



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2176

Appeal MA-060190-1

Town of Richmond Hill



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Town of Richmond Hill (the Town) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

We are requesting all copies of the Project Management Services submissions received for your RFP (Request for Proposals) No. 32-05 – [for a named project].

The Town notified four companies pursuant to section 21 of the *Act*, seeking their views on the disclosure of their submissions. After receiving their views, the Town advised the requester that it was denying access pursuant to section 10(1) of the *Act* (third party information), as the four short list bidders had not consented to the disclosure of their submissions in response to the RFP. The Town provided the requester with a copy of the public record that describes the awarded contract for RFP 32-05.

The requester (now the appellant) appealed the Town's decision. During mediation, the winning bidder advised the Town that it was prepared to release pages 144 to 150 of its own submission to the requester, so long as the Town severed the client name, the client reference, the project manager name and the project budget on these pages.

The appellant advised the mediator that it did not object to the Town severing the name of the individual who was the client reference; however it was interested in receiving all the other information about the winning bidder described on pages 144 to 150.

As well, during mediation the appellant advised that it was only pursuing access to the winning proposal, which is the proposal of the winning bidder, the affected party. Therefore, the winning proposal, which is reflected in pages 118 to 218, is the only proposal remaining at issue.

The appellant further stated that it was not interested in receiving the names of individuals on any resumes that are included in the records, although it was interested in obtaining the resumes themselves. Therefore, the identifying names on the resumes are not at issue.

As no further mediation was possible, the file was referred to me to conduct the inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Town and the affected party, initially. Both the Town and the affected party provided representations. The affected party raised the possible application of the mandatory invasion of privacy exemption in section 14(1) as it took the position that the records contain "personal information".

I sent the appellant a Notice of Inquiry setting out the facts and issues in this appeal, seeking its representations on the issues in this appeal, including the application of the invasion of privacy exemption, which was raised by the affected party. I provided the appellant with a copy of the representations received from the Town and the affected party. Certain portions of the affected party's representations were withheld as they appeared to contain confidential information. The appellant did not provide representations in response to the Notice of Inquiry.

RECORDS:

The records consist of the winning project management proposal for RFP No. 32-05, pages 118 to 218, more particularly described in the following Index:

INDEX OF RECORDS

<u>Record #</u>	<u>item</u>	<u>Town Page #</u>	<u>Description of Record</u>
1.			<u>Proposal Letter</u>
	(i)	118-119	Introduction pages
	(ii)	120	Table of Contents
	(iii)	121-122	Overview
	(iv)	123-126	Proponent's Profile
	(v)	127-134	Work Plan
	(vi)	135-137	Project Team
	(vii)	138-140	Quality Control
	(viii)	141-142	Safety plan
	(ix)	143	Price Proposal
2.			<u>Appendix "A" - Comparable Project Profiles</u>
	(i)	144-150	Past projects
3.			<u>Appendix "B" - RFP Supporting Documents</u>
	(i)	151	Tab
	(ii)	152	Contact Information
	(iii)	153-156	Town issued Purchase requisition - electronic form
	(iv)	157	Part "D" RFP schedule of fees
	(v)	158	Completed RFP pages Part "E" Form of Proposal
	(vi)	159 - 160	Reference information
	(vii)	161 - 162	Addendum and agreement signatures

4. **Appendix “C” - Sample Project Plan**
 - (i) 163 Product Description and Project Charter
 - (ii) 164 Scope statement, Budget and Cost management
 - (iii) 165 Plan, Risk Management Design & Review plan
 - (iv) 166 Quality Management Plan
 - (v) 167-168 Staffing & Communication plan
 - (vi) 169-170 Procurement Plan
 - (vii) 171 Billing and Progress payments

5. **Appendix “D” - Sample Project Schedule**
 - (i) 172-174 Sample Project schedule

6. **Appendix “E” - Sample Cost Tracking Log**
 - (i) 175-176 Sample Cost tracking log
 - (ii) 177-182 Sample budget log
 - (iii) 183-185 Sample commitment log
 - (iv) 186-190 Sample cost allocation log
 - (v) 191 Sample project overview

7. **Appendix “F” - Sample Risk Register**
 - (i) 192-197 Sample risk register

8. **Appendix “G” - Project Organization Chart**
 - (i) 198 Project organization chart

9. **Appendix “H” - Project Team Resumes**
 - (i) 199-210 Resumes and experience including past projects

10. **Appendix "I" - Health and Safety and WSIB**
- (i) 211 Health & Safety Policy
 - (ii) 212 WSIB Clearance Certificate
11. **Enclosures**
- (i) 213-218 Letters of reference

DISCUSSION:

PERSONAL INFORMATION

The affected party submits that certain portions of Records 1, 2, 3 and 9 contain the "personal information" of identifiable individuals. The term "personal information" 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.)].

