



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2193

Appeal MA-060139-1

The Corporation of the Town of Orangeville



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NATURE OF THE APPEAL:

The Town of Orangeville (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records related to the design/build proposal submissions which it received in response to a Request for Proposals (RFP) for the construction of its Police Station/ Fire Hall.

Under section 21 of the *Act*, the Town notified the three companies (the affected parties), which had provided the Town with design/build proposal submissions, of the request. Two of the affected parties refused to consent to the release of their proposal submission. The third affected party did not respond to the Town's request. The Town then denied access to the three proposal submissions under the mandatory third party information exemption in section 10(1) of the *Act*.

The requester, now the appellant, appealed the decision. No issues were resolved during mediation.

The file was referred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to the Town and the three affected parties, initially, seeking their representations. I received representations from the Town only. A complete copy of the Town's representations was sent to the appellant, along with a Notice of Inquiry. I received representations from the appellant in response. I then sought reply representations of the Town, seeking its representations on the issue of the application of the mandatory exemption in section 14(1) (invasion of privacy) to the personal information in the records. I then sought surreply representations from the appellant on this issue. The appellant did not provide further representations in response.

RECORDS:

The records at issue are the three design/building proposal submissions, more particularly described as Records 1, 2 and 3.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether certain information in the records is exempt under section 14(1) of the *Act*, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history

of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

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

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

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

I only received representations of the Town on this issue. The Town submits that:

The record contains personal information about various employees associated with the companies that have submitted proposals to the Town. The personal information is found in the resumes that were included as part of the overall proposal and includes personal names, contact information and in some instances, individual photographs...

The personal information contained in the resumes provides information about each individual in a personal capacity. This information includes particulars regarding the individual's employment and educational history and training. The information also includes, in some cases, personal photographs and listings of personal references and contact information. It is reasonable to conclude that contacting a personal reference of an individual could allow one to discover considerable personal information about that individual...

It is reasonable to expect that an individual would be identified by the release of the personal information. The information includes full names, contact information, particulars of employment, and in some cases, personal photographs.

Analysis/Findings

Upon review of the records, I find that only Records 1 and 3 contain personal information. In particular, both records contain resumes of the affected parties' employees. The resumes include each individual's name, along with information relating to their education or employment history, as contemplated by paragraph (b) of the "personal information" definition of section 2(1). Previous orders issued by this office have found that resumes typically include personal information as that term is defined in section 2(1) [see for example Orders P-727, P-766 and MO-1444].

I am satisfied that the information contained in the resumes in Records 1 and 3 qualifies as the personal information of individuals other than the appellant for the purpose of the definition of that term in section 2(1) of the *Act*

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.

In order for the section 14(1)(f) exception to the mandatory exemption in section 14(1) to apply, it must be established that disclosure would not be 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.

Furthermore, where the record contains the personal information of an individual other than the appellant, the only way that such a record can be disclosed is if I find that disclosure would not constitute an unjustified invasion of personal privacy of that individual.

I have reviewed the resumes in Records 1 and 3 and conclude that they contain information relating to the educational and employment history of several employees of the affected parties, which are corporate entities. Previous orders issued by this office have found that information contained in resumes [Orders M-7, M-319, M-1084] and work histories [Orders M- 1084, MO-1257] falls within the scope of section 14(3)(d). Therefore, I find that disclosure of the personal information of the resumes that form part of the records 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].

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 16 has not been raised by the appellant. Section 14(4) only applies to officers and employees of institutions. Therefore, section 14(4) has no application to the circumstances of this appeal since the affected parties’ are not institutions as defined by section 2(1) of the *Act*.

Therefore, I find that the resumes in Records 1 and 3, which are found in Appendix E in both records, are exempt from disclosure. I will now consider whether the remainder of the records are exempt from disclosure pursuant to section 10(1) of the *Act*.

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.

Part 1: type of information

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

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

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

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

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

Representations

The Town submits that the records contain technical information, as the proposals have been prepared by professionals and includes information describing the construction and structure of the Project including architectural and design concept drawings.

The Town also submits that the records contain commercial and financial information. It states that:

Information relating to a bid for a contract, including pricing or costs for the provision of such services has been held to be commercial and financial information [M-511, PO-2453, MO-1919]. The Requested Documents contain information regarding specific price amounts and a breakdown of pricing for various portions of the proposed Project...

