy that institutions should adopt a liberal interpretation of a request in order to best serve the purpose or spirit of the *Act* [Orders P-134, P-880], in my view, a liberal interpretation of the request at issue would allow that the "draft proposed Election Tabulation System Agreement" is reasonably related to the type of information to which the appellant is seeking access.

Most importantly, it appears that the appellant was unaware of the existence of this record when he "clarified" his request. In my view, in the circumstances, it is not open to the City, having failed to mention the existence of this record at that time, to rely on the clarification as a basis for excluding this record from the scope of the request. Also, given that the record is, in my view, "reasonably related" to the request and thus responsive, it is disappointing that the City has continued to attempt to exclude it. The approach taken by the City will have the unfortunate result of requiring me to order a new decision letter for this record, at this late stage, with the potential for a further appeal if access is denied.

The City's submissions as to why the "draft proposed Election Tabulation System Agreement" is not responsive and should not be considered to fall within the scope of the request also refer to the fact that the draft agreement is not "formalized". I am not entirely clear on what the term "formalized" means in this context although the City submits that the draft agreement "is still under review", "has not been executed" and "has no formal standing with the City". This does not mean that the record is not accessible under the *Act*. All information within the custody or under the control of a municipality is subject to the provisions of the *Act*. As it has not be disputed that the draft agreement is in the custody or under the control of the City, this record is subject to disclosure under the *Act*, just as is any other record held by the City.

Accordingly, I find that the "draft proposed Election Tabulation System Agreement" falls within the scope of the request and is a responsive record.

Although the City has indicated that should the "draft proposed Election Tabulation System Agreement" be found to be a record responsive to the appellant's request, it would apply the exemptions at section 10(1)(a), (b) and (c) to withhold the record, the City has not issued a formal decision letter with respect to this record, nor have the parties made submissions on the disclosure of this specific document. Accordingly, I will order the City to issue a decision letter with respect to the disclosure of the "draft proposed Election Tabulation System Agreement".

THIRD PARTY INFORMATION

Section 10(1) states:

> 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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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 institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, 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 10(1) will occur.

The City has claimed section 10(1)(a), (b) and (c), apply to exempt Records 2 and 5 from disclosure in their entirety.

The affected party, however, narrows the scope of the information for which section 10(1) might apply. The affected party submits, in an affidavit sworn by the Compliance Officer of that company and included as part of their representations, that:

> I [the Compliance Officer] have reviewed the documents in issue as provided by

> the City of Barrie to determine which portions of [Records] 2 and 5 should be exempted from disclosure pursuant to the exemptions contained in section 10 of the *Act*.
>
> [Record] 2 consists of the response from [company #1] (a predecessor company of the affected party) to the City of Barrie's Request for Proposal (RFP #TR 00-24) for the Provision of Touch Screen Election Equipment and a cover letter dated April 25, 2000. [The affected company] claims that page 38 of [the affected party's] Cost Proposal in [Record] 2 and Attachments 7, 8, 10 and 11 (in their entirety) to [Record] 2, contain information that is exempt from release under section 10(1) of the *Act*.
>
> [Record] 5 consists of a portion of the response of [company #1] to the City of Barrie's Request for Proposal (RFP #97-17) for an Election Vote tabulation System and a cover letter dated February 26, 1997. [The affected party] claims that page 6 of [Record] 5, which outlines a list of current users as of 1997, is exempt from release under section 10(1) of the *Act*
>
> These specified pages and attachments are hereinafter referred to as "redacted information".

Accordingly, the affected party only claims section 10(1) applies for portions of the records at issue.

As noted above, the City and the affected party have both claimed section 10(1) applies to exempt Attachment 8 of Record 2 which contains the résumés, and possibly the personal information, of a number of employees of the affected party. As previously explained, given the disposition of this portion of the record under the mandatory invasion of privacy exemption at section 14(1), set out later in this order, I will not be addressing Attachment 8 of Record 2 in my analysis of the application of section 10(1) but will include it in a discussion on personal information and section 14(1) below.

In addition to sections 10(1)(a), (b), and (c), the City has denied access to the records on the basis of section 10(2) of the *Act*. Section 10(2) reads as follows:

> A head may disclose a record described in subsection (1) if the persona to whom the information relates consents to the disclosure.

Section 10(2) contemplates disclosure of records where the affected party "consents". In my view, section 10(2) is not an exemption, but rather provides for disclosure of a record if the person to whom the information relates consents to the disclosure.

The affected party in this case specifically identifies information in the records that it claims to be exempt and its representations are entirely focused on demonstrating how the section 10(1) exemption applies to the specified information alone. However, later in its representations dealing with the application of the public interest override the affected party states that it has

"has agreed to the disclosure of most of the information in the RFP documents, with the exception of the few documents listed above".

In my view, this may well amount to consent within the meaning of section 10(2) regarding the disclosure of all of the information contained in Records 2 and 5 not identified by the affected party as subject to section 10(1) by the affected party. However, in the absence of representations on this issue, I will examine the application of section 10(1) to Records 2 and 5 in their entirety, with the exception of Attachment 8 related to Record 2 which I will analyse under the section 14(1) exemption. The position of the affected party is an important factor in analyzing whether the section 10(1) harms are demonstrated in this case.