The affected party submits that the records contain "personal information", namely, the educational history (e.g. degree or diploma acronyms) and the employment history (e.g. other employers worked for, duties held on various projects, including the current one) of certain individuals, pursuant to paragraph (b) of the definition.

I have reviewed the records which the affected party argues contain the personal information of its employees and one of its officers. I find that the names of these individuals and their job titles do not qualify as their "personal information" within the meaning of the definition of that term in section 2(1). This information simply identifies these individuals in their professional or business capacity.

Similarly, I find that the affected party's clients' point of contact person, names and job titles, also does not qualify as "personal information" for the purposes of section 2(1). Adopting the principles referred to in the orders above, the information associated with an individual in a professional or business capacity is not considered to be "about" the individual in a personal capacity, and is not, therefore, their personal information for the purposes of the *Act*.

Accordingly, I find that the names and job titles of these individuals do not constitute their personal information as that term is defined by section 2(1) of the *Act*.

However, the records also contain information relating to the employment or educational history of certain identifiable individuals within the meaning of the definition of that term. I find that this information constitutes their personal information as defined in paragraph (b) of the definition of “personal information”. In addition, I find that the names of individuals and details about their work on previous projects for the affected party represent the employment history of these individuals for the purpose of paragraph (b) of the definition in section 2(1).

Finally, as identified above, Record 9 contains the resumes of a number of individuals who are employees of the affected party. I find the resumes contain the personal information of the individuals. They contain 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].

In this appeal, however, the appellant takes the position that the names of the individuals in the resumes could be severed out, and that the remaining information ought to be disclosed to him as it would no longer relate to an “identifiable individual”, as required by the *Act*.

I adopt the findings of Adjudicator Frank DeVries in Order MO-2151, where he stated that:

I have reviewed the information contained in the resumes, which are detailed accounts of the education and employment history of the named individuals. Even if the names of the individuals are severed from the records, the resumes contain sufficiently detailed information about the individuals such that, in my view, it is reasonable to expect that each of the individuals may be identified.

Therefore, I am satisfied that the information contained in the resumes in Record 9 qualifies as the personal information of individuals other than the appellant.

In summary, I find that the employment or educational history of identified individuals contained in the records qualify as the personal information of these individuals for the purpose of the definition of that term in section 2(1) of the *Act*.

PERSONAL PRIVACY

General principles

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. The affected party has raised the presumption in section 14(3)(d), which states:

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;

However, in Order P-216, former Assistant Commissioner Tom A. Wright held that a person's name and professional title, without more, does not constitute "employment history". I agree with that reasoning for the purposes of the present appeal.

The affected party claims that disclosure would constitute an unjustified invasion of personal privacy of the identifiable individuals who are described therein. The affected party states that:

The record[s] contains the educational history (e.g. degree or diploma acronyms) and the employment history (e.g. other employers worked for, duties held on various projects, including the current one) [of certain named individuals].

With respect to the personal information contained in the resumes that form part of the records, the affected party states:

It is not enough to simply redact the name of the individuals where connected to their educational and employment history. It is not difficult to take this personal

information and without knowing the individual's name, discover whose personal information it is, when you know the individual is one of our key employees. We ask that none of this personal information be revealed, with or without the names redacted.

I have reviewed the records and conclude that they contain information relating to the educational and employment history of several employees and one officer of the affected party, which is a corporate entity. Having reviewed the records, I find that the affected party's employees' and officer's education and employment information, including the number of years they have been with both the affected party and other employer companies, constitutes the educational and employment history of the individuals to whom this information relates. 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 in these 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 party is not an institution as defined by section 2(1) of the *Act*.