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

Analysis/Findings

On my review of the records, I agree with the characterization of the records by the Town that the records contain commercial information, as they address the provision of design/build construction services to the Town. I also agree with the Town that the records contain financial information, namely, information concerning the cost accounting practices of the affected parties. I also agree with the Town that the records contain technical information, namely architectural, engineering and electronic information concerning the Construction Project. Therefore, I find that the information contained in the records constitutes technical, commercial and financial information for the purposes of section 10(1) of the *Act*.

Part 2: supplied in confidence

Supplied

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

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

The Town states in its reply submissions that:

The contract between the Town and the successful party is a public document...

As a result I obtained a copy of the contract from the Town. I will deal with Record 1 separately from Records 2 and 3, as Record 1 is the winning proposal. Furthermore, Record 1 is a contract for only the design/build of the Town’s Police Station. The Town did not contract with the winning affected party to design/build the Fire Hall.

In particular, the Town states that:

The Requested Documents are not contracts which have been mutually generated. The Requested Documents consist entirely of information which has been provided directly to the Town by third parties in response to a Request for Proposals (RFP). None of the information therein can fairly said to be mutually generated or the result of even a minimal negotiation process. The Requested Documents may be classified as offers, but they may not be classified as contracts...

In formulating the contract, there was some carryover or transfer from the original design build proposal (with modifications), some information added from the original proposal, and some information was removed from the original proposal altogether.

It should first be noted the successful proposal was a proposal to construct both a police station and a fire hall. The ultimate contract, however, was only for the construction of a police station. As a result, all references and information relating to the construction of the fire hall were removed in its entirety in the contract.

The information and specifications relating to the design build outline, schedule, site plans, floor plans, and elevation drawings were incorporated, in part, from the proposal into the contract. There is, however, some information or specifications

that were either added to the contract or removed from the proposal. In other words, the incorporation of the noted portions of the proposal was not merely a verbatim incorporation of portions of the proposal into the contract. The contract was ultimately tailored to reflect the specifics of the project.

The contract contained added information regarding a geotechnical investigation that was not included in the original proposal.

Finally, there were many portions of the proposal that were not reproduced at all in the contract. This includes information relating to subcontractors, details of similar projects, qualifications of key personnel (resumes), an organization chart, the schedule of provisional items and costs and bonding documentation.

Analysis/Findings re: Record 1

I have compared the information contained in Record 1 to that in the winning contract. Record 1, the winning proposal, consists of a cover letter to the Town along with Appendices A to F. Appendix A of Record 1 contains the Drawings and Specifications for the proposal. Appendix B of Record 1 contains the Construction Schedule. Appendix F contains the provisional items and costs. I find that the contents of Appendices A, B and F in Record 1 concerning the design/build of the Police Station are almost identical to that in the contract. The provisions for the Fire Hall are not contained in contract and I will deal with these provisions separately, along with the project organization chart, Appendix C which is a list of subcontractors, Appendix D which is a list of similar projects, and the Bid Bond documents. I have already dealt with Appendix E in this order, which contains the resumes of this affected party's key employees.

Previous orders have found that except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" for the purpose of section 10(1). [Orders MO-1706, PO-2371 and PO-2384]. The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

In Order MO-1706, Adjudicator Bernard Morrow states:

... [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

In Order PO-2435 Assistant Commissioner Brian Beamish found that:

If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS [Management Board Secretariat which issued the RFP] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry ... to claim that the per diem amount was simply submitted and was not subject to negotiation.

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

Further, upon close examination of each of these [named agreements], I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

In summary, I find that the [named agreements] are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1) [section 10(1) of the municipal *Act*].

I agree with and adopt Assistant Commissioner Beamish's approach. Having reviewed the winning RFP, Record 1, I find that its terms, save and except for the exceptions listed above, formed part of the full contract with the Town, with the addition of a number of significant further terms. The contract was then read and signed by both the Town and the affected party. Therefore, I conclude that the contents of the contract which reflect the terms of Record 1 were subject to negotiation and that the information in the contract was, accordingly, not "supplied" within the meaning of that term in section 10(1). The contract came into existence as a result of the Town's acceptance of this affected party's proposal in response to the RFP. Therefore, I find that Appendices A, B and F of Record 1, except for the provisions for the Fire Hall, were not

“supplied” for the purposes of section 10(1) and do not fall into either the “inferred disclosure” or “immutability” exceptions.