Part 1: type of information

The City and the affected party both submit that the records at issue contain information that qualifies as trade secrets and/or commercial and financial information. The affected party submits that the records also contain technical information. These types of information listed in section 10(1) have been defined in prior orders to mean the following:

> *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].

I adopt these definitions for the purposes of this appeal.

Representations

The City submits:

> Trade Secrets:
>
> The proposal submissions, Records 2 and 5 contain trade secrets about the functioning/programming of the election equipment, and the method and process embodied in the equipment and program. It is our understanding that this information is proprietary in nature in as [the affected party] has ownership of the information, developed the system using their own resources and exclusive to [the affected party].
>
> Commercial Information:
>
> Proposal submissions are directly related to the buying, selling and/or exchange of merchandise and services. In this case it is the provision of electronic voting equipment and training and support services.
>
> Financial Information:
>
> The Request for Proposal submissions contain information that relates directly to the operating expenses of the business in addition to financial statements.

The affected party submits that the information to which it objects to being disclosed falls within the definitions of trade secrets, technical information, commercial information, and financial information as those terms are defined in dictionaries as well as in previous orders.

The affected party explains that page 38 of the Cost Proposal portion of Record 2 contains the affected party's bank account information which they submit consists of financial information; that Attachment 7, the "Project Timeline and PRIM" provides a detailed description of steps required to implement a voting system which they submit consists of a work product which they would also characterize as a trade secret and/or technical information; that Attachment 10 "Users List" is a client list which they submit consists of commercial information, and that Attachment 11, "Election Services and Support" which lists support service schedules and, they submit, contains trade secrets and/or technical information.

With respect to Record 5, the affected party submits that page 6 consists of a list of the affected party's Canadian clients which qualifies as commercial information.

The appellant makes the followings submissions on the type of information contained in the records:

> The City of Barrie [and the affected party] has maintained the functioning/programming of the election equipment is a "trade secret". Since when in history of Electoral Law in Canada/Ontario, has the election process been a "trade secret". Our transparent, auditable election process is paid for and owned by the Citizens of Barrie/Canada and not by any City Clerk or foreign corporation from Texas.

Analysis and findings

I have carefully reviewed the records and accept the submissions of the City and the affected party that the records contain information that qualifies as commercial, financial, and/or technical information as well as contain trade secrets belonging to the affected party.

Record 2 and 5 both clearly contain commercial information within the meaning of section 10(1) of the *Act*. All three records contain information that pertains to a commercial relationship between the parties involving the sale of merchandise (an electronic vote tabulation system with required software and hardware) and services (installation and training) by the affected party to the City. Additionally, the records contain information about the affected party's current client, which, in my view, qualifies as commercial information as well.

Records 2 and 5 also contain information that would qualify as financial information as they provide information relating to the proposed costs for the various components of the voting system, for the delivery and installation of the system, and for training.

In addition, records 2 and 5 clearly contain information that qualifies as technical information as that term has been defined in previous orders. From my review of the records, they both contain detailed information about the programming of the software and hardware required for the functioning of the election equipment required for the voting system as well as descriptions of the method and process required to install that equipment. This information belongs to an organized field of knowledge that falls under the category of mechanical arts; specifically, the field of information technology for the software and electronics for the hardware.

Some of the information contained in the records that relates to the software and hardware would also qualify as trade secrets. Additionally, some of the information that relates to the set up and implementation procedures developed and employed by the affected party in the provision of their systems would also qualify as trade secrets. As this information discloses a system that was developed by the affected party itself to be used in the affected party's business, it has economic value to the affected party and there is evidence in the records themselves that it is protected as such.

I therefore find that part 1 of the section 10(1) test has been met for Records 2 and 5.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the affected party must have supplied the information to the City in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

Both the City and the affected party submit generally that the information at issue was "supplied" to the City by the affected party. In his representations, the appellant does not specifically address whether the information was supplied.

Having reviewed the information contained in Records 2 and 5 closely I find that the information was "supplied" to the City by the affected party within the meaning of section 10(1).

Previous orders have established that whether information is "immutable" (or not susceptible to change) is a factor to be considered in determining whether it may qualify as having been "supplied" to an institution by an affected party within the meaning of section 10(1) of the *Act* (or its provincial equivalent at section 17(1) of the *Freedom of Information and Protection of Privacy Act*). In Orders PO-2371 and PO-2384 Adjudicator Steven Faughnan considered types of information that might be considered to be "immutable". In Order PO-2384 Adjudicator Faughnan stated:

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

I agree with this analysis and find it relevant to the current appeal.

The records at issue in this appeal contain information that the affected party provided to the City for the purpose of demonstrating the suitability of its product and services for the purposes sought by the City with respect to putting an alternative voting system in place. This information details the hardware and the software package that makes up the affected party's Electronic Vote Tabulation System, much of which I have found to qualify as technical information and trade secrets belonging to the affected party. In my view, the information contained in the records is immutable, underlying non-negotiated information that belongs to the affected party and would not have been known to the City had it not been supplied to it.

Accordingly, I find that the information contained in the records was "supplied" to the City within the meaning of part 2 of the section 10(1) test.