Therefore, I find that the resume information in Record 9 (other than the individuals' names and titles), are exempt from disclosure under section 14(1). I also find that in Record 1, the educational and employment history of the project team at pages 135 to 137, but not the individuals names and job titles, are also exempt from disclosure under section 14(1). In Records 2 and 11 the project managers' names and certification number are exempt from disclosure, as I have concluded that this information constitutes their employment history. With respect to the remaining records or portions of records, I also find that any reference to an individual's educational and employment history is exempt from disclosure. For ease of reference, I will provide a highlighted copy of the records indicating those portions that I have found to qualify for exemption under section 14(1)(a).

THIRD PARTY INFORMATION

Both the Town and the affected party rely on the mandatory exemption in section 10(1) which 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 of the Parties

With respect to part 1 of the test, the Town merely submits that the records contain technical, commercial and financial information.

The affected party states that:

In our view, the records[s] contain commercial and labour relations information.

Commercial Information. The record[s] were prepared by professionals, who are experts in structuring proposals, and it contains our ideas, processes and procedures for performing the services required pursuant to the [named] project...

Labour Relations Information. The records[s] contain confidential information about the names, duties and qualifications of our employees.

Analysis/Findings

On my review of the records, I agree with the characterization of the records by the affected party that the records contain commercial information, as they address the provision of project management services to the Town. I also agree with the Town that the records contain financial information, namely, information concerning cost accounting and operating costs. I find that the information contained in the records constitutes either commercial or financial information for the purposes of section 10(1) of the *Act*. I do not agree with the affected party that the

information can be considered to be labour relations information. The records do not concern the collective relationship between an employer and employees [Orders P-653, MO-1215].

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 contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

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]

Representations of the Parties

The Town submits only that the information in the records was supplied in confidence as outlined in the Town's RFP document.

The affected party states that:

The record[s] were supplied to the Town in response to an RFP concerning a [named] project. Item 4 of the RFP specifically stated that the Town will attempt to keep each proposal confidential and for this reason, we were comfortable in submitting a proposal. We have treated the record[s] consistently as confidential and have not revealed it to anyone outside of the Town and our organization. The record[s] are not available to the public. Furthermore, in the normal course, we would not expect the record[s] to be made public. We have been led to believe that the record[s] would not be public because the very nature of the RFP process is that the proposals received are confidential, lest competitors steal ideas from each other for winning the right to tender the services. It will significantly undermine the whole purpose of confidentiality in the request for proposal process if industry competitors are asked to compete on a confidential basis and then the information they provide is later exposed to competitors and used against them to their detriment in other business competitions. Maintenance of confidentiality is particularly important in the construction industry, which is highly competitive and where proposals are kept secret because we compete against other construction companies on many different projects in any given year. The fact that the competition is now over in no way lessens the confidential nature of the record[s]...

Analysis/Findings

I accept that the affected party supplied the information contained in the records "in confidence". In the circumstances of this appeal, and based on the representations of the Town and the affected party, I am satisfied that the information contained in the proposal, including the appendices, was supplied to the Town, and that it was supplied with a reasonably-held expectation of confidentiality.

Part 3: harms

General principles

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].

The affected party describes the records as:

...a detailed description of our business. The record[s] discloses the approach we take to compete in the very competitive construction and project management market, including the specialized proposal drafting techniques we utilize in order to prepare professional proposals and processes and procedures used in the actual construction of the project. The ideas, processes and procedures found in the record[s] and the structure of the record[s] itself are the result of our experience, expertise and the investment of a significant amount of our time, money and effort.

It submits that disclosure of the records would result in the following harm:

- (i) prejudice to the affected party's competitive position;
- (ii) undue gain by the appellant; and,
- (iii) similar information no longer being supplied.

The Town only made one general submission with respect to part 3 of the test, arguing that the release of the information in the records would result in large companies such as the affected party no longer submitting bids to any municipal government, including the Town. The Town contends that, since their proprietary know-how, presentation skills and financial formulas would become common knowledge, this would allow other companies to copy them and gain unfair competitive advantage.

I will now deal with each item of the test in part 3 separately.