Although, it is not necessary for me to address the “in confidence” component of part 2 and the “harms” component in part 3 of the section 10(1) test before concluding that this part has not been established with respect to Appendices A, B and F of Record 1, except the provisions concerning the Fire Hall, for the sake of completeness I will address these components for the portions of Record 1.

Analysis/Findings re: the remainder of Record 1 and Records 2 and 3

I find that the provisions for the Fire Hall, Appendices C and D, the Bid Bond documents and the Project Organization Chart of Record 1 and all of the information contained in Records 2 and 3 have been directly “supplied” to the Town by the affected parties for the purposes of section 10(1).

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 my view, however, where information has been made public after it has been “supplied” to the institution, this is a relevant consideration in assessing the “in confidence” component of section 10(1).

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]

Representations

The Town states that:

The Requested Documents were supplied in response to a RFP by the Town. The RFP required that each applicant provide its proposal in an opaque, sealed envelope. The RFP then required that the sealed envelope be marked "CONFIDENTIAL TENDER FOR: TOWN OF ORANGEVILLE POLICE STATION/FIRE HALL". In addition, the information contained in the responses to the RFP was not available from any other source to which the public has access.

Clearly the above suggests that the Town and the affected parties would be treating the responses to the RFP as confidential. At a minimum, it is implicit by the requirement that the envelope be opaque, sealed and marked as "confidential" that there would be a reasonable expectation that the information contained in the proposal would be kept confidential.

Many decisions of the Office [of the Information and Privacy Commissioner/Ontario] have held that there can be no reasonable expectation of confidentiality by a party submitting a proposal if that party has not identified portions of the bid that were to remain confidential [PO-2453; MO-1919]. In those cases, the RFP has contained a specific provision requiring the party submitting a proposal to identify the confidential portions thereof. The RFP issued by the Town did not have such a provision. The Town did not invite the provider of the proposal to request confidentiality. Rather, the Town required confidentiality as indicated by requiring each proposal to be sealed and marked "confidential".

In response, the appellant submits that:

We feel the Town of Orangeville's case reference is not applicable and it is our contention that the refusal by the Town of Orangeville, to disclose information, is frivolous abuse of taxpayer's funding and the grounds of appeal are inaccurate by the following:

- a) at some point, we will be able to look at the building, therefore access to the drawings will be available through the Building Permit department
- b) we can summon council minutes authorizing funding for this project, therefore another avenue open to us to access this information
- c) there will be other avenues to obtain the Freedom of Information through staff recommendations to council

In its reply representations, the Town submits that:

The party requesting disclosure does not have the ability to access the proposals through other means. The contract between the Town and the successful party is a public document and to the extent that there is overlap in the proposal and the contract, the requesting party could access that information. Otherwise, the proposals were not made public documents as they were submitted on the condition and understanding of confidentiality.

A search of the municipal council minutes of its meetings will not reveal the particulars of the proposals. Any reference to the various proposals were made in a general way and do not disclose particular details of each proposal.

There are only building permits on file for the successful party and the corresponding project. A search of the relevant building permits will not reveal the details of the proposals. Much of the details contained in the successful proposal would not relate to the building permits. The Building Department has no records that relate to unsuccessful proposals.

Analysis/Findings

I accept that the affected parties provided the information in the proposals to the Town with an expectation of confidentiality. In the circumstances of this appeal, I am satisfied that the information contained in the proposals, except for the portions of Appendices A, B and F of Record 1 which I have found were not “supplied” above, was supplied with a reasonably-held expectation of confidentiality.

I do not accept that the portions of Appendices A, B and F of Record 1, which I have found were not “supplied” above, meet the “in confidence” component of part 2 of the test. These portions of Record 1 have been incorporated into a publicly available contract and are therefore otherwise available from sources to which the public has access [Order PO-2043].

Part 3: harms

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

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

In its decision letter to the appellant, the Town appeared to be relying on the exemptions contained in paragraphs (a) and (c) of section 10(1). In particular, the Town states in its decision letter:

[D]isclosure of the information, in part or in whole, would prejudice the competitive and innovative position of the submitter and result in harm to the company should the methodology and fee structure be released.

In its submissions, the Town also relied on paragraph (b) of section 10(1).

The appellant did not provide representations with respect to part 3, the harms component of section 10(1).