In confidence

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

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

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

The City submits:

> These proposals were provided to the City of Barrie by [the affected party] through the Request for Proposal process. There is a reasonable expectation of confidentiality. During verbal communications with [the affected party] it has been indicated that they have concerns regarding the release of the information and did not grant permission for us to release the information.
>
> Confirmation of this has been received via a letter dated August 2nd from [named

> law firm], the solicitor for [the affected party] which has been copied to your office. In this letter they indicate that their client would be opposed to any release of the requested information.
>
> The contract in which [the affected party] entered into is public record at the City of Barrie, however, the Request for Proposal submission is not.
>
> Through our FOI notice in the Request for Proposal document, it is reasonable that a business would assume that this information would not be released without permission.

The affected party submits that it supplied the records at issue directly to the City in response to two Requests for Proposals. With respect to whether the information was supplied with a reasonable expectation of confidentiality the affected party submits:

> Certain portions of [the affected party's] responses to the RFPs were supplied to the City of Barrie with an explicit expectation of confidentiality. Attachment 7 to [Record] 2 for instance, was explicitly marked as "Proprietary" or "Proprietary and Confidential."
>
> The remainder of the redacted information was not marked explicitly as confidential in [the affected party's] response. Nevertheless, because of the competitive nature of the RFP process, and the confidentiality surrounding the commercial and technical aspects of [the affected party's] proposals to the City, such proposals were supplied to the City of Barrie with a reasonable expectation that they would not be made public.
>
> Page 38 of the Costs Proposal in [Record] 2, contains information relating to [the affected party's] bank account that is currently still in use, which as a rule is not divulged unless [the affected party] engages in a commercial contract or relationship with a particular person. There is no public interest served by releasing [the affected party's] bank account number and the release of such information is inconsistent with the purpose behind the *Act*.
>
> The redacted information has consistently been treated by [the affected party] as confidential. [The affected party] maintains internal safeguards and controls over all of their submissions in response to RFPs and contracts derived as a result. Proposals are kept confidential and are divulged to [the affected party] personnel only on a "need to know" basis. All proposals and contracts are kept in a secured office or filing cabinet, to which access it restricted.

The appellant does not make any submissions that specifically address whether the information at issue was supplied "in confidence".

Having reviewed Records 2 and 5 I find that while certain portions of the information were supplied "in confidence" by the affected party, other portions of the information at issue were

not, for the following reasons.

First, dealing generally with the portions of the proposal for which the affected party has *not* specified that it objects to the disclosure, I do not find that any of this information was supplied "in confidence" within the meaning of part 2 of the section 10(1) test. Aside from the City's bald assertions, there is no evidence before me that any of this information was communicated to the City on the basis that it was confidential and that it was to be kept confidential. Given that the City is a public institution that is governed by the *Act*, it should be clear to any parties making submissions on a Request for Proposal that any information provided to the City might be disclosed under of the *Act* subject to the third party exemption claim. Moreover, the fact that the affected party itself has reviewed the specific information and does not object to its disclosure reveals that is not treating this information consistently in a manner that indicates a concern for its protection. Accordingly, I find that the information contained in Records 2 and 5 to which the affected party has *not* objected to the disclosure (with the exception of Attachment 8 of Record 2 which will be discussed under section 14(1)) was not supplied "in confidence" to the City. As all three parts of the section 10(1) test must be met for the exemption to be established, section 10(1) cannot apply to exempt these portions of the records from disclosure.

With respect to the information specifically identified by the affected party (other than Attachment 8 of Record 2), I make the following finding.

The affected party objects to the disclosure of the bank account information located on the photocopy of a certified cheque issued by the company's predecessor. This photocopy is page 38 of the Cost Proposal component of Record 2. I am not satisfied that this information was supplied "in confidence" to the City. The certified cheque is a common method of payment that generally does not carry any expectations of confidentiality. In my view, the evidence does not demonstrate that this cheque was supplied, either implicitly or explicitly, in confidence to the City.

Attachment 7 of Record 2 entitled "Project Timeline and PRIM (Project Review and Implementation Manual)" contains a 63 page document that essentially provides the template for the creation of a Project Review and Implementation Manual to be jointly prepared and agreed upon by the affected party (the service provider) and the City (the customer). This record provides great detail about the steps taken to implement the voting system and is clearly marked both confidential and proprietary. Though a statement that a document is confidential does not automatically result in a finding that the record was supplied in confidence, it can provide strong evidence that this was the case. In the circumstances of this appeal, taking into account that Attachment 7 of Record 2 is marked confidential, and also the detailed trade secrets and technical information contained in this record, I am satisfied that it was supplied to the City explicitly in confidence.

Attachment 11 of Record 2 entitled "Election Services and Support" is a four page document which details the specifics on the type of support that is provided to the customer to ensure the election system functions properly and how such support is provided. This record is not explicitly marked confidential or proprietary. Nevertheless, based on the submissions of both the affected party and the City and given the fact that, like Attachment 7, Attachment 11 provides

details about the affected party's methods and techniques that have been developed over time, including information that would qualify as technical information, I accept that this attachment was supplied implicitly in confidence by the affected party.

Finally, the affected party objects to the disclosure of Attachment 10 of Record 2 and page 6 of Record 5 which are both user lists that detail the affected party's clients as of the date of the submission. As noted above, in its representations the affected party submits that such lists are not generally divulged to the public as they would permit competitors to identify and target the affected party's customers. I accept the position put forward by the affected party. Customer lists, client lists, users lists are all compiled by companies as a result of a great deal of work expended to seek out and solicit new clients, and are normally kept confidential. In the circumstances of this appeal, I am satisfied that these lists were supplied, implicitly to the City in confidence by the affected party.