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

The affected party states as follows:

If disclosed to a third party, the ideas, processes and procedures outlined in the record[s] could be copied by our competitors in future RFP processes which will significantly prejudice our competitive position by eliminating the competitive advantage that our proposal structures, and our processes and procedures for completing construction projects, have given us. As mentioned above, the construction and project management industries are extremely competitive. It is

more than merely price that distinguishes us from our competitors, but also our proposal format and other information related to providing the services that is revealed in those proposals. It is inevitable that the record[s] will be used as a template by others because it was the winning proposal....

Disclosure of the price prejudices our competitive position by allowing our competitors to simply offer the services at a lower price. The disclosure of the price also interferes with our ability to negotiate the cost of services with other customers. Prices quoted depend on a number of factors and knowledge of the price quoted to the Town may cause confusion or discontent with our current or future customers, despite the fact that services provided to them may be very different.

Our employees are our most valuable asset. If the record[s] are disclosed, it would give our competitors a shopping list of our employees. While the movement of employees amongst firms is a reality of business, the way in which our employees are listed and presented, along with their qualifications, resumes, and duties makes it extremely easy for our competitors to target our employees for hiring. The loss of employees to competitors would not only prejudice our competitive position because of our loss, but doubly prejudice it because of our competitors' gain. Even if our employees are not hired by our competitors, our competitive position is prejudiced because the record[s] reveal to our competitors, our formula for the type of employees and the skill sets necessary to produce and execute winning proposals and build successful construction projects.

I have found above that the information in the records relating to the educational and employment history of a number of individuals is no longer at issue, as being exempt under section 14(1) of the *Act*. Accordingly, with respect to the information about identifiable individuals in the records, I need only address the application of section 10(1) to the names of the identifiable individuals and their job titles in the records that remain at issue.

I find that the information in the records and the representations 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. I also find that the disclosure of the specific information contained in the appendices..., which includes specific samples of the types of reporting records used by the affected party in carrying out the project, and the specific manner in which this information is recorded, could reasonably be expected to prejudice significantly the competitive position of the affected party, as it provides specific

templates of those types of documents. Accordingly, I am satisfied that these portions of the record qualify for exemption under section 10(1)(a).

After reviewing the records, as well as the representations of the Town and the affected party, I find that the following portions of the proposal qualify for exemption under section 10(1)(a):

- a) the financial status information in Record 1, page 123;
- b) the communications, design coordination services and the value-added services components of the Work Plan section, the Estimated Time Involvement section, the Quality Control section and the Price Proposal section in Record 1;
- c) the schedule of fees in Record 3, item (iv);
- d) the sample project plan (Record 4);
- e) the sample project schedule (Record 5);
- f) the sample cost tracking log (Record 6); and
- g) the sample risk register (Record 7).

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 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).

The other information contained in the proposal ...contains information about the manner in which the affected party proposes to meet the requirements of the RFP. The affected party has made general representations with respect to the concern that disclosure of the proposal would result in the identified harms. The affected party also identifies its concern that the disclosure of the form and structure of the proposal will allow others to use their successful proposal as a "template". I recently reviewed a similar argument in Order PO-2478. In that case the

arguments were put forward by an affected party and the Ministry of Energy in respect of a proposal received by the Ministry, and in which the exemption in section 17(1)(a) and (c) of the *Freedom of Information and Protection of Privacy Act*, (which is similar to section 10(1)(a) and (c) of the *Act*) was raised. After reviewing the argument, I stated:

In general, I do not accept the position of the Ministry and affected party concerning the harms which could reasonably be expected to follow the disclosure of the record simply on the basis that the disclosure of the “form and structure” of bid would result in the identified harms under sections 17(1) (a) and (c), as it would allow competitors to use the information contained in the successful bid to tailor future bids. In a recent Order, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms.

In Order PO-2435, Assistant Commissioner Beamish made the following statement:

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

I find that the disclosure of merely general information contained in the proposal which discloses only the “form and structure” of the proposal would 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 these portions of the records are not exempt under that section.

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

The affected party takes the position that the records are also exempt under section 10(1)(b), as its disclosure could reasonably be expected to result in similar information no longer being

supplied to the Town, where it is in the public interest that similar information continue to be so supplied. The affected party states:

If the record[s] are made public, it will result in fewer responses to the Town's requests for proposals being made by quality firms. Firms like us will be reluctant to respond to the Town's future requests for proposals and to do business with the government because the disadvantages of disclosure (i.e. prejudice to competitive position and undue gain) will far outweigh the benefits. It is in the public interest that as many firms as possible respond to every Town or other government RFP, so that the firm that offers the best combination of price and quality may be selected for the project...