The applicable paragraphs of section 10(1) state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency

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

The Town states in its representations concerning paragraph (a) that:

The information contained in the Requested Documents includes detailed information regarding pricing structure, project time lines, design concepts, architectural drawings, mechanical drawings and structural information including the materials to be utilized in construction. Disclosure of this information creates the reasonable expectation that the affected party's competitive position would be prejudiced. This information provides valuable information regarding each affected party's bid procedures, practices and how each party carries on business in general.

In responding to a future RFP, a party obtaining a prior proposal of an affected party will be able to compare the prior proposal to its own pending bid. A competitor would have an unfair advantage by having knowledge of the affected party's bid, including building methods, design concepts, preferred materials, key subcontract contacts, time lines, cost structure and other elements of the bid that made it effective and/or successful. The party could then easily adjust or underbid future tenders/proposals in order to better compete with the affected party in the future.

In addition, disclosure of the Requested Documents would interfere with each affected party's future negotiations as there will be pressure to offer similar pricing structure on future contracts for similar work. Also, potential subcontractors will be able to inflate the value of their work if they have the knowledge of the various elements of the proposal including pricing information and cost markup.

Analysis/Findings

I find that the information in the records is substantially similar to that contained in Order MO-2151. I adopt the approach taken by Adjudicator Frank Devries in that case, where he found exempt from disclosure

... the specific detail contained in those portions of the proposal that identify the specific information relating to the affected party's proposed approach to the project. In my view, the unique information contained in those small portions of the proposal discloses a particular approach to the project taken by the affected party.

After reviewing the records, as well as the representations of the Town, I find that the following portions of the records satisfy the requirements of part 3 of the test and thereby qualify for exemption under section 10(1)(a).

Record 1

- Any reference to the design/build of the Fire Hall
- The proposal's cover letter

Record 2

- Pages 9 to 11 (architectural design concept letter), 16 to 18 (mechanical design brief), 20 to 23 (electrical design brief), and 28 to 36 (drawings)

Record 3

- Pages 20 to 48 (Building Summary), 52 (list of subcontractors) and 94 (financial information).

I do not find that the other portions of the records qualify for exemption under section 10(1)(a). I agree with the findings of Adjudicator DeVries in Order MO-2151, where he found that:

In my view, the remaining portions of the record do not contain information which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. I find that I have not been provided with sufficiently persuasive representations which satisfy me that the information contained in these portions of the record qualify for exemption under section 10(1)(a). Some of the information is information about the affected party and its history, experience and qualifications. This information appears to be of a public nature, and I have not been provided with sufficiently detailed and convincing evidence supporting the position that the disclosure of this information could reasonably be expected to result in the harms set out in section 10(1)(a).

In Order PO-2435, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms.

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

I adopt the position taken by the Assistant Commissioner. In my view the arguments put forward by the Town regarding their concerns that disclosure will allow competitors to modify their approach to preparing proposals in the future would not, in itself, result in the harms identified in section 10(1)(a) of the *Act*.

I find that the disclosure of merely general information contained in the proposals which discloses only the "form and structure" of the proposal could not reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. I do not have sufficiently detailed and convincing evidence to demonstrate that disclosure of this general information could reasonably be expected to result in the harms set out in section 10(1)(a). Therefore, I find that the remaining portions of the records are not exempt under section 10(1)(a).

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

The Town states in its representations concerning paragraph (b) that:

The Town relies on the RFP and request for tenders process (together called “Requests”) in order to conduct the majority of its construction projects. As a growing community, it is essential that the Town receive multiple quality bids on each Request to ensure quality design and construction during this growth. Preparation of a proposal in response to any Request is an expensive and time consuming task. Responding to a RFP is a particularly time expensive and time consuming endeavour as the bidder must also include the design concepts as part of its proposal.

Allowing other competitors to pull and view competing bids will provide a disincentive to other parties to enter bids on Requests issued by the Town. Put simply, competing businesses do not want their competitors to have access to the type of information that is contained in a proposal, especially to a RFP. There would be less incentive for, a party to invest the time and money to bid for work if there was a real chance that the bid proposal could be made public and taken advantage of by other competitors. The Town would also find that the quality of the bids/proposals received in general would decline and be less detailed as each bidding party would have to be mindful that any information forwarded in the bid/proposal could be utilized by its direct competitors.

Analysis/Findings

In my view, the Town has not met the onus of proof by providing these extremely general and highly speculative submissions. The Town’s position is significantly undermined by the lack of representations from the affected parties on paragraph (b) of section 10(1).