In sum, I have found that Attachments 7, 10, and 11 of Record 2 and page 6 of Record 5 were "supplied in confidence" to the City as is required by part 2 of the section 10(1) test. I must now determine whether they meet part 3, the harms requirement.

I have also found that part 2 of the section 10(1) test has not been met for page 38 of Record 2, the certified cheque, and the remaining information contained in Records 2 and 5 (with the exception of Attachment 8 of Record 2 to be discussed below). Although all three parts of the test must be met for section 10(1) to apply, for the sake of completeness, I will also briefly address whether harms can be established with respect to the disclosure of those portions for which I have already found have not met the requirements of part 2.

Part 3: harms

To meet this part of the test, the parties opposing disclosure (in this case the institution and 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].

Representations

The City has claimed section 10(1)(a), (b) and (c), apply to exempt Records 2 and 5 from disclosure. The affected party agrees with the City but takes the position that section 10(1)(a) in particular applies to page 38, Attachment 7, Attachment 10 and Attachment 11 of Record 2 as well as page 6 of Record 5.

The City submits that were the information disclosed there is a reasonable expectation that the affected party would suffer prejudice to their competitive position as contemplated by section 10(1)(a). It submits:

> The electronic voting business community is a competitive industry sector where knowledge of proprietary electronic systems and business action plans translate to monetary advantage to the business with the information. Electronic vote tabulation technology continues to change based on demand and technological advances. It is a volatile environment as it demonstrated by the buy-outs of [Company #1] and [Company #2] by [Company #3- the affected party].
>
> The release of the information contained in the applicable documents could injure [the affected party's] ability to compete in the business community as their business processes, etc. would be open to public scrutiny by competitors.

The City also submits that disclosure could reasonably result in similar information no longer being supplied to it (section 10(1)(b)). It submits:

> According to section 10(1)(b) of the *Act*, the F.O. I. head shall refuse to disclose a record that reveals financial or labour relations information, supplied in confidence, if the disclosure could reasonably be expected to result in similar information no longer being supplied to the institution.
>
> The subject records contain abundant financial information gathered and/or prepared by [the affected party] and supplied to the City of Barrie in confidence. If the records are disclosed, [the affected party] will be much less inclined to gather, prepare and supply such information in the future. Such information and provision of services is of vital importance to the municipal corporation on the behalf of the community it serves. It is in the public's best interest that similar information continues to be supplied.

The City's brief representations on the application of the discretionary exemption at 11(d) also appear to be relevant to their claim that the harm in section 10(1)(b) could reasonably be expected to occur. It submits:

> If this information is released, other organizations would be unwilling to provide the depth of information required for the proposal submissions to the municipality. If companies are unwilling to provide the services or increase their prices, it would result in a significant cost increase to the City of Barrie taxpayers.
>
> Because of the changing environment, there is a need for Request for Proposals which allow for flexibility in additional system requirements.

Finally, the City claims that disclosure of the information at issue could reasonably result in undue loss of gain for the affected party, as contemplated by section 10(1)(c). It submits:

> It is out belief that the release of these records has the potential to result in a significant loss of income and position in the business community to [the affected party].
>
> Disclosure of the subject records could allow competitors the opportunity to redevelop their systems with specialty items already offered by [the affected party] in addition to copying their business proposals and undercutting their submission prices. [The affected party] would lose future business opportunities and as a result the profit from these business opportunities. As this is a multi-billion dollar industry, the loss could be substantial.

The affected party submits that section 10(1)(a) in particular applies to the specific portions of information to which it is objecting to disclosure:

> The public release of the redacted information from these proposals would cause harm to [the affected party] because it would be exploited by [the affected party's] competitors to their advantage. [The affected party] is prepared to supply their services. They would also gain access to [the affected party's] know-how and technical solutions in developing the product in question. The intelligence thereby gained would undermine [the affected party's] competitive position in the industry.
>
> There is detailed and convincing evidence that establishes a reasonable expectation of harm to [the affected party's] competitive position if the redacted information were released.
>
> Attachment 7, "Project Timeline and PRIM" and Attachment 11, "Election Services and Support" of [Record] 2: These Attachments provide a breakdown of the steps required to implement a voting system for a customer and the time that [the affected party] would take to do so. The release of such information would allow competitors to learn the methods and techniques that are required for the implementation of [the affected party's] electronic voting systems, the training required, the project schedule, etc. By learning these times, a competitor would understand how [the affected party] sets up its electronic voting systems and would be able to determine how to offer a similar service based on this information. These Attachments represent know-how developed by [the affected party] at its own cost and expense. [The affected party] would be deprived of the value of this investment if a competitor could access this information at no cost to itself, and exploit it for its own commercial purposes in competing with [the affected party].
>
> Attachment 10, "Users' List" of [Record] 2 and Page 6 of [Record] 5: Those Attachments are lists of [the affected party's] current clients that were using a [affected party] electronic voting system as of April 25, 2000 and 1997, respectively. These lists provide [the affected party's] clients at a particular time, a number of which are continuing clients at the present time. The release of such

> information will allow [the affected party's] competitors to identify current customers for target advertising and learn their contact details and particulars. Although competitors may eventually learn of these customers through their own efforts, the release of [the affected party's] ready made lists of customers provides competitors with free information that [the affected part] spent time and money assembling. They will then use this information to compete with [the affected party] and contact existing clients.

The appellant disputes that any of the harms outlined above would occur if the information were disclosed and submits that "if we cannot test the computer system in fear of being sued, then how can one verify the system works, or the outcome of any election".

Analysis and findings

Having reviewed the information at issue and the representations of the parties, I accept that the City and the affected party have successfully provided the detailed and convincing evidence to establish that were *some* of the portions of Records 2 and 5 disclosed there is a reasonable expectation that the harms listed in section 10(1)(a) and/or (c) could occur. I am not, however, persuaded that disclosure of those same portions could reasonably be expected to result in the harm listed in section 10(1)(b). With respect to the other portions of Records 2 and 5, in my view, neither the City nor the affected party has provided the evidence required to establish any of the harms listed in sections 10(1)(a), (b) or (c) of the *Act*.

First, dealing specifically with the application of section 10(1)(b) to all of the portions of the records at issue, in my view, I have not been provided with the requisite detailed and convincing evidence to demonstrate that disclosure of this information could reasonably be expected to result in similar information no longer being supplied to the City. 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 would ultimately deter vendors from responding to Request for Proposals issued by the City. Vendors compete for the City's business and not the other way around and I have not been provided with detailed and convincing evidence to show that disclosure would deter vendors from doing business with the City and, as part of that process, provide information to it in the form of an RFP or tender, for example.

I have previously found that Attachments 7, 10 and 11 of Record 2 and page 6 of Record 5 meet both parts 1 and 2 of the section 10(1) test. With respect to the application of part 3 to these records, I make the following findings:

- Attachment 7 of Record 2 entitled "Project Timeline and PRIM (Project Review and Implementation Manual)" is made up of a project timeline that outlines the major steps required to implement the proposed election system as well as a 63 page document which breaks down the specific steps required to implement the election system and details the mechanics of the equipment, the technological makeup of the software and the training of staff.

  Attachment 11 of Record 2 is a four page document which details the specifics on

the type of support that is provided to the customer to ensure the election system functions properly and how such support is provided.

Having reviewed both these attachments, I accept the affected party's arguments that they provide considerable detail about the affected party's methods and techniques for both the implementation and the functioning of their product. It is evident that these methods and techniques, some of which might qualify as trade secrets, have been developed over a great deal of time and trial and error. I accept that their disclosure could reasonably be expected to result in prejudice to the affected party's competitive position and in an undue loss for the affected party or undue gain for their competitors (sections 10(1)(a) and (c)). I therefore find that part 3 of the section 10(1) test has been met for Attachments 7 and 11 of Record 2.

- Attachment 10 of Record 2, "User's List", and page 6 of Record 5, are both lists of the affected party's clients that were using an electronic voting system as of April 2000 and 1997, respectively. I accept that disclosure of these client lists could reasonably be expected to result in prejudice to the competitive position of the affected party and/or result in an undue loss for the affected party or undue gain for their competitors. Client lists are created and compiled as a result of a significant degree of work on the part of the company to whom the list relates, and disclosure could reasonably be expected to provide a competitor with a significant advantage facilitating their ability to compete with the affected party and attempt to woo existing clients away from the affected party. Accordingly, I find that the harms listed in section 10(1)(a) and (c) have been established and part 3 has been met for the client lists, Attachment 10 of Record 2 and page 6 of Record 5.

Although I have found that the information remaining at issue in Records 2 and 5 (specifically the certified cheque at page 38 of Record 2 and all of the information *not* identified by the affected party) meet part 1 of the section 10(1) test, I have also found that this information does not meet the "in confidence" requirement of part 2 of the test. Although, as noted above, for section 10(1) to apply all three parts of the section 10(1) test must be met, for the sake of completeness I will determine whether these portions of the records meet part 3 of the test. For this information, I make the following findings:

- Page 38 of Record 2, is the copy of a certified cheque cut by the affected party's predecessor. The affected party indicates that it is particularly concerned with the numbers that appear at the bottom of the cheque which include the affected party's bank account number, branch number and cheque number as the account from which this cheque was drawn is the account currently used by the affected party.

  I do not accept that disclosure of this information could reasonably be expected to prejudice the competitive position of the affected party, or interfere with its contractual or other negotiations. I also do not accept that disclosure of this

information would result in an undue loss or gain to the affected party or that it is reasonable to assume that disclosure would result in similar information no longer being supplied. This type of information appears on the bottom of every cheque to identify to the bank, the account from which the funds are to be drawn. This information, in and of itself, is not sufficient to access the account to withdraw funds, nor does it provide anyone with information that, in my view, could reasonably be expected to result in any of the harms outlined in section 10(1)(a),(b) or (c). Accordingly, I find that part 3 has not been met for page 38 of the Cost Proposal component of Record 2.

- As for all of the information *not* specifically identified by the affected party, as noted above, the purpose of the mandatory exemption at section 10(1) is to protect the confidential "informational assets" of businesses that provide information to government institutions. The exemption is designed primarily to protect the interests of the affected party, rather than the City, and the affected party is, in any event, in the best position to provide evidence in relation to the harms set out in each of sections 10(1)(a) and (c). In my view, it is very significant that the affected party does not object to the disclosure of the majority of the information and only specifically objects to the disclosure of page 38, Attachment 7, Attachment 10 and Attachment 11 of Record 2 as well as page 6 of Record 5. It would be rare to find that application of section 10 is made out in the face of a position such as that taken by the affected party in this case.

  Looking at the totality of the evidence, I find that a reasonable expectation of harm is not established in relation to disclosure of the information in Records 2 and 5 that has not been identified by the affected party. The value of the City's arguments in this respect are significantly diminished to the extent that they are not supported by the affected party. Accordingly, I find that part 3 of section 10(1) test has not been established for these portions of the records.

In sum, having reviewed the representations submitted by the parties, the records at issue and all the circumstances of this appeal, I have found that Attachments 7, 10, and 11 of Record 2 and page 6 of Record 5 have met all three parts of the section 10(1) test and, subject to my discussion on the application of the public interest override at section 16, are exempt from disclosure under sections 10(1)(a) and (c) of the *Act*.

I have also found that page 38 of the Cost Proposal component of Record 2 (the copy of the certified cheque) and all of the remaining information *not* specifically identified by the affected party as being subject to the exemption claim at section 10(1), do not meet the established requirements of either parts 2 or 3 of the section 10(1) test. As all three parts of the test must be established for the exemption to apply I find that these portions of the records do not qualify for exemption under section 10(1) of the *Act*. Accordingly these records remain at issue for the purposes of my analysis on the application of section 11(d).

ECONOMIC AND OTHER INTERESTS

The City submits that section 11(d) applies to portions of Records 2 and 5 that remain at issue.

Section 11(d) states:

> A head may refuse to disclose a record that contains,
>
> > information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

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

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

For 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)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

The City presents two reasons as to why section 11(d) applies in the circumstances of this appeal.

First, the City submits that there is "the potential that the affected party would seek legal recourse resulting in significant liability and exposure of the Corporation." It points to the fact that the affected party has hired a law firm to represent their interests regarding disclosure of the information.

Second, the City submits:

> If this information is released, other organizations would be unwilling to provide the depth of information required for the proposal submissions to the municipality. If companies are unwilling to provide the services or increase their prices, it would result in a significant cost increase to the City of Barrie taxpayers.
>
> Because of the changing environment, there is a need for Request for Proposals

which allow for flexibility in additional system requirements.

The appellant responds that "if we can not test the computer system in fear of being sued, then how can one verify the system works, or the outcome of any election?"

Analysis and finding

In my view the City's arguments with respect to the application of section 11(d) are speculative in nature and 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 the harms specified, i.e. the affected party seeking legal recourse, or the possible deterrence of other organizations from providing the detailed information required for proposal submissions.

I will deal first with their submission that disclosure of the information at issue would result in other organizations choosing not to respond to future Request for Proposals issued by the City. 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 City's arguments in this appeal are speculative. The City suggests that parties would refuse to negotiate or enter into agreements with the City 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 City'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 City, and thus result in injury to the City's financial interests.

As for the City's argument that the affected party has hired a law firm to defend its interests regarding disclosure of the information and therefore, that this indicates that there is "the potential" that the affected party would seek legal recourse against the City, I note that the City provides no indication of what it anticipates would be the cause of action, though apparently the City believes it would arise from disclosure of the withheld information. This argument is significantly weakened by the fact that any action against the City for a disclosure made in good faith under the *Act* is prohibited under section 49(2), which states, in part:

> No action or proceeding lies against the head, or against a person acting on behalf or under the direction of the head, for damages resulting from the disclosure or non-disclosure in good faith of a record or any part of a record under this Act….

The City's representations on this point are entirely speculative. Particularly in view of section 49(2), the fact that the affected party has retained legal counsel to defend its interests regarding disclosure of the information does not lead one to conclude that there is a reasonable expectation of a law suit against the City, which has provided no evidence that disclosure of the information could reasonably be expected to result in a claim being filed.

The affected party has not filed any materials by the court or indicated to the City that it intends to do so. Moreover, based on the affected party's representations as noted in the harms section of the analysis under section 10(1), their concerns about the disclosure of the information at issue is more limited than that of the City. Given the circumstances of this appeal, I am not persuaded that such as harm could reasonably be expected to occur.

Based on my review of the contents of these records and the somewhat limited representations of the City on this issue, I find that the exemption at section 11(d) does not apply in the circumstances of this appeal. In my view, the City has failed to provide the kind of detailed and convincing evidence required to establish that disclosure of the information at issue could reasonably be expected to be injurious to the City's financial interests. Accordingly, I find that section 11(d) does not apply to exempt any of the information at issue from disclosure.

PERSONAL INFORMATION

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 education or the employment history of the individual [paragraph (b)], private or confidential correspondence sent to an institution by the individual [paragraph (f)], the views or opinions of another individual about that individual [paragraph (g)] and the individual's name where it appears with other personal information relating to the individual [paragraph (h)].

Attachment 8 of Record 2 is entitled "Resumes" and consists of 11 pages of narrative resumes of employees of the affected party. Having reviewed the information in this Attachment, I find that

it contains the personal information of the individuals whose resumes are found there. The resumes contain each individual's name along with information relating to the education or the employment history as contemplated by paragraph (b) of the "personal information" definition of section 2(1). That resumes contain the personal information of the individuals to whom they relate has also been established in previous orders issued by this office [see for example Orders P-727, P-766 and MO-1444].

Accordingly, the information in Attachment 8 of Record 2 qualifies as the personal information of individuals other than the appellant.

INVASION OF PERSONAL 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.

Section 14(3)(d) of the *Act* is the only provision that, in my view, appears to be relevant in the circumstances of this appeal. 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 resumes which make up Attachment 8 of Record 2, I find that the

information contained in them constitutes the employment history of the individuals to whom thy relate and their disclosure 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]. As section 14(3) cannot be rebutted by one or a combination of factors listed in section 14(2), and I have found that section 14(4) has no application in the circumstances of this appeal, I find that disclosure of Attachment 8 of Record 2 would result in an unjustified invasion of the personal privacy of those individuals to whom the resumes relate and, subject to my analysis of the application of the public interest override at section 16 of the *Act*, Attachment 8 of Record 2 therefore qualifies for exemption under section 14(1) of the *Act*.

PUBLIC INTEREST OVERRIDE

Section 16 of the *Act* provides:

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

Section 16 is commonly referred to as the "public interest override" since it permits information which is otherwise exempt from disclosure under specified parts of the *Act* to be disclosed in the public interest. For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption that has been found to apply (in this case the exemptions at sections 10 and 14) [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner),* [199] O.J. No. 488 (C.A.)].

Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398].

Compelling public interest

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. However, where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claims which in the circumstances of this appeal are at section 10(1) and 14(1).

Representations

The appellant raised the possible application of section 16 during mediation and maintains the position that the public interest override applies in this appeal to permit disclosure of the information at issue. The appellant's submissions with respect to why the information at issue should be disclosed are based on his view that the City is using an expensive voting system that is mechanically and technologically problematic, has resulted in low voter turnout, and makes the election process in auditable, resulting in diminished transparency of the election process. Specifically, the appellant submits:

1) City of Barrie is using a ballot-less, unverifiable, [named election equipment] since 1995.
2) Experience has been negative. There has been constant break downs from the start. Programs (software being changed and upgraded) with ongoing computer crashes. No verifiable recounts or counts. No verifiable auditable paper trails. Upon purchasing election equipment in 2000 the computers had to be thrown out and replaced for 2003. Complaints from citizens of Barrie of long line ups lost voting opportunities citizens not [being] able to vote for [their] candidate. CBS 60 Minutes wanted to bring in top computer scientist to test out [the election equipment]. [The affected party] contracts maintain that the election equipment [was] not allowed to be tested. The scrutineering of the election process has been obscured and [principles] of the Municipal Election Act of Ontario have been omitted, by using alternative method voting.
3) Still under investigation. If we can not test the computer system in fear of being sued, [then] how can one verify the system works, or the outcome of any election?
4) The [effect] of this alleged ballotless computer touch screen method has lowered voter turnout and has jeopardized our transparent democratic process.
5) The total costs are still being disclosed but so far it seems to be nothing but a huge "Money Pit". The paper ballot, ballot box, hand count, scrutineer method is far more inexpensive and can achieve a verifiable true auditable count.
6) The City of Barrie/[the affected party] has maintained the functioning/programming of the election equipment is a "trade secret". Since when in history of Electoral law in Canada/Ontario, has the election process been a "trade secret". Our transparent, auditable election process, is paid for and owned by the Citizens of Barrie/Canada and not by any City Clerk or foreign corporation from Texas.
7) We [are] asking for total [disclosure] of documents, contract etc. from the City of Barrie Re: [the affected party] et al. And refer to recent public statements of the conduct for discloser [sic] from city halls, from Freedom of Information Commissioner [Ann Cavoukian] and the Justice Bellamy's 244 recommendations.

The City takes the position that the public interest override is not applicable in the circumstances

of this appeal. It submits:

> There is no demonstrated public interest in the release of the documents. The City of Barrie has been utilizing various alternative voting methods for 10 years and it is reasonable to assume that if there was an overriding public interest issue it would have been addressed during the first years of use of the equipment. Over the years, there have been inquiries regarding the equipment, testing procedure, etc.; however, no other individual or member of the media has made an inquiry regarding the Request for Proposal submissions and agreements.
>
> The use of this equipment has been expressly approved by City Council as the elected representatives of the City of Barrie. On July 24, 1995, City Council passed By-law 95-171 which authorized the use of electronic voting equipment for the 1995 election and any subsequent municipal election conducted by the City Clerk. This by-law was adopted in accordance with Section 42 of the *Municipal Elections Act, 1996*.
>
> A significant amount of information has already been disclosed regarding the electronic ballot equipment, testing, security and the voting process and this is adequate to address any public interest considerations.
>
> As with every municipal election, staff continue to monitor advances in voting systems to ensure that Barrie electors continue to be provided with the most economical, accessible and secure method of voting. This review includes contact with other municipalities regarding their experiences with various systems, vendors for information regarding new products and processes, the Accessibility Advisory Committee to address accessibility issues, etc.

The affected party states at the outset of its representations that although the *Act* is silent as to who bears the burden of proof with respect to the public interest override at section 16, following former Commissioner Sidney B. Linden's comment in Order 47, it is an established principle that a party asserting a right has the onus of proving its case. The affected party therefore takes the position that in this appeal, the burden of proof in establishing that section 16 applies rests with the appellant. They submit that the appellant has not met that burden.

The affected party submits that the assertions made by the appellant about the problems with the election equipment are unsubstantiated and also, that the appellant has failed to show how disclosure of the information that remains at issue would address the concerns that he has outlined in his representations. The affected party further submits that there is no compelling public interest in those limited portions of Records 2 and 5 to which they object to the disclosure because the majority of the records can be disclosed to the appellant:

> As stated in Order M-381 (*Re Ottawa Police Services Board;* August 26, 1994), one of the factors to consider in determining if there is a compelling public interest in disclosure is the degree of public disclosure that has already taken place:

> …a significant factor to be considered in determining the relevance of section 16 is the degree of public disclosure which has already taken place concerning this matter. … As a result, the public has been provided with a considerable amount of information. … (emphasis added)

[The affected party] has agreed to the disclosure of most of the information in the RFP documents, with the exception of the few documents listed above. The documents that [the affected party consents to disclosing] to the appellant include pricing information, sample reports, product marketing information, and the terms and conditions of the lease between [the affected party] and the City of Barrie. These disclosed documents address a number of the issues raised by the appellant, namely the contracts that exist between the City of Barrie and [the affected party] and the cost of the electronic system.

Another aspect to consider in determining whether there is a compelling public interest in disclosure is whether the release of the information will inform the public about the activities of their government. As stated by an Inquiry Officer in Order P-982 (*Re Ministry of the Attorney General;* August 25, 1995):

> … the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (emphasis added)

[The affected party] submits that the documents still at issue do not address the kinds of public interest matters argued by the appellant. Much of the information that is being claimed as confidential is information relating to third parties, such as [the affected party's] employees and clients. This third party information does not speak to or address the alleged issues of public interest which the appellant has raised in his appeal. The same can be said regarding the Project Timeline and Project Review and Implementation Manual, as well as the Election Services Support document. These documents do not provide any information relating to such issues as voter turnout, maintenance costs, complaints regarding transparency, etc.

Analysis and findings

As noted above, to order the disclosure of the information which I have previously found exempt under sections 10(1) and 14(1) I must be persuaded that there is a compelling public interest in the disclosure of the records and, if there is a compelling public interest, that that compelling

public interest clearly outweighs the purpose of those exemptions. In my view, in the current appeal, this threshold has not been met and section 16 does not apply.

From the appellant's arguments I can extrapolate that he takes the position that a compelling public interest exists in the disclosure of the information in order to serve the purpose of informing the citizens of the City about matters such as its disbursement of public funds and the integrity of the election process. I accept that there is indeed a public interest in subjecting the City to scrutiny with respect to their choice of election systems as it involves the disbursement of public funds as well as the public perception of the integrity of the election process which, as a foundational process of a democratic government, should be subject to a high degree of transparency. I also accept that such public interest is more than likely to be considered compelling.

However, I agree with the position taken by the affected party that in the circumstances of this appeal, in light of the degree of disclosure that will be granted to the appellant as a result of this order, and the nature of the remaining information that has been withheld under the exemptions, there is no compelling public interest in the disclosure of the information that will remain undisclosed. Disclosure of this information would not assist in public scrutiny of public funds nor would it have any impact on the public perception of the integrity of the election process. In essence, disclosure of this information would not address the concerns put forward by the appellant, nor would it shed any light on the operations of the City. Accordingly, I find that there is no compelling public interest in the disclosure of the information that I have found exempt under sections 10(1) and 14(1) of the *Act*.

As an aside, although I have found that a compelling public interest does not exist in the circumstances of this appeal, this is not based on the City's arguments on this subject, which I do not accept. First, the City argues that because it has been using various alternative voting methods for approximately a decade without prior inquiries or requests for information on the subject, it is therefore reasonable to assume that no overriding public interest could exist. In my view, the fact that information has not previously been requested from the City on this subject, or that a public interest argument has not been previously raised, does not preclude the possibility that a compelling public interest exists or that one might arise in the future.

I also do not find the City's submission about the fact that it has received the approval of City Council for the use of the election system provides any relevant information in relation to whether there is a compelling public interest in disclosure. Simply because a matter has been approved and even subsequently adopted as a by-law does not reasonably lead to the conclusion that decisions taken by Council cannot be subject to public scrutiny or that a compelling public interest would not exist in the disclosure of information related to such decisions.

In sum, I find that no compelling public interest in the disclosure of the information that I have found to qualify for exemption under either section 10(1) or 14(1) of the *Act* exists. Accordingly, the public interest override at section 16 does not apply in this appeal.

ORDER:

1. I order the City to provide the appellant with a decision on the disclosure of the "draft proposed Election Tabulation Agreement" in accordance with the provisions of the *Act*, treating the date of this order as the date of the request, in accordance with sections 19, 21, 22 and 23 of the *Act*, *and* without recourse to a time extension under section 20. I further order the City to provide me with a copy of its decision when it sends the decision to the appellant.

2. I uphold the City's decision to withhold Attachments 7, 8, 10, 11 of Record 2 and page 6 of Record 5.

3. I order the City to disclose the remaining portions of Records 2 and 5 not listed in Provision 2, to the appellant by **August 29, 2006** but not before **August 24, 2006**.

4. I find that the search undertaken by the City for records responsive to the appellant's request was reasonable and I dismiss that part of the appeal.

5. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 3.

Original Signed By — July 24, 2006

Catherine Corban
Adjudicator