As indicated above, if we, or other companies like us, must risk the prejudice to our competitive position and the undue loss to us and gain to our competitors that will occur if proposals like the record[s] are made public, then we (and other companies like us) will stop responding to the Town's requests for proposal. As mentioned above, this is not in the public interest because the pool of cost effective, quality service providers willing to respond to the Town's contracts will shrink, resulting in an increased likelihood of such contracts being performed by more expensive, less qualified firms...

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

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 Town 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, qualifies for exemption 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 Town, understand that certain information regarding how it plans to carry out its obligations will be public. 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 this information will have the effect that companies will no longer supply similar information to the Town. Accordingly, I find that the requirements for section 10(1)(b) have not been met.

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

The affected party claims that the records are exempt under section 10(1)(c), as disclosure could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency. The affected party states:

We are not in the business of training other companies to prepare proposals or training other companies on how to efficiently build large construction projects. We have incurred the expense and invested the enormous amount of time required to plan and prepare winning proposals and develop the project management and construction procedures contained in the record[s]. If the record[s] are disclosed, then our competitors would have a gain to which they are not entitled because they could simply copy the format of the proposal and the procedures contained in the record[s]....

The ability of our competitors to offer the services at a lower price will be assisted by the fact that they will not have had to put the same time, effort or resources into preparing a proposal or planning how to best provide the services that we have had to, because of the fact that they were able to obtain, at no cost to themselves, a template for winning proposals and the plans for how to provide the construction services...

The affected party also makes representations on how the disclosure of the information relating to its employees, including their educational and employment history, could result in the harms identified in section 10(1)(c). However, as indicated above, I have found that much of that information (except for the names and job titles of the affected party's employees and officer) is exempt from disclosure under section 14(1).

I also agree with the findings of Adjudicator DeVries in Order MO-2151, with respect to the applicability of section 10(1)(c) to the remaining information, where he stated that:

In the circumstances of this appeal, I am not satisfied that the information which I have found does not qualify under section 10(1)(a) qualifies under section 10(1)(c). As identified above, I have found that certain specific information concerning the proposal is exempt under section 10(1)(a). This included information about the specifics of certain aspects of the proposal, and specific

samples of documents. As identified above, the information remaining at issue includes other information about the affected party and its history, experience and qualifications, as well as information which I consider to be fairly general about the manner in which the affected party proposes to meet the requirements of the RFP. In my view, the disclosure of information of this nature could not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

With respect to the affected party's concerns that competitors will use the proposal as a template for future proposals, ...I am not satisfied that the disclosure of general information contained in the proposal which discloses the "form and structure" of the proposal could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

In conclusion, with respect to the claimed section 10(1) exemption, I find that part 3 of the test, as outlined in paragraph (a), operates to exempt certain records or portions of records from disclosure. With respect to the remaining records or portions of records, I have not been provided with sufficiently "detailed and convincing" evidence to establish a "reasonable expectation of harm" as contemplated by paragraphs (a), (b) or (c) of section 10(1). As all three parts of the test under section 10(1) must be met, the remaining information contained in the records or portions of records do not qualify for exemption under section 10(1).

ORDER:

1. I uphold the Town's decision not to disclose the educational and employment history of identifiable individuals. 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 14(1).
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:
 - a) the financial status information in Record 1, page 123;
 - b) the communications, design coordination services and the value-added services components of the Work Plan section, the Estimated Time Involvement section, the Quality Control section and the Price Proposal section, in Record 1;
 - c) the schedule of fees in Record 3, item (iv);
 - d) the sample project plan (Record 4);
 - e) the sample project schedule (Record 5);

- f) the sample cost tracking log (Record 6); and
 - g) the sample risk register (Record 7).
3. I order the Town to disclose the remaining records or parts of the records by **May 3, 2007** but not before **April 26, 2007**.
 4. In order to verify compliance with provisions of this Order, I reserve the right to require the Town to provide me with a copy of the records disclosed to the appellant.

Original signed by: _____
Diane Smith
Adjudicator

_____ March 27, 2007