I agree with and adopt the following findings of Adjudicator DeVries in Order MO-2164, where he stated:

I am not persuaded that disclosing the information which I have found does not qualify for exemption under section 10(1)(a) could reasonably be expected to result in similar information no longer being supplied to the City in the future, as contemplated by section 10(1)(b). I have found that certain specific information in the record, which could prejudice the competitive position of the affected party, is exempt under section 10(1)(a). With respect to the remaining information at issue, in my view companies doing business with public institutions such as the City understand that certain information regarding how it plans to carry out its obligations will be made public. I find a number of the arguments put forward by the City speculative, and not sufficiently “detailed and convincing”. Furthermore, I do not accept that the prospect of the release of the type of information

contained in the portions of the records which I have found do not qualify under section 10(1)(a) could reasonably be expected to result in a reluctance on the part of companies to participate in future projects.

Accordingly, I am not satisfied that it is reasonable to expect that the disclosure of the information in the records that I have not found to be exempt under section 10(1)(a) will have the effect that companies will no longer supply similar information to the Town. As a result, I find that the requirements for section 10(1)(b) have not been met.

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

The Town is concerned that a competitor of the affected parties would incur an undue gain, and the affected parties would incur an undue loss, by the release of the information contained in the affected parties' proposals. The Town submits that:

Disclosure by the Town of the Requested Documents would result in undue loss to the affected parties and the Town and in undue gain for [a competing] party for the reasons set forth above...

The requesting party is not a citizen of the Town, nor is it a party who would have any real concern regarding the operation of Town affairs...

This is not a situation where the requesting party has requested a particular part of a successful bid. This is also not a situation where the requesting party has requested disclosure of terms of a contract. Rather, the requesting party has made a blanket request to see all of the bids received in response to a RFP...

To allow this type of disclosure to occur would undermine and could seriously jeopardize the success of the RFP tender process. The integrity of the RFP process depends on bidding parties having some assurance of confidentiality and that its competitors will not take advantage of the information contained in each bid.

To allow this type of disclosure would also be contrary to the overall objective of the section 10(1) exemption... If this type of disclosure request does not fall under the section 10(1) exemption, then it is difficult to imagine what would. These are confidential proposals entered on the presumption of confidentiality. The affected parties have placed a great deal of resources into creating a proposal that is competitive. This information should not be released to direct competitors of the affected parties.

Analysis/Findings

As disclosure to the appellant of the information in the records is, in effect, disclosure to the world, I find that the identity of the requester is irrelevant for the purposes of this appeal [Order

PO-2465]. I also find that the information which does not qualify for exemption under section 10(1)(a) and (b) also does not qualify for exemption under section 10(1)(c).

The information that I have found not to be exempt under section 10(1)(a) and (b) includes information contained in the winning proposal that is reflected in the publicly available contract for the Project, as well as general information about the affected parties, including their history, experience and qualifications, and how they propose to meet the requirements of the Project. In my view, it has not been established that disclosure of the information that I have found not to be exempt could reasonably be expected to result in undue loss to the affected parties and the Town or undue gain to the appellant as contemplated by section 10(1)(c).

In summary, I have found that some portions of the proposals qualify for exemption under section 10(1)(a). I find that the disclosure of the remaining portions of the records will not result in the harms identified in sections 10(1)(a), (b) or (c). As all three parts of the test under section 10(1) must be met, the remaining information contained in the records does not qualify for exemption under section 10(1).

ORDER:

1. I uphold the Town's decision not to disclose the resumes of identifiable individuals contained in Appendix E of both Records 1 and 3.
2. With respect to the claimed section 10(1) exemption, I uphold the Town's decision not to disclose the following records or portions of records:

Record 1

- Any reference to the design/build of the Fire Hall
- The proposal's cover letter

Record 2

- Pages 9 to 11, 16 to 18, 20 to 23, and 28 to 36

Record 3

- Pages 20 to 48, 52 and 94

I have provided the Town's Freedom of Information Coordinator with a highlighted copy of the records. To be clear, only the portions which I have highlighted are exempt from disclosure under section 10(1).

3. I order the Town to disclose the remaining records or parts of the records by **June 18, 2007** but not before **June 13, 2007**.

4. In order to verify compliance with this order, I reserve the right to require the Town to provide me with a copy of the portions of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: _____
Diane Smith
Adjudicator

_____ May 11, 